



Blockchain & Cryptocurrency Regulation

2019

First Edition

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glg global legal group



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An introduction to virtual currency money transmission regulation

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Introduction

The proliferation of virtual currencies, and activities relating to this new asset class, including how businesses are looking to incorporate blockchain payments to quickly and seamlessly effectuate remittances to locations around the world, raises significant compliance issues with respect to money transmission laws and regulations. This treatise chapter examines when businesses in the virtual currency arena may be obligated to comply with both U.S. federal and state money transmission laws and regulations.

On the federal level, the Financial Crimes Enforcement Network (“FinCEN”), a division of the U.S. Department of the Treasury, exercises regulatory authority pursuant to the Currency and Financial Transactions Reporting Act of 1970, as amended by Title III of the USA PATRIOT Act of 2001 and other legislation, which legislative framework is commonly referred to as the Bank Secrecy Act (“BSA”).¹ The BSA is a comprehensive federal anti-money laundering (“AML”) and counter-terrorism financing (“CTF”) statute. FinCEN is charged with protecting the financial system from being used for money laundering and to prevent terrorism financing. Accordingly, the federal government is primarily concerned with preventing criminals from laundering money or otherwise participating in illegal financial activities. The laws are in place to allow FinCEN to manage the collection, processing, storage, dissemination, and protection of data filed pursuant to its reporting requirements in order to monitor personal information or transactional data.

The data is analysed by FinCEN, which allocates its resources to the areas that pose the greatest financial crime risk. FinCEN also shares information with foreign financial intelligence unit counterparts on AML and CTF efforts. Specifically, FinCEN recently announced that it is sharing its experience on virtual currency with foreign partners through the Egmont Group of Financial Intelligence Units (“FIU”) and other international forums. The goal is to help FIUs better advise reporting entities on what to report about virtual currency transactions or activity and other relevant information for revealing important methods and constituents involved in financing illicit activities.

In addition to the federal regime, any entity operating in the virtual currency arena must

also consider the intricate (and often confusing) web of state money transmission laws with which they may have to comply. State money transmission regulations are not aimed at protecting against money laundering and terrorist financing; they focus on consumer protection to ensure that a money transmitter will not lose, steal, or misdirect the consumer's money. Virtually every state has its own money transmission licensing regime, which is inefficient, particularly in the context of virtual currency businesses whose technologies and products may operate fluidly across state lines.

The maze of state licensing regulations, paired with FinCEN's federal requirements, demand thoughtful consideration of legal compliance for any person or business who operates in the virtual currency industry and may be considered a money transmitter.

Federal virtual currency money transmission

The BSA requires that "financial institutions," businesses offering a wide array of broadly-defined financial services, surveil their customers and provide information about those customers to FinCEN.² Financial institutions must take a number of precautions against financial crime, including establishing Know Your Customer ("KYC") and AML programs and the filing of Suspicious Activity Reports ("SARs") and Currency Transaction Reports ("CTRs") that are used in criminal, tax, and regulatory investigations and proceedings and certain intelligence and counter-terrorism matters.³

"Financial institution" includes any bank, broker or dealer in securities, money services business, telegraph company, casino, card club, or a person subject to supervision by any state or federal bank supervisory authority, and that status is determined based on the type of activities in which that person or entity engages.⁴ A "money services business," which includes a money transmitter, is the financial institution most relevant to this treatise.

The definition of money transmitter for purposes of BSA regulations includes:

- (a) [a]ny person, whether or not licensed or required to be licensed, who engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or
- (b) [a]ny other person engaged as a business in the transfer of funds.⁵

Whether a person is a money transmitter, including those operating in the virtual currency arena, is a matter of facts and circumstances.⁶ The term "money transmission services" means "the 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."⁷ In 2011, FinCEN issued a final rule amending definitions and other regulations relating to money services businesses to provide that money transmission covers the acceptance and transmission of value that substitutes for currency.⁸ Simply put, when a person accepts and transmits anything of value that substitutes for currency, that person is deemed a money transmitter. The regulations specifically exempt from money transmitter status a person who only provides the delivery, communication, or network data access services used by a money transmitter to supply money transmission services; for example, when the only type of brokerage services offered by a person are those in which the buyer makes payment directly to the seller.⁹

FinCEN virtual currency guidance

FinCEN issues guidance on various issues that arise under FinCEN regulations (hereinafter, collectively, the “Guidance”), which is intended to clarify issues or respond to questions of general applicability.¹⁰ FinCEN first addressed rulemaking authority over virtual currency in March 2013, clarifying that it would regulate transmitters of virtual currency in the same manner as transmitters of fiat currency.¹¹

Under FinCEN regulations, fiat currency (also referred to as “real” currency) is defined as “the coin and paper money of the United States or of any other country: [i] that is designated as legal tender; [ii] that circulates; and [iii] is customarily used and accepted as a medium of exchange in the country of issuance.”¹² “‘Virtual’ currency is a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency.”¹³ The Guidance issued in March 2013 addressed “convertible virtual currency,” which is defined as either having “an equivalent value in real currency, or acts as a substitute for real currency.”¹⁴ FinCEN regulations cover both transactions where the parties are exchanging fiat and convertible virtual currency, as well as transactions from one virtual currency to another virtual currency. Businesses providing anonymizing services (also known as “mixers” or “tumblers”), which attempt to conceal the source of the transmission of virtual currency, are money transmitters when they accept and transmit convertible virtual currency and, therefore, have regulatory obligations under the BSA.¹⁵

The convertibility of the virtual currency is an important distinction. If a virtual currency cannot be converted to or sold for real currency and does not have any monetary value on the open market, then it does not implicate federal money transmission laws.

