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Virtual Currency Activity Subject to Money Transmission Licensing in Florida and Arkansas

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Innovative companies and platforms that seek to bring new virtual currency products and services to market in the US generally need to consider the potential applicability of US state money transmission licensing laws. How these laws may apply to virtual currency activities is critical because nearly all US jurisdictions regulate money transmission under state-specific licensing regimes, and a license may be required before a person can engage in certain types of virtual currency activities in a particular jurisdiction. While an increasing number of states have issued guidance or amended their money transmission statutes to address at least some types of virtual currency activities, many states don't have a formal, public position regarding the applicability of their money transmission statutes to virtual currency activities. As a result, determining if a particular activity involving virtual currency is subject to state licensing may require a state-by-state analysis – and often entails significant uncertainty.

Recently, two states – Florida and Arkansas – have provided additional clarity regarding virtual currency activity subject to regulation in their respective jurisdictions. In Florida, this clarity comes in the form of guidance, while Arkansas has updated its money transmission statute to expressly define regulated money transmission to include virtual currency.

Florida issues industry alert

On August 17, 2021, the Florida Office of Financial Regulation (OFR) issued an industry alert stating that a person engaged in the business of selling virtual currency in Florida must obtain a license under the state's money transmission law.[1]

The OFR cited the Florida Third District Court of Appeal's 2019 decision in a criminal money laundering case, *State v. Espinoza,* 264 So. 3d 1055 (Fla. 3d DCA 2019). In *Espinoza,* the court held that virtual currency fell within the definitions of "monetary value" and "payment instrument" for the purposes of being a "money transmitter" under Florida's money transmission statute, and that the statute had no third-party transmission requirement.[2] As a result, persons engaged in the business of selling virtual currency, including in a noncustodial capacity,[3] must obtain a license under the state's money transmission law.

With this announcement, Florida joins a few other states in expressly affirming that selling virtual currency, even in a noncustodial capacity, is subject to regulation. Most prominently, since 2015, New York's virtual currency business activity regulations, which encompass the buying and selling of virtual currency as a customer business, have imposed a licensing requirement similar to state money transmission laws.[4] Additionally, Washington's Department of Financial Institutions has affirmed that people engaged in operating a platform to facilitate the exchange of fiat currency for virtual currency (or one virtual currency for another virtual currency) must obtain a license under the state's money transmission law.[5] State regulators in Oregon and New Mexico have also issued statements that appear to reach a similar conclusion.[6] More broadly, however, the applicability of many money transmission statutes to activity involving the sale of virtual currency in a noncustodial capacity – and even to certain virtual currency custodial activities – isn't always clear.[7]

Arkansas addresses virtual currency

In its 2021 session, the Arkansas State Legislature amended the state's money transmission statute to, among other things, expressly address virtual currency activities.[8] With the amendments having taken effect, Arkansas has joined a growing list of states that expressly regulate virtual currency activities under their money transmission statutes (or other regulatory regimes that directly address virtual currency).

The definition of "money transmission" activity subject to licensing under Arkansas's money transmission statue now includes "receiving money, *virtual currency*, or monetary value for transmission."[9] Subject to certain exclusions, "virtual currency" is defined as "a digital representation of value that … is used as a medium of exchange, a unit of account, or a store of value; and … does not have legal tender status as recognized by the United States Department of the Treasury."[10] The amended statute also expressly requires that licensees transmitting virtual currency hold "like-kind virtual currency of the same volume" as that is obligated to customers.[11] It further extends certain reporting and recordkeeping requirements to virtual currency obligations of the licensee. For example, licensees are now required to retain records for at least five years for each virtual currency obligation sold or paid.[12]

Given growing consumer and business interest in virtual currency, additional guidance or statutory amendments to address the applicability of money transmission laws to virtual currency activities should be anticipated. As the regulatory regime evolves, however, industry participants will need to continue to grapple with ambiguity and uncertainty.

Notes

1. Florida State Office of Financial Regulation, "Industry Alert: Amnesty Period for Virtual Currency Sellers" (August 17, 2021).
2. In other words, the exchange of fiat currency for virtual currency doesn't need to involve a third party to be activity regulated under Florida's money transmission statute.
3. That is, upon sale of the virtual currency to a customer in exchange for fiat currency, the business transfers the virtual currency to the customer's wallet held with another entity.
4. *See* 23 N.Y.C.R.R. § 200.2(q).
5. *See* Washington State Department of Financial Institutions, "Guidance: Virtual Currency and Money Transmission Laws," (last visited September 14, 2021).
6. *See* Oregon State Division of Financial Regulation, "Digital or virtual currencies: What are they?" (last visited September 14, 2021); New Mexico Regulation and Licensing Department, "Money Service Businesses," (last visited September 14, 2021). In New Mexico, for example, the Regulation and Licensing Department states on its website that any person engaged in "foreign currency dealing or exchanging" is a "money service business" under the state's money transmission law. We note, however, that neither states' money transmission statute expressly refers to "virtual currency."
7. A number of states have addressed the regulation of certain virtual currency activities under money transmission laws through guidance or opinion letters, and only a limited number of states have amended their money transmission statutes (or created standalone regulatory regimes) to expressly address virtual currency activity.
8. *See* An Act to Amend the Uniform Money Services Act, No. 532, 93rd General Assembly, Regular Session (Ark. 2021) (hereinafter "Act 532").
9. Act 532, Section 1 amending Ark. Code Ann. § 23.55.102(12) (emphasis added).
10. Act 532, Section 3 amending Ark. Code Ann. § 23.55.102.
11. Act 532, Section 21 amending Ark. Code Ann. § 23.55.701.
12. Act 532, Section 19 amending Ark. Code Ann. § 23.55.605(a).

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