The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION JULY-AUGUST 2019

LexisNexis

THE BANKING LAW JOURNAL

VOLUME 136 **NUMBER 7** **July-August 2019**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at ..... (800) 252-9257
Email: ..... matthew.t.burke@lexisnexis.com
Outside the United States and Canada, please call . . . . . (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3385
Fax Number . . . . . (800) 828-8341
Customer Service Website . . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2019–Pub.4815)

Editor-in-Chief, Editor & Board of Editors

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

A U.S. Regulatory Patchwork Quilt: Cryptocurrency and Money Transmitter Licensing

Robin Nunn*

This article focuses on the different answers given by state authorities to the question: Are cryptocurrencies subject to regulation under money transmitter licensing laws? This question is important because the federal law definition of "money transmitting" depends in part on state laws, which vary considerably. Finally, the article discusses two potential policy solutions to the present patchwork quilt of varying state regulations.

According to its original design, Bitcoin was intended to reduce market participants' need to rely on "financial institutions serving as trusted third parties to process electronic payments."[1] While Bitcoin and other cryptocurrencies based on blockchain technology have, at least in part, achieved this goal, the real-world use of cryptocurrencies has also created new opportunities for intermediaries to facilitate the practical use of cryptocurrencies by consumers, businesses, and investors.

The use of cryptocurrencies has also raised difficult legal and policy questions about the applicability of pre-existing federal and state laws and regulations to cryptocurrency businesses and whether such businesses qualify as "financial institutions." These include: Where are cryptocurrencies "located" and what governments have legal authority to regulate cryptocurrency transactions? Are cryptocurrencies securities, commodities, currencies, or vehicles for money transmission? How do virtual currency businesses fit into ancient regulatory frameworks?

This article focuses on the different answers given by state authorities to one such question: Are cryptocurrencies subject to regulation under money transmitter licensing laws? As described below, this question is important because the federal law definition of "money transmitting" depends in part on state laws. Because state laws on the subject vary, cryptocurrency businesses must currently navigate complicated rules in some states, while in others the

---

* Robin Nunn is a partner at Dechert LLP, where she serves as chair of the firm's Consumer Financial Services practice, focusing her practice on regulatory, enforcement, and complex civil litigation. She may be reached at robin.nunn@dechert.com.

[1] Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* 1 (Oct. 31, 2008), https://bitcoin.org/bitcoin.pdf.

laws are generally permissive. Finally, this article discusses two potential policy solutions to the present patchwork quilt of varying state regulations.

MONEY TRANSMITTER LICENSING

Money transmitter licensing requirements provide a useful example of how approaches to the regulation of cryptocurrency intermediaries can differ significantly and create inconsistent obligations for market participants. In the United States, federal law prohibits the knowing operation of "all or part of an unlicensed money transmitting business."[2] Federal law defines "money transmitting" as "transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier."[3] Businesses that engage in money transmitting are required to comply with federal registration requirements[4] as well as state money transmitting licensing requirements.[5] In other words, a business engaged in money transmitting must register with the U.S. Department of the Treasury Financial Crimes Enforcement Network ("FinCEN") as a money service business ("MSB"), and must comply with the any state licensing rules of the jurisdictions in which it operates.

FinCEN issued interpretive guidance in 2013 stating that its registration requirements for money transmitters do not "differentiate between real currencies and convertible virtual currencies."[6] Under FinCEN's Guidance, administrators or exchangers of virtual currency—including Bitcoin—must register with FinCEN under 31 U.S.C. Section 5330 as 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 an 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.[7] Thus, when a business transacts

---

[2] 18 U.S.C. § 1960(a).

[3] 18 U.S.C. § 1960(b)(2).

[4] *See* 18 U.S.C. § 1960(b)(1)(B); 31 U.S.C. § 5330.

[5] *See* 18 U.S.C. § 1960(b)(1)(A).

[6] U.S. Dep't of Treasury Fin. Crimes Enf't Network, *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FIN-2013-G001 at 3 (Mar. 18, 2013), https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf.

[7] For example, Theresa Lynn Tetley was sentenced to one year in federal prison after

in cryptocurrency in a way that would constitute "money transmitting" with respect to transactions in government-backed currency, the federal registration requirements will presumably apply.