The Guidance refers to three categories of participants in the virtual currency ecosystem: users, exchangers, and administrators as explained below.¹⁶

- **User:** a person who obtains virtual currency to purchase goods or services.¹⁷ In January 2014, this definition was expanded to also include businesses that are strictly investing in convertible virtual currency for their own account and not for any other party.¹⁸ Under the current Guidance, it would appear that institutions investing in virtual currencies such as co-mingled investment funds are considered users.
- **Exchanger:** a person *engaged as a business* in the exchange of virtual currency for real currency, funds, or other virtual currency. Note that a person must be engaged in a business; thus, trading simply for personal investment purposes does not qualify one as an exchanger. In addition, one must accept *and* transmit virtual currency from one person to another or to another location, such as a brokerage service or trading platform. Mere acceptance of virtual currency in exchange for providing a good or service does not make a person a money transmitter.
- **Administrator:** a person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency.¹⁹

Users are not considered money transmitters, and thus are not required to register with FinCEN. Exchangers or administrators may operate as money transmitters and may be required to register with FinCEN depending on the specific facts and circumstances.

Since issuing the Guidance in March 2013, FinCEN has issued other Guidance and rulings on virtual currency that further inform the application of existing money transmission regulations: *Application of FinCEN’s Regulations to Virtual Currency Software Development and Certain Investment Activity*, FIN-2014-R002 (Jan. 30, 2014) (the “2014 Software and

Investment Guidance”); *Application of FinCEN’s Regulations to Virtual Currency Mining Operations*, FIN-2014-R001 (Jan. 30, 2014) (the “2014 Mining Guidance”); and *Request for Administrative Ruling on the Application of FinCEN’s Regulations to a Virtual Currency Payment System*, FIN-2014-R012 (Oct. 27, 2014) (the “2014 Payment System Ruling”).

Classification of persons and entities conducting virtual currency business activities for money transmission purposes

The aforementioned Guidance provides insight into how to apply the FinCEN standards of when registration is necessary to various players in the virtual currency market. How FinCEN’s Guidance might apply to these persons and entities is set forth below:

- **Software developer:** The production and distribution of virtual currency-related software, in and of itself, are not money transmission services and the entity engaged in the activity is not a money transmitter, even if the purpose of the software is to facilitate the sale of virtual currency.²⁰
- **Miners:** Miners play a vital role in allowing many decentralized blockchain-based virtual currency systems to operate properly. Mining is important because virtual currencies or tokens such as Bitcoin are initially acquired through mining; unlike paper money, decentralized virtual currencies do not have a central government to issue the currency. This provides a somewhat controlled way to distribute tokens and creates a real incentive for miners to enter the market. Miners also play another vital role; in the traditional banking system, banks maintain an accurate record of parties and details of each transaction; however, since there is no central regulator for decentralized virtual currencies, the miners assume this role.

Those who mine virtual currencies, whether by “earning,” “harvesting,” “creating,” or “manufacturing,” are all classified as users and not money transmitters. Once the virtual currency is mined, a miner, depending on how he/she uses the convertible virtual currency and for whose benefit, may potentially become a money transmitter.²¹ Just because the miner acquired the tokens directly by mining them, rather than purchasing or being given them, his/her status as a user is unaffected. Miners may use their mined tokens or currencies to purchase goods, and until they engage in activities that would qualify them as a transmitter, they remain a user.

- **Centralized virtual currencies:** A convertible virtual currency that has a centralized repository is a centralized virtual currency (“CVC”). The repository of a CVC is a money transmitter to the extent that it allows transfers of value between persons or from one location (i.e., a user’s account in New York) to another (i.e., that user’s account in California). In addition, if the CVC repository accepts currency or its equivalent from a user and privately credits the user with an appropriate portion of the repository’s own convertible virtual currency, and then transmits that internally credited value to third parties at the user’s direction, the CVC repository is a money transmitter.²²
- **Decentralized virtual currencies:** A decentralized virtual currency (“DVC”) is a virtual currency that has no central repository and no single person who has the ability to issue or redeem the virtual currency. Persons may obtain the virtual currency through their own computing or mining effort or by purchasing the currency. A person who creates units of a DVC and uses it to purchase real or virtual goods and services is a “user” of the convertible virtual currency and is not subject to regulation as a money transmitter. By contrast, a person who creates units of a DVC, and sells those units to another person for real currency or its equivalent and is engaged in that transfer as

a business, is a money transmitter to the extent that he/she is transferring it from one person or location to another person or location. A person who accepts and transmits real currency to one person in exchange for a DVC, but is arguably engaged in the business of providing goods and services, may have a valid argument that he/she is not a money transmitter. The exact scope of the regulation in this context is currently unclear.²³

