Published on *The National Law Review* https://natlawreview.com

PA Department of Banking and Securities: Virtual Currency is not “Money”

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Typical Virtual Currency Exchanges Do Not Require PA Money Transmitter Licenses

The Pennsylvania Department of Banking and Securities (“DoBS”) just released Guidance declaring that virtual currency, “including Bitcoin,” is not considered “money” under the Pennsylvania Money Transmission Business Licensing Law, otherwise known as the Money Transmitter Act (“MTA”). Therefore, according to the Guidance, the operator of the typical virtual currency exchange platform, kiosk, ATM or vending machine does *not* represent a money transmitter subject to Pennsylvania licensure.

This Guidance is important because it has implications beyond merely the burdens imposed by Pennsylvania law for obtaining a money transmitter license. As we previously have blogged (here), it is a federal crime under 18 U.S.C § 1960 to operate as an unlicensed money transmitter business, which is defined in part as a business “operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable.” Thus, a state law violation can become a federal violation. Further, the Financial Crimes Enforcement Network (“FinCEN”) has issued Guidance declaring that administrators or exchangers of digital currency – including popular crypto currencies such as Bitcoin – represent money transmitting businesses which must register with FinCEN under 31 U.S.C. § 5330 as money services businesses (“MSBs”), which in turn are governed by the Bank Secrecy Act (“BSA”) and related reporting and anti-money laundering compliance obligations. Moreover, a failure to register with FinCEN as a MSB when required also represents a separate violation of Section 1960. Drawing on the FinCEN guidance, federal courts have upheld the convictions of individuals who ran virtual currency exchanges and consequently were convicted of violating Section 1960 for operating unlicensed or unregistered money transmitter businesses.

The Pennsylvania Guidance

The Guidance is short and direct. Its application is also potentially very broad. After concluding that virtual currency does not constitute “money” under Pennsylvania state law, the Guidance then in part

explains why many virtual currency exchangers are not subject to licensure in Pennsylvania as money transmitters:

Several of the entities requesting guidance on the applicability of the MTA are web-based virtual currency exchange platforms ("Platforms"). Typically, these Platforms facilitate the purchase or sale of virtual currencies in exchange for fiat currency or other virtual currencies, and many Platforms permit buyers and sellers of virtual currencies to make offers to buy and/or sell virtual currencies from other users. These Platforms never directly handle fiat currency; any fiat currency paid by or to a user is maintained in a bank account in the Platform's name at a depository institution.

Under the MTA, these Platforms are not money transmitters. The Platforms, while never directly handling fiat currency, transact virtual currency settlements for the users and facilitate the change in ownership of virtual currencies for the users. There is no transferring money from a user to another user or 3rd party, and the Platform is not engaged in the business of providing payment services or money transfer services.

The Guidance then provides a similar analysis regarding virtual currency kiosks, ATMs and vending machines, focusing again on the concept of whether the business "touches" fiat currency.

The DoBS's conclusion was not necessarily compelled as a matter of logic. The MTA prohibits any person from "engag[ing] in the business of transmitting **money** by means of a **transmittal instrument** for a fee or other consideration with or on behalf of an individual without first having obtained a license from the department." The DoBS focused entirely on the definition of "money." Arguably, it could have chosen to focus instead on the defined term "transmittal instrument," which the MTA more broadly defines as "any check, draft, money order, personal money order, debit card, stored value card, electronic transfer or other method for the payment of money or transmittal of credit[.]" Other States may take a similar approach and focus on a single statutory term with a traditional definition, such as "money," rather than choosing to focus on broader and more opaque verbiage in their respective statutes that is susceptible to more modern applications.

A Regulatory Patchwork Quilt

The DoBS Guidance is relatively clear, although the devil often lurks in the details. In contrast, the approach of the various States regarding whether virtual currency exchangers represent "money transmitters" subject to state licensure frequently represents a confusing and fractured regulatory landscape, sometimes made more difficult by vague and old statutes, and/or lack of administrative guidance. We note here just a few examples of the potential conflicting approaches. Our point here is not to resolve nuances, but rather to emphasize the current state of complexity:

- New Hampshire: The selling, issuing, or transmitting of "convertible virtual currency," even if the state considers it a "payment instrument" or "stored value," is exempt from money transmitter regulations. The New Hampshire Banking Department issued a statement saying it would no longer regulate businesses *solely* engaged in virtual currency transactions. However, the statement also declared that "those who transmit money in fiat and cryptocurrency are still required to be licensed."
- Texas: The Texas Department of Banking issued in January 2019 a revised Supervisory Memorandum, which in part states as follows. Ultimately, in Texas, "it depends."

Because factors distinguishing the various centralized virtual currencies are usually complicated and nuanced, to make money transmission licensing determinations the Department must individually

analyze centralized virtual currency schemes. Accordingly, this memorandum does not offer generalized guidance on the treatment of centralized virtual currencies by the Money Services Act's money transmission provisions. On the other hand, money transmission licensing determinations regarding transactions with cryptocurrency turn on the single question of whether cryptocurrencies should be considered "money or monetary value" under the Money Services Act.

. . . .

Because cryptocurrency is not money under the Money Services Act, receiving it in exchange for a promise to make it available at a later time or different location is not money transmission. Consequently, absent the involvement of sovereign currency in a transaction, no money transmission can occur. However, when a cryptocurrency transaction does include sovereign currency, it may be money transmission depending on how the sovereign currency is handled. A licensing analysis will be based on the handling of the sovereign currency.

- Washington: Under Washington State law, "[m]oney transmission" is specifically defined to mean "receiving money or its equivalent value (equivalent value includes virtual currency) to transmit, deliver, or instruct to be delivered to another location[.]" The Washington Department of Financial Institutions has posted its guidance on virtual currency regulation, which states that the transmission of virtual currencies could make a company subject to Washington's money transmission regulations, regardless of whether the company deals in fiat currency.

National Law Review, Volume IX, Number 25