U.S. states, however, have adopted differing approaches to the questions of whether their money transmission licensing laws apply to cryptocurrency transactions, and if so, to what extent. In some states, legislation, regulation, or court decisions have provided cryptocurrency businesses with clear guidance on these questions. In other states, these questions remain unanswered.

The states' approaches to this issue are important because they have implications beyond merely the burdens imposed by state laws for obtaining a money transmitter license. It is a federal crime under 18 U.S.C. Section 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."[8] Thus, a state law violation can become a federal violation.

Since a state law violation can become a federal violation with dire consequences, these questions are important for firms involved in virtual currency transactions. No uniformity exists among the states as they have taken different approaches—some more rigorous and some cryptocurrency-friendly. Several states have addressed the issue of money transmission licensing applying to cryptocurrency—these include, specifically detailed below as of April 4, 2019,

- New Hampshire;
- Wyoming;
- Pennsylvania;
- Texas;
- Florida; and
- New York.

---

operating a bitcoin-for-cash exchange service without registering as a money services business with FinCEN and without implementing anti money-laundering mechanisms. *"Bitcoin Maven" Sentenced to One Year in Federal Prison in Bitcoin Money Laundering Case*, U.S. Dep't of Justice (July 9, 2018), https://www.justice.gov/usao-cdca/pr/bitcoin-maven-sentenced-one-year-federal-prison-bitcoin-money-laundering-case.

[8] 18 U.S.C. § 1960(b)(1)(B).

A REGULATORY PATCHWORK QUILT

New Hampshire

New Hampshire enacted legislation in 2017 that expressly exempts businesses that "sell[ ] or issue[ ] payment instruments or stored value solely in the form of convertible virtual currency or receive convertible virtual currency for transmission to another location" from its money transmitter licensing requirements.[9] This statutory exemption is likely the least restrictive approach to the regulation of cryptocurrency market participations, but it is not without limits. The statute does not exempt cryptocurrency businesses from compliance with New Hampshire's consumer protection laws.[10] In addition, as confirmed by interpretive guidance from the New Hampshire Banking Department, businesses that transact in both traditional currency and cryptocurrency remain obligated to comply with these licensing requirements.[11]

Wyoming

Like New Hampshire, Wyoming has enacted legislation indicating that it is actively promoting cryptocurrency businesses and blockchain technology. Wyoming has been dubbed the "Delaware of digital asset law."[12] The state's Money Transmitter Act has an exemption for the "[b]uying, selling, issuing, or taking custody of payment instruments or stored value in the form of virtual currency or receiving virtual currency for transmission to a location within or outside the United States by any means."[13] Under Wyoming law, virtual currency is defined as "any type of digital representation of value that: (A) Is used as a medium of exchange, unit of account or store of value; and (B) Is not recognized as legal tender by the United States government." In addition, virtual currency is not subject to taxation as "property" in Wyoming.

Pennsylvania

Pennsylvania also has exempted most cryptocurrency businesses from its money transmission licensing requirements, although by regulatory guidance rather than statute. In late January 2019, after receiving multiple inquiries from

---

[9] N.H. Rev. Stat. Ann. § 399-G:3(VI-a).

[10] *Id.*; N.H. Rev. Stat. Ann. § 358-A:3.

[11] N.H. Banking Dep't, *Cryptocurrency* (Aug. 2, 2017), https://www.nh.gov/banking/documents/cryptocurrency.pdf.

[12] Caitlin Long, *What Do Wyoming's 13 Blockchain Laws Mean?* Forbes (Mar. 4, 2019, 7:29 AM), https://www.forbes.com/sites/caitlinlong/2019/03/04/what-do-wyomings-new-blockchain-laws-mean/#67d9fffa5fde.

[13] Wyo. Stat. Ann. § 40-22-104(vi).

entities engaged in various forms of virtual currencies and after a three-year delay, the Pennsylvania Department of Banking and Securities issued guidance stating that, because the term "money" under Pennsylvania law is defined as "[l]awful money of the United States" and "[a] medium of exchange currently authorized or adopted by a domestic or foreign government," cryptocurrencies such as Bitcoin are not "money" within the meaning of the Pennsylvania Money Transmitter Act. The guidance specifically states that "only fiat currency, or currency issued by the United States government, is 'money' in Pennsylvania" and that the operators of virtual currency exchange platforms, ATMs and vending machines are not "money transmitters" under Pennsylvania law. The Pennsylvania Department of Banking and Securities' guidance does not on its face exempt cryptocurrency businesses from any other potentially applicable consumer protection law or regulation.