- **Wallets:** are secure virtual currency storage systems used to hold and potentially send or receive virtual currency. Most virtual currencies have official or suggested wallets and the use of a wallet is necessary. The wallet contains a public and private key for each virtual currency address. The private key is a secret number that allows the virtual currency to be spent. The public key is used to ensure the wallet holder is the owner of the wallet address and can receive funds. The public key is mathematically derived from the private key. The status of a wallet as a money transmitter is primarily determined by whether or not the wallet company has custody of the private keys for the virtual currency.
 - **Custodial wallets:** Custodial wallet companies are likely money transmitters. They typically accept virtual currencies for users and transmit them when the currencies need to be moved. The custodial wallet is in full control of the transaction and the user could not facilitate the transaction without the participation and action of the wallet provider. Examples of custodial wallet companies include Bitfinex, Bitthumb and Coinbase.
 - **Non-custodial wallets:** Non-custodial wallet companies are likely *not* money transmitters. These wallets never accept or transmit virtual currencies; they are a software tool. The user facilitates the transaction and neither the wallet nor the keys are ever in the possession of the non-custodial wallet company. This entity can be thought of as merely a developer of software used to aid the customer in facilitating his/her own transactions. Examples of non-custodial wallet companies include Jaxx, BitGo and Mycellium.
- **Custodial exchanges:** are virtual currency exchange platforms on which users are able to buy and sell virtual currencies. What distinguishes this type of exchange as custodial is the fact that the exchange is in control of a user's funds, or in other words, the exchange is the custodian of the private keys for the virtual currencies or tokens. Examples of these types of exchanges include Coinbase, GDAX, Kraken, and Bitfinance. Custodial exchanges are money transmitters because they are both buying and selling, and accepting and transmitting virtual currencies.
- **Non-custodial exchanges:** are virtual currency exchange platforms on which users are able to purchase and sell virtual currencies. What makes the non-custodial exchange different from the custodial exchange is that the exchange never takes possession of the user's virtual currency or private keys. Examples include Shape Shift and Evercoin. Non-custodial exchanges are likely not money transmitters. They are merely a source to help connect potential buyers with potential sellers, similar to a message or classifieds board like Craigslist. Because they are never in possession of the currency or private keys, they are never accepting or transmitting, and they are not buying or selling.
- **Token developers:** are the individuals who create a token platform and the virtual currency. Satoshi Nakamoto, the creator of Bitcoin, was the first to develop and release to the public a peer-to-peer digital currency platform. A token developer who either gives away his/her tokens or allows mining is simply distributing his/her

software and, absent other facts, is not a money transmitter.²⁴ These token developers never accept and transmit tokens, but rather are simply developing and distributing the software in order to allow other users to operate peer-to-peer. Whether token developers are subject to regulation depends on the business they are engaged in and whether they are a DVC or CVC, as discussed above.

A token developer who sells virtual currency or tokens to users, rather than giving them away or allowing users to mine currency, is more complex. A miner who sells the currency he has mined and a developer who sells currency he has created should be treated the same. At the outset, the Guidance does not address these scenarios and there is not yet any case law in the area. However, in FinCEN's first civil enforcement action against a virtual currency exchanger, Ripple Labs Inc., FinCEN alleged that Ripple Labs' currency, XRP, made the developer an exchanger subject to BSA regulation.²⁵

Ripple Labs settled, agreeing to a \$700,000 penalty and to take certain remedial measures. This settlement is not precedential because it was a negotiated agreement. However, the allegations seemingly contradict the 2014 Software and Investment Guidance and make the treatment of token developers planning to sell their tokens somewhat unclear.

- **Token issuers:** Although no official guidance has been issued, FinCEN has indicated that those who raise money through an Initial Coin Offering (“ICO”) may also have to register as money transmitters. A February 13, 2018 letter from FinCEN to U.S. Senator Ron Wyden of the Senate Committee on Finance (the “FinCEN Letter”) states that FinCEN is working with the SEC and CFTC to enforce AML obligations of businesses engaged in ICOs.²⁶ FinCEN was careful to note that not all ICO issuers must register with FinCEN. Instead, whether an issuer must register depends on the nature of the financial activity involved.²⁷ The FinCEN Letter further states that a developer that sells convertible virtual currency such as Bitcoin (which has an equivalent value in fiat currency and can be exchanged back and forth for fiat currency), including in the form of an ICO, in exchange for another type of value that substitutes for currency, is a money transmitter and must comply with AML requirements. On August 9, 2018, FinCEN Director Kenneth A. Blanco stated in a speech that “[w]hile ICO arrangements vary and, depending on their structure, may be subject to different authorities, one fact remains absolute: FinCEN, and our partners at the SEC and CFTC, expect businesses involved in ICOs to meet all of their AML/CFT obligations.”²⁸
- **Payment systems:** Virtual currency payment processing systems typically process payments and assist in executing transactions by accepting cash from the buyer, keeping that cash, and then paying the seller with the approximate market value of a virtual currency, or vice versa. By keeping a large reserve of virtual currency at all times, the payment processor is able to act as his/her own currency exchange to supply equivalent virtual currency for the cash supplied by the buyer.

According to FinCEN, payment processing systems that accept and convert both real and virtual currencies are money transmitters because they are exchangers and, therefore, must register.²⁹ “An exchanger will be subject to the same obligations under FinCEN regulations regardless of whether the exchanger acts as a broker (attempting to match two (mostly) simultaneous and offsetting transactions involving the acceptance of one type of currency and the transmission of another) or as a dealer (transacting from its own reserve in either convertible virtual currency or real currency).”³⁰

There is, however, a carve-out from registration for payment processors when four conditions are met:

- (a) the entity providing the service facilitates the purchase of goods or services, or the payment of bills for goods or services (other than money transmission itself);
- (b) the entity operates through clearance and settlement systems that admit only BSA-regulated financial institutions;
- (c) the entity provides the service pursuant to a formal agreement; and
- (d) the entity's agreement must be at a minimum with the seller or creditor that provided the goods or services and receives the funds.³¹

Meeting this exemption requirement can prove difficult.

- **Bitcoin ATMs:** Generally, a fiat currency automated teller machine ("ATM") is not subject to FinCEN regulation as a money services business or money transmitter.³² Fiat ATMs simply allow a consumer to access his/her own account and his/her own fiat currency. There is no exchange because most fiat ATMs are unable to transmit funds to third parties or accounts at other financial institutions.³³ Bitcoin ATMs, however, are not merely an intermediary between a consumer and his/her personal bank. Bitcoin ATMs function as either one-way (converting fiat currency to Bitcoin) or two-way (converting fiat currency to Bitcoin and Bitcoin to fiat currency) machines. In both instances, these machines may act as intermediaries between buyers and sellers, more as a broker than as a teller. Therefore, Bitcoin ATM operators generally must register with FinCEN as money transmitters.

Registering as a money services business

Once established, money services businesses have 180 days to register with the United States Secretary of the Treasury.³⁴ Any company or individual serving as a money services business must file a FinCEN Form 107, along with an estimate of business volume for the coming year, information related to the business' ownership and control, and a list of its authorized agents.³⁵ FinCEN Form 107 requires money services businesses to identify the states in which they have agents and branches, the type of money services activities they plan to carry out (i.e., money transmitter, currency dealer or exchanger, check casher), the number of agents they have authorized to carry out each activity, and the location (financial institution and account number) of their primary transaction account.³⁶ If accepted, registration must be renewed every two years. If there is any change in ownership or control, transfer of a 10% voting or equity interest, or more than a 50% increase in authorized agents, then the business must re-register.³⁷

Money services businesses must comply with recordkeeping, reporting and transaction monitoring requirements under FinCEN regulations. Examples of these requirements include the filing of reports relating to currency in excess of \$10,000 received in a trade or business whenever applicable,³⁸ general recordkeeping maintenance,³⁹ and, to the extent any transactions constitute "transmittal of funds" under 31 C.F.R. § 1010.100(ddd), then the money services business must comply with the "Funds Transfer Rule" (31 C.F.R. § 1010.410(e)) and the "Funds Travel Rule" (31 C.F.R. § 1010.410(f)). These requirements apply to both domestic and foreign-located convertible virtual currency money transmitters, even if the foreign-located entity has no physical presence in the United States, as long as it does business in whole or substantial part within the United States.⁴⁰ Compliance requirements may vary depending on whether or not the business is a peer-to-peer exchange or a large, high-volume exchanger.⁴¹

Failure to comply with these requirements, including submission of false or materially incomplete information, can result in fines up to \$5,000 per violation, or per day of a continued violation, and imprisonment of up to five years.⁴² While registration is relatively easy, once registered, the compliance obligations are burdensome.

No action letters/Requests for rulings to federal or state regulators

If a person or entity is clearly a money transmitter, then federal registration with FinCEN is required, as is potential state licensing as discussed below. However, there may be situations in which it is unclear whether a person or entity must register as a money transmitter. In such a circumstance, it is possible to use “no-action” letters or “requests for rulings” from federal and state regulators. These letters allow a person or entity to explain their business activity to the federal or state regulators to address unclear areas of the law, and to clarify whether particular business activities subject the person or entity to registration or licensing requirements under the federal or state regulatory regimes.

State virtual currency money transmission

State money transmission, unlike federal money transmission, requires licensure, not registration. As a pre-requisite to receiving a licence and/or in connection with maintaining a licence, states generally require some combination of: payment of licensing costs; bonding (or other security device); minimum net worth requirements; disclosure of applicant employment history; submission to investigations or examinations; audited financials and periodic financial reporting to the state; prior money transmission or financial services business experience; disclosure of litigation and bankruptcy proceedings; and fingerprinting and background checks. Even if a person or entity is not a money transmitter under the BSA, they may be a money transmitter in any number of states, or vice versa.

A licence is required in any state where the person or company does business, or solicits citizens, regardless of whether or not he/she has any physical presence in the state. Thus, any entity that is planning a global or nationwide rollout of its virtual currency business must satisfy state licensing requirements regardless of where it is physically located. This is particularly onerous to comply with for virtual currency businesses, because virtual currency is a borderless medium of exchange.

States where money transmission licensing or other requirements are necessary for virtual currency activities

Alabama: requires a licence to transmit virtual currencies.⁴³

Alaska: requires that a licensee or applicant who requests approval of a licence to provide transmission of virtual currency enter into a Limited Licence Agreement with the Alaska Department of Commerce, Community and Economic Development, Division of Banking and Securities.⁴⁴

Connecticut: requires the licensing of virtual currency storage and transmission.⁴⁵

Georgia: requires a licence to transmit virtual currencies.⁴⁶

Hawaii: requires a licence and fiat reserves equal to the value of virtual currency held for clients.⁴⁷

Idaho: virtual currency exchangers that accept legal tender (e.g., government backed/issued “fiat” currencies) for later delivery to a third party in association with the purchase of a virtual currency must be licensed as a money transmitter with the Department of Finance.⁴⁸ Idaho exempts the sale of virtual currency via Bitcoin ATMs from licensing.⁴⁹

New York: a BitLicense is required by the New York State Department of Financial Services to engage in any “Virtual Currency Business Activity,” which is broadly defined under the regulations.⁵⁰

North Carolina: requires virtual currency transmitters to obtain a licence and additional insurance. The law provides several exemptions, including for miners, software companies implementing blockchain services such as smart contract platforms, smart property, multi-signature software and non-custodial and non-hosted wallets.⁵¹

Oregon: the state recently amended the definition of “money” in its money transmission statute (Or. Rev. Stat. §§ 717 *et seq.*) to include virtual currency. In addition, the state requires virtual currency exchanges to be registered as money transmitters.