Texas

Texas has adopted a similar approach to Pennsylvania, with one important caveat. In January 2019, the Texas Department of Banking issued guidance stating that cryptocurrency is not money under the Money Services Act, and receiving it in exchange for a promise to make it available at a later time or different location is not a money transmission.[14] However, the guidance distinguishes cryptocurrencies that are "centralized" from those that are "decentralized." On its face, the guidance only applies to decentralized cryptocurrencies, which it defines as cryptocurrencies that "are not created or issued by a particular person or entity, have no administrator, and have no central repository." The guidance specifically identifies Bitcoin, Litecoin, Ripple, and Ethereum as examples of decentralized cryptocurrencies. The guidance does not take a definitive position with respect to centralized cryptocurrencies, but notes that certain centralized cryptocurrencies backed by an issuer with sovereign currency (*i.e.*, "stablecoins") may fall within the definition of "money" or "monetary value" under the Money Services Act. According to the guidance, for businesses that transact in stablecoins, Texas' "licensing analysis will turn on whether the stablecoin provides the holder with a redemption right for sovereign currency thus creating a claim that can be converted into money or monetary value."

Florida

In contrast to the approaches taken by New Hampshire, Wyoming, Pennsylvania, and Texas, a decision issued by the Third District Court of

---

[14] Tex. Dep't of Banking, *Supervisory Memorandum* 1037 (Jan. 2, 2019), https://www.dob.texas.gov/public/uploads/files/Laws-Regulations/New-Actions/sm1037.pdf.

Appeal of Florida in January 2019 indicates that Florida's money transmitter licensing requirements are fully applicable to cryptocurrency businesses. In *State v. Espinoza*, the trial court had dismissed a criminal charge against the defendant for unlicensed money transmission because the defendant had merely sold cryptocurrency, which did not qualify as "money" under Florida's money transmission licensing statute, and the defendant had not acted as a middleman in a transmission of currency to a third party.[15] The trial court had also dismissed two money laundering charges against the defendant because it found that cryptocurrency did not qualify as a "monetary instrument" under the Florida Money Laundering Act.[16] The appellate court reversed. It held that, although Bitcoin did not expressly fall under the definition of a currency, it qualified as a "payment instrument" under Florida's Money Services Business law because it functions as a "medium of exchange." In so holding, the appellate court noted previous guidance from the Florida Office of Financial Regulation, as well as the fact that the defendant had marketed a business on his website and was not merely selling his own Bitcoins. It also held that the defendant had engaged in unlicensed money transmission, because cryptocurrency is a form of "monetary value;" and the Florida money transmission statute, unlike federal law, does not have a third-party transmission requirement.

New York

New York has taken a different, and arguably more onerous, approach to the regulation of cryptocurrency businesses than any of the foregoing states. In 2015, the New York State Department of Financial Services ("DFS") announced specific licensing rules requiring any business that transacts in cryptocurrency for profit to obtain a "BitLicense."[17] The DFS described the BitLicense requirement as a consumer protection regulatory framework that covers cryptocurrency businesses "involving New York State, or persons that reside, are located, have a place of business, or are conducting business in New York."[18] A BitLicense is necessary to:

---

[15] *State v. Espinoza*, No. 3D16-1860 (Fla. 3d Dist. Ct. App. Jan. 30, 2019).

[16] Following the trial court's determination that Bitcoin was not a "monetary instrument" under Florida's Money Laundering Act, the statutory definition of "monetary instruments" under the statute was amended by the legislature to include "virtual currency." Fla. Stat. § 896.101(2)(f) (2018).

[17] *NYDFS Announces Approval of First BitLicense Application From a Virtual Currency Firm*, Dep't of Fin. Servs., N.Y. State (Sept. 22, 2015), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1509221.

[18] *BitLicense Frequently Asked Questions*, Dep't of Fin. Servs., N.Y. State, https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/bitlicense_faqs (last visited Mar. 18, 2019).

- Transmit cryptocurrency;
- Store, hold, maintain or control virtual currency on behalf of others;
- Buy or sell cryptocurrency as a customer business;
- Perform exchange services as a customer business; and/or
- Control, administer, or issue a virtual currency.