Vermont: requires virtual currency transmitters to obtain a money transmission licence.⁵²

Virginia: requires virtual currency transmitters to obtain a money transmission licence.⁵³

Washington: virtual currency transmitters must obtain a money transmission licence. For companies that store virtual currency on behalf of others, there must be a third party security audit, a money transmitter bond which is calculated on the basis of the transmitter’s dollar volume and payment’s dollar volume from the previous year, and the company must provide certain disclosures to consumers.⁵⁴

Wisconsin: state law does not currently give the Department of Financial Institutions the authority to regulate virtual currency. Therefore, Wisconsin is unable to license or supervise companies whose business activities are limited to those involving virtual currency. However, should the transmission of virtual currency include the involvement of sovereign currency, it may be subject to licensure in Wisconsin depending on how the transaction is structured. Wisconsin encourages companies to consult with legal counsel to determine whether the business activities they plan to conduct meet those defined in Chapter 217, the “Seller of Checks” law, as requiring licensure.⁵⁵

States that have enacted friendly virtual currency licensing regulations or have taken no position on virtual currency activities

Arizona: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Arizona Department of Financial Institutions pursuant to Ariz. Rev. Stat. § 6-1201 *et seq.*

Arkansas: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Arkansas Securities Division pursuant to the Arkansas Uniform Money Services Act, Ark. Code Ann. §§ 23-55-101 *et seq.*⁵⁶

California: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise, but proposes licensing all “digital currency businesses.”⁵⁷

Colorado: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Colorado Division of Banking pursuant to the Colorado Money Transmitters Act, Colo. Rev. Stat. §§ 11-110-106 *et seq.*

Delaware: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Delaware Office of the State Bank Commissioner pursuant to 5 Del. Code §§ 2301 *et seq.*

District of Columbia: the district has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the District of Columbia Department of Insurance, Securities, and Banking Bureau pursuant to D.C. Law §§ 26-1001 *et seq.*

Florida: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise, but prohibits the laundering of virtual currency.⁵⁸ Some virtual currency businesses have obtained a traditional money transmitter licence from the Florida Office of Financial Regulation pursuant to Fla. Stat. §§ 560.101 *et seq.*

Indiana: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise.

Illinois: the state has no virtual currency money transmission-specific regulations. The Illinois Department of Financial and Professional Regulation has issued Digital Currency Regulatory Guidance stating that virtual currencies are not “money” under the Transmitters of Money Act and exempting the exchange of “digital currencies” from “money transmission” licensing requirements. Some virtual currency businesses have obtained a money transfer licence from the Illinois Department of Financial and Professional Regulation pursuant to 205 Ill. Comp. Stat. 657.

Iowa: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a money services licence from the State of Iowa Division of Banking pursuant to Iowa Code §§ 533C.201 *et seq.*

Kansas: The Kansas Office of the State Bank Commissioner issued guidance regarding the applicability of the Kansas Money Transmitter Act to people or businesses using or transmitting virtual currency.⁵⁹ Virtual currency is not considered “money” for the purposes of the Kansas Money Transmitter Act and a person or business engaged solely in transmitting virtual currency is exempt from licensing.⁶⁰ Some virtual currency businesses have obtained a traditional money transmitter licence from the Kansas Office of the State Bank Commissioner pursuant to Kan. Stat. Ann. §§ 9-508 *et seq.*

Kentucky: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Kentucky Office of Financial Institutions pursuant to KY. Rev. Stat. §§ 286.11.0001 *et seq.*

Louisiana: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Commissioner of Financial Institutions pursuant to La. Rev. Stat §§ 6:1031 *et seq.*

Maine: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Maine Department of Professional and Financial Regulation, Bureau of Consumer Credit Protection pursuant to Title 32 Me. Rev. Stat. §§ 6101 *et seq.*

Maryland: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise, but the Maryland Department of Labor, Licensing and Regulation has advised consumers that under the federal paradigm, an “administrator” or “exchanger” must register with FinCEN.² Some virtual currency businesses have obtained a traditional money transmitter licence from the Maryland Department of Labor, Licensing and Regulation pursuant to Md. Code Ann., Fin. Inst. §§ 12-401 *et seq.*

Massachusetts: the state exempts Bitcoin ATMs from “financial institution” and bitcoins from foreign currency transmission regulations.⁶¹ Businesses involved in the dissemination of virtual currencies on the internet are “market place facilitators” subject to sales or use tax collection.⁶² Some virtual currency businesses have obtained a traditional money services business licence from the Massachusetts Office of Consumer Affairs and Business Regulation, Division of Banks, pursuant to 209 CMR 45 *et seq.*

Michigan: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmission licence from the Michigan Department of Licensing and Regulatory Affairs Office of Financial and Insurance Regulation pursuant to the Money Transmissions Services Act, Mich. Comp. Laws §§ 487.1001 *et seq.* Virtual currency transactions are exempt from sales tax and retailers are required to instantly convert the value of the virtual currency to USD as of the day and the exact time of the transaction.⁶³

Minnesota: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmission licence from the Department of Commerce Division of Financial Examinations pursuant to Minn. Stat. §§ 53B.01 *et seq.*

Mississippi: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Mississippi Department of Banking and Consumer Finance pursuant to Miss. Code Ann. §§ 75-15-1 *et seq.*

Missouri: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise except that it exempts Bitcoin ATM transactions from sales tax.⁶⁴ Some virtual currency businesses have obtained a traditional money transmitter licence from the State of Missouri, Division of Finance pursuant to Mo. Rev. Stat. §§ 361.700 *et seq.*

Montana: the state is notable as being one of the only states not to have enacted a money transmission statute.

Nebraska: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. In an administrative release, the Nebraska Department of Revenue found that the term “currency” does not include Bitcoin or other virtual currency. Proposed legislation, L.B. 691, which was introduced in the legislature in January 2018, would amend the state’s money-laundering statutes to account for virtual currencies. Proposed legislation LB 987 establishes regulations focused on businesses engaging in “virtual currency business activity,” and creates a tiered system of registration and licensure for companies that want to do business using virtual currencies. Some virtual currency businesses have obtained a traditional money transmitter licence from the Nebraska Department of Banking and Finance pursuant to the Nebraska Money Transmitters Act, Neb. Rev. Stat. §§ 8-2701 *et seq.*

Nevada: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Nevada Department of Business and Industry, Financial Institutions Division, pursuant to Nev. Rev. Stat. Ann. §§ 671.010 *et seq.*

New Hampshire: the state amended its Money Transmitter statute (N.H. Rev. St. Ann. § 399-G:3) to exempt “persons who engage in the business of selling or issuing payment instruments or stored value solely in the form of convertible virtual currency or receive convertible virtual currency for transactions to another location” from the state’s money

transmission regulation.⁶⁵ Some virtual currency businesses have obtained a traditional money transmitter licence from the New Hampshire Banking Department.

New Jersey: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the New Jersey Department of Banking and Insurance pursuant to N.J.S.A 17:15C-1 *et seq.*

New Mexico: the state enacted its Uniform Money Services Act (§§ 58-32-301 (A)(1) *et seq.*) effective January 1, 2017, but the application to virtual currencies is currently unknown. The definition of “money” does not include virtual currencies.

North Dakota: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the North Dakota Department of Financial Institutions pursuant to N.D. Cent. Code §§ 13-09-01 *et seq.*

Ohio: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Ohio Division of Financial Institutions pursuant to Ohio Rev. Code §§ 1315.01 *et seq.*

Oklahoma: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise, but subordinates the rights of merchants accepting Bitcoin to the rights of any security interest in the Bitcoin (traditional money transfers are free and clear of any security interest).⁶⁶ Some virtual currency businesses have obtained a traditional money transmitter licence from the Oklahoma Office of the State Bank Commissioner pursuant to 6 Okla. Stat. §§ 1511 *et seq.*

Pennsylvania: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise, but in late 2016, Pennsylvania amended the definition of “money” in its money transmission law to encompass virtual currencies. Some virtual currency businesses have obtained a traditional money transmitter licence from the Pennsylvania Department of Banking and Securities pursuant to 7 P.S. §§ 6101 *et seq.*

Rhode Island: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Rhode Island Department of Business Regulation pursuant to R.I. Gen. Laws §§ 19-14 and 19-14.3.

South Carolina: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise, but the South Carolina Attorney General has published frequently asked questions that disclose that further guidance with respect to the transmission of virtual currencies will be provided in the “near future.”⁶⁷

South Dakota: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the South Dakota Department of Labor Regulation, Division of Banking pursuant to S.D. Codified Laws §§ 51A-17-1 and S.D. Admin. R. 20:07:21:01 *et seq.*

Tennessee: the state has issued guidance clarifying that it does not consider virtual currency to be money under its Money Transmitter Act and therefore, no licence is required.⁶⁸ Some virtual currency businesses have obtained a traditional money transmitter licence from the Tennessee Department of Financial Institutions pursuant to Tenn. Code. Ann. §§ 45-7-201 *et seq.*

Texas: in Supervisory Memorandum 1037 issued by the Texas Department of Banking, Texas exempted the exchange of virtual currencies from money transmission licensing requirements because it does not consider virtual currency to be money.⁶⁹ Some virtual currency businesses have obtained a traditional money transmitter licence from the Texas Department of Banking pursuant to Tex. Fin. Code § 151.001 and Tex. Fin. Code § 151.301.

Utah: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise. Some virtual currency businesses have obtained a traditional money transmitter licence from the Utah Department of Financial Institutions pursuant to Utah Code Ann. §§ 7-25-101 *et seq.*

West Virginia: the state has taken no position on virtual currency money transmission as of the date of publication of this treatise, but prohibits the laundering of cryptocurrencies.⁷⁰ Some virtual currency businesses have obtained a traditional money transmitter licence from the West Virginia Division of Financial Institutions pursuant to W. Va. Code §§ 32A-2-1 *et seq.*

Wyoming: the state amended its Money Transmitter Act to exempt virtual currencies from the Wyoming money transmitter licence and regulations.

Attempts to standardize licensing practices

In an attempt to simplify the process and to create some uniformity and efficiency, seven states – Georgia, Illinois, Kansas, Massachusetts, Tennessee, Texas and Washington – have come together to reach a level of reciprocity. In early 2018, these states agreed that if one party state reviews key requirements of state licensing for a money transmitter applicant, including cybersecurity, background checks, and compliance with the BSA, then the other participating states will accept those findings in their own licensing process. This is the first real step toward an integrated 50-state system of licensure and supervision.⁷¹

Acknowledgments

The authors acknowledge with thanks the contributions to this chapter by Dennis M.P. Ehling, Gregory Cronin and Justin Porter.