PATHS FORWARD

At present, these differing approaches to the regulation of cryptocurrency transactions present compliance problems for cryptocurrency businesses. However, there have been two attempts put forth to solve these problems. The first potential solution was offered by the U.S. Treasury Department's Office of the Comptroller of the Currency ("OCC"). In July 2018, the OCC announced that it would consider "applications for special purpose national bank charters from financial technology (fintech) companies that are engaged in the business of banking but do not take deposits."[19] Because the OCC is the exclusive regulator of entities chartered as national banks, receiving such a charter could exempt businesses from the requirements of complying with state money transmitter licensing laws. While the precise contours of the OCC's regulatory approach have not been fleshed out, and its authority to issue such charters has been challenged by the Conference of State Bank Supervisors and the New York DFS,[20] the OCC's proposal could ultimately permit cryptocurrency businesses to operate throughout the United States without concern of running afoul of the requirements of 50 different state regulatory schemes.

The second potential solution, the Uniform Regulation of Virtual-Currencies Businesses Act ("URVCBA"),[21] was put forth by the Uniform Law Commission ("ULC") in an attempt to establish a uniform framework among

---

[19] U.S. Treasury Dep't Office of the Comptroller of the Currency, *Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters* (July 31, 2018), https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-other-occ-policy-statement-fintech.pdf.

[20] *See Conf. of State Bank Supervisors v. Office of the Comptroller of the Currency*, No. 1:18-cv-02449 (D.D.C. filed Oct. 25, 2018); *Vullo v. Office of the Comptroller of the Currency, et al.*, No. 1:18-cv-08377 (S.D.N.Y. Sept. 14, 2018).

[21] Nat'l Conference of Comm'rs on Unif. State Laws, *Uniform Regulation of Virtual-Currencies Businesses Act* (Oct. 9, 2017), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ef45a10b-ac62-ad3d-2f42-588d7eac3e40&forceDialog=0.

the states.[22] The URVCBA, similar to New York's BitLicense, requires that once an entity is deemed to be engaged in the regulated activity, it must apply for a license and be approved after a thorough review of its policies, procedures, and background. After an entity is licensed, it is subject to examinations and recordkeeping requirements, and must maintain compliance programs and procedures. The URVCBA differs from BitLicense in three key areas: (1) URVCBA provides for a *de minimis* threshold under which licensure is not required; (2) URVCBA provides reciprocity if an entity is licensed in another state under that state's version of the URVCBA; and (3) URVCBA provides and exemption for all banks from the licensure requirement.

In March 2019, the ULC asked states that were considering enacting the URVCBA and competing legislation to withhold from doing so while the formation of a study committee, comprised of the American Law Institute and the ULC, examines whether amendments to the Uniform Commercial Code are needed to accommodate developments in technology, including digital assets.[23] To date, California, Hawaii, Nevada, and Oklahoma had bills moving towards their legislatures that were based on the URVCBA and the Supplemental Act, and Rhode Island was considering the URVCBA.[24] While Wyoming rejected the model acts and, as discussed above, enacted a different law, Missouri also introduced a similar law to Wyoming.[25]

---

[22] Am. Bar Ass'n Derivatives & Futures Law Comm. Innovative Dig. Prod. & Processes Subcomm. Jurisdiction Working Grp., *Digital and Digitized Assets: Federal and State Jurisdictional Issues*, (March 2019), https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/committees/CL620000pub/digital_assets.pdf.

[23] Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Regulation of Virtual-Currencies Businesses Act*, 25-27, 39-40 (Oct. 9, 2017), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ef45a10b-ac62-ad3d-2f42-588d7eac3e40&forceDialog=0.

[24] Edwin Smith, *The Uniform Commercial Code and Digital Assets: Legislative Initiatives*, ULC (Mar. 13, 2019), https://www.uniformlaws.org/blogs/edwin-smith/2019/03/13/ucc-and-digital-assets-legislative-initiatives.

[25] Caitlin Long, *Seismic News About State Virtual Currency Laws: ULC Urges States to Withdraw Model Act*, Forbes (Mar. 25, 2019), https://www.forbes.com/sites/caitlinlong/2019/03/25/seismic-news-about-state-virtual-currency-laws-ulc-urges-states-to-withdraw-model-act/#7715aadf5fda.