* * *

Endnotes

1. 31 U.S.C. §§ 5311-5332.
2. *Id.* § 5321(a)(2).
3. See FinCEN, *BSA Requirements for MSBs*, <https://www.fincen.gov/bsa-requirements-msbs>.
4. 31 C.F.R. § 1010.100(t).
5. *Id.* § 1010.100(ff)(5).
6. *Id.* § 1010.100(ff)(5)(ii).
7. *Id.* § 1010.100(ff)(5)(i)(A).
8. Bank Secrecy Act Regulations – Definitions and other Regulations Relating to Money Services Businesses, 76 FR 43585 (July 21, 2011).
9. 31 C.F.R. § 1010.100(ff)(5)(ii)(A); see also *Application of FinCEN's Regulations to Persons Issuing Physical or Digital Negotiable Certificates of Ownership of Precious Metals*, FIN-2015-R001 (August 14, 2015).
10. 31 C.F.R. Chapter X (formerly 31 CFR Part 103).

11. *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FIN-2013-G001 (Mar. 18, 2013) ("March 2013 Guidance").
12. *Id.* pg. 1.
13. *Id.*
14. *Id.*
15. See https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block?utm_source=7-28-18+Member+List&utm_campaign=7b8d25b1ba-EMAIL_CAMPAIGN_2018_01_19_COPY_01&utm_medium=email&utm_term=0_e50a6ec6df-7b8d25b1ba-344964271#_ftn1 (last visited on August 11, 2018).
16. *Id.*
17. *Id.* pg. 2.
18. *Application of FinCEN's Regulations to Virtual Currency Software Development and Certain Investment Activity*, FIN-2014-R002 (Jan. 30, 2014).
19. FIN-2013-G001 pg. 2.
20. 2014 Software and Investment Guidance pg. 2.
21. 2014 Mining Guidance.
22. FIN-2013-G001 pg. 4.
23. FIN-2013-G001 pg. 5.
24. See 2014 Software and Investment Guidance.
25. See FinCEN, *FinCEN Fines Ripple Labs Inc. in First Civil Enforcement Action Against a Virtual Currency Exchanger: Company Agrees to \$700,000 Penalty and Remedial Actions*, (May 5, 2015), <https://www.fincen.gov/sites/default/files/2016-08/20150505.pdf>.
26. The FinCEN Letter is not technically Guidance that must be followed, but the underlying regulations in the FinCEN Letter must be followed.
27. The FinCEN Letter appears to suggest that, at least in certain cases, virtual currency exchanges are subject to the BSA not because they are money services businesses, but because they are broker-dealers.
28. See https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block?utm_source=7-28-18+Member+List&utm_campaign=7b8d25b1ba-EMAIL_CAMPAIGN_2018_01_19_COPY_01&utm_medium=email&utm_term=0_e50a6ec6df-7b8d25b1ba-344964271#_ftn1 (last visited on August 11, 2018).
29. 2014 Payment System Ruling.
30. *Id.*
31. 2014 Payment System Ruling pg. 3.
32. *Application of the Definition of Money Services Business to Certain Owner-Operators of Automated Teller Machines Offering Limited Services*, FIN-2007-G006 (Dec. 3, 2007).
33. *Id.*
34. 31 U.S.C. § 5330.
35. 31 C.F.R. § 1022.380.
36. See FinCEN Form 107 (Mar. 2011).
37. 31 C.F.R. § 1022.380(b)(4).
38. *Id.* § 1027.330.
39. *Id.* § 1027.410.
40. FinCEN pursued enforcement action against BTC-e, an internet-based virtual currency exchange and a foreign located money services business, for failing to implement basic

AML controls that enabled criminals to launder proceeds. FinCEN fined BTC-e \$110 million and its administrator, Alexander Vinnik, \$12 million – the largest individual penalty ever assessed by FinCEN. FinCEN partnered with the Department of Justice, which pursued BTC-e and Vinnik criminally.

41. See FinCEN, *BSA Requirements for MSBs*, <https://www.fincen.gov/bsa-requirements-msbs>.
42. 18 U.S.C. § 1960.
43. Ala. Code § 8-7A-2(8).
44. See <https://www.commerce.alaska.gov/web/dbs/LimitedLicenseAgreementOrders.aspx> (last visited on August 11, 2018). Some virtual currency businesses such as Coinbase and CoinX have also obtained a traditional money transmitter licence from the Alaska Division of Banking and Securities pursuant to AS 06.55.102, which is limited to the transmission of fiat currency. Alaska’s legislature has proposed a bill to define virtual currency and broaden the definition of money transmission to include it. H.B. 180, 30th Legislature, First Session (introduced Mar. 14, 2017).
45. Conn. Gen. Stat. § 36a-598. In February 2018, a bill was proposed (H.B. 5001, 2018 Leg., 2018 Feb. Reg. Sess. Gen. Ass. (Conn. 2018)), which would impose fees to trade or transfer virtual currency. Some virtual currency businesses have obtained a traditional money transmitter licence from the Connecticut Department of Banking.
46. Ga. Code § 7-1-680(26); Ga. Code § 7-1-690(b)(1) (authorizes virtual currency transmission regulations to encourage economic development).
47. HI Rev Stat § 489D-1 (2013); see Hawaii Division of Financial Institutions Application available at <https://cca.hawaii.gov/dfi/files/2018/04/HI-Money-Transmitter-License-Company-New-App-Checklist.pdf> (last visited August 12, 2018). Coinbase exited Hawaii in 2017, requiring Hawaiian customers to close their accounts, stating that it would be impossible for Coinbase to operate in the state given the reserve requirement. In early 2017, the Hawaiian Senate introduced Senate Bill 949, which seeks to clarify that decentralized virtual currency activities are *not* subject to the state’s Money Transmitters Act, and establishes a Decentralized Virtual Currency Working Group within the state’s Department of Commerce and Consumer Affairs to study whether virtual currencies should be regulated under the Act. Two bills, Senate Bill 2853 and Senate Bill 3082, introduced in the Hawaiian Senate in January 2018, aim to define and include virtual currencies under Hawaii’s Money Transmitters Act. The bills would mandate that those transmitting virtual currencies in the state obtain a licence to do so, and that these persons or businesses issue a warning to consumers before enabling such transactions.
48. See Idaho Department of Finance, Letter Re: Money Transmissions (Dated July 26, 2016), available at <https://www.finance.idaho.gov/MoneyTransmitter/Documents/NAOP/Digital%20Currency/2016-07-26.pdf> (last visited August 11, 2018) (“An exchanger that sells its own inventory of virtual currency is generally not considered a virtual currency transmitter under the Idaho Money Transmitters Act.” However, “an exchanger that holds customer funds while arranging a satisfactory buy/sell order with a third party, and transmits virtual currency... between buyer and seller, will typically be considered a virtual currency transmitter.”)
49. Idaho Dep’t of Finance, No Action Letter (Oct. 10, 2014).
50. 23 NYCRR 200. The New York State regulatory scheme has been the subject of much criticism and has resulted in an exodus of businesses from New York because of the costs and regulatory requirements associated with the BitLicense. As of the date of this treatise, only eight companies have been granted a BitLicense. Assembly Bill

A9899A to amend certain provisions of the BitLicense is pending in the New York State Legislature.

51. N.C. Gen. Stat. § 53-208.41, *et seq.*
52. 8 Vt. Stat. Ann. §§ 2500, *et seq.*
53. Va. Code § 6.2-1900.
54. Wash. Rev. Code §§ 19.230.010, *et seq.*
55. See <https://www.wdfi.org/fi/lfs/soc/> (last visited August 11, 2018). Some virtual currency businesses have obtained a money transmitter licence from Wisconsin.
56. Ark. Code Ann §§ 23-55-101 *et seq.*
57. Assembly Bill 1123 has been introduced for the second time into the California assembly, which proposes to enact the Virtual Currency Act to prohibit a person from engaging in any virtual currency business, unless licensed by the Commissioner or Business Oversight, or is exempt from licensure.
58. Fla. Stat. § 896.101.
59. See Kansas Office of the State Bank Commissioner, Guidance Document MT 2014-01, Regulatory Treatment of Virtual Currencies Under the Kansas Money Transmitter Act, (June 6, 2014), available at http://www.osbckansas.org/mt/guidance/mt2014_01_virtual_currency.pdf.
60. See Kansas Office of the State Bank Commissioner, Guidance Document MT 2014-01, Regulatory Treatment of Virtual Currencies Under the Kansas Money Transmitter Act, (June 6, 2014), available at http://www.osbckansas.org/mt/guidance/mt2014_01_virtual_currency.pdf (last visited August 11, 2018).
61. See Office of the Commissioner of Financial Regulation, Virtual Currencies: Risks for Buying, Selling, Transacting, and Investing - Advisory Notice 14-01, (April 24, 2014), available at <http://www.dllr.state.md.us/finance/advisories/advisoryvirtual.shtml> (last visited August 11, 2018).
62. Mass. Division of Banks, Opinion 14-004 (May 12, 2014).
63. 830 CMRH 1.7(b)(1).
64. See Tax Policy Division of the Michigan Dept. of Treasury, Treasury Update, Vol. 1, Issue 1 (November 2015), available at https://www.michigan.gov/documents/treasury/Tax-Policy-November2015-Newsletter_504036_7.pdf (last visited August 11, 2018)
65. Missouri Dep't of Revenue, LR 7411, Collection of Sales Tax on Bitcoin Transfers Through an Automated Teller Machine (ATM), (September 12, 2014).
66. See H.B. 436, 2017 Leg., 165th Sess. (N.H. 2017).
67. Okla. Stat. § 1-9-332.
68. See <http://www.scag.gov/money-services-frequently-asked-questions> (last visited August 11, 2018).
69. Memo, Tenn. Dep't of Fin. Inst., Regulatory Treatment of Virtual Currencies under the Tennessee Money Transmitter Act (Dec. 16, 2015) available at <https://www.tn.gov/content/dam/tn/financialinstitutions/new-docs/TDFI%20Memo%20on%20Virtual%20Currency.pdf> (last visited August 11, 2018).
70. See <https://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf> (last visited August 11, 2018).
71. W. Va. Code §§ 61-15-1 *et seq.* See Conference of State Bank Supervisors, “State Regulators Take First Step to Standardize Licensing Practices for Fintech Payments”, Feb. 6, 2018, <https://www.csbs.org/state-regulators-take-first-step-standardize-licensing-practices-fintech-payments>.

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