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In August 2020, Louisiana adopted the Virtual Currency Businesses Act (VCBA) to regulate virtual currency activity in the state. In doing so, it joined New York as only the second US state to establish a stand-alone payments regulatory regime for virtual currency activities, although other states that have expressly addressed the regulation of virtual currency have generally done so through their existing money transmission laws.

The implementation of the Louisiana law was pending the promulgation of final regulations by the state's financial regulator, the Office of Financial Institutions (OFI). Those regulations were formally adopted through an emergency rule last month. As a result, Louisiana's virtual currency regulatory scheme finally takes effect on January 1, 2023, and applications for licensure are supposed to be available through the Nationwide Multistate Licensing System (NMLS) as of that date. A license or other equivalent permission is required for a covered entity to continue engaging in virtual currency business activity in Louisiana after June 30, 2023.

Louisiana Virtual Currency Businesses Act

The stand-alone virtual currency regime established by the VCBA, and implemented by the OFI rulemaking, is more granular than most state approaches to virtual currency regulation. In this regard, the structure and requirements of the VCBA are broadly similar to New York's long-standing BitLicense regulations. Like New York's law, the VCBA requires a license to engage in "virtual currency business activity" with or on behalf of a Louisiana resident. (A "resident" includes a person domiciled in or who has a place of business in the state, and a "person" is defined as "an individual, partnership, estate, business or nonprofit entity, or other legal entity.")

The VCBA defines "virtual currency" as "a digital representation of value that is used as a medium of exchange, unit of account, or store of value, and that is not legal tender, whether or not denominated in legal tender." It defines "virtual currency business activity" as "exchanging, transferring, or storing virtual currency or engaging in virtual currency administration." This definition **excludes**, among other things, a "digital representation of value issued by or on behalf of a publisher and used solely within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform."

Virtual currency administration constitutes "issuing virtual currency with the authority to redeem the currency for legal tender, bank credit, or other virtual currency," which suggests that "stablecoins" are likely also subject to regulation under the regime. The "transfer" of virtual currency subject to regulation also is broadly defined to include assuming control of virtual currency from, or on behalf of, a resident and doing any of the following: "(a) Credit[ing] the virtual currency to the account of another person; (b) Mov[ing] the virtual currency from one account of a resident to another account of the same resident; [and] (c) Relinquish[ing] control of virtual currency to another person."

The licensing requirements for the virtual currency license are similar to those for a "standard" fiat currency money transmission license – and, to some degree, resemble the requirements for the New York virtual currency license application. The application, which must be submitted through the NMLS, requires background information about the applicant, a business plan, information about Financial Crimes Enforcement Network registration and related compliance matters, biographical information and criminal background checks for control persons, and surety bond and net worth requirements. The surety bond requirement is based on the volume of virtual currency activity (up to a $1 million volume-based surety bond maximum), but the banking department maintains the discretion to increase the requirement to $7 million. The net worth requirement is the greater of $100,000 or 3% of total assets.

The calculation of net worth can include virtual currency "measured by the average value of the virtual currency in United States dollar equivalent over the prior six months," subject to certain limitations.

Implementing regulations and timeline

The OFI will begin accepting initial applications for licensure through the NMLS on January 1, 2023. According to the regulations, completed applications for licensure submitted on or before April 1, 2023, will receive an approval, conditional approval, or denial by the end of June 2023. (There is also a separate "registration" for persons engaging in a *de minimis* volume of virtual currency business activity in the US, but the regulations do not further elaborate on the process for registration, such as how it would be handled through the NMLS.)

Implementing regulations were **published in the Louisiana Register** on October 20, 2022. The regulatory rule filing is somewhat unusual because, for administrative reasons, the OFI published the unchanged draft regulations as a final rule, but immediately **promulgated an emergency rule**, striking the text inserted by the "final" rule and replacing it with the updated regulations informed by public comment. Therefore, the actual rule in effect is not the final rule but, rather, the "emergency rule" currently at 10:I §1901-1937.

Notably, the implementing regulations include additional definitions not in the VCBA. These definitions establish, among other things, the triggers for "control" of a regulated entity, and provide that failure to meet withdrawal requests constitutes an unsafe or unsound act.

Regulation of virtual currency under state payments regulations

Although Louisiana is joining New York as the second state with a stand-alone virtual currency payments regulatory scheme, a number of states have already addressed the regulation of such activities under their money transmission laws. 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. As a result, any company seeking to bring new virtual currency products and services to market in the US generally needs to consider the potential applicability of state money transmission licensing laws.

Despite a decade of experience with virtual currency, money transmission regulators have not found a consistent way to apply their laws to virtual currency activities (even though each state's law generally applies to the same type of money-movement activity). Roughly 13 states – other than Louisiana and New York – have expressly addressed the regulation of virtual currency through amendments to their money transmission statutes, while many others have issued some interpretive guidance. A significant number of states still have not established a formal, public position on the regulation of virtual currency activity.

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. Broadly, however, states' approaches to regulating virtual currency transmissions fall into four buckets:

1. States that regulate both virtual currency activities and related fiat activities

These states have specifically addressed crypto by amending money transmission statutes or regulations, or by issuing guidance, and have brought activities such as enabling crypto trading, custodying crypto, and transferring crypto (as well as fiat currency on- and off-ramps) within the existing money transmission regime.

2. States that have indicated they do not regulate virtual currency activities but have expressly stated that they may regulate certain fiat currency activities in connection with virtual currency activities

For example, facilitating the transfer of fiat currency in connection with the purchase of virtual currency through an exchange, or custodying fiat to facilitate crypto trades, may be subject to licensing in these jurisdictions.

3. States that have expressly stated that they do not currently regulate virtual currency activities (in some cases, even including certain associated activities involving fiat currency)

These states also have specifically addressed crypto by amending money transmission statutes or regulations, or by issuing guidance, but in so doing have explicitly **excluded** crypto-related activities from the money transmission law, including related fiat currency activities.

4. States that have not established any formal, public position regarding the applicability of their money transmission laws to virtual currency activities

In these states, virtual currency activities (and related fiat currency activity) could still generally be subject to regulation as money transmission if the statute were interpreted to encompass virtual currency as “money” or “monetary value,” as applicable.

At least two states – Kansas and Texas – have indicated in guidance that certain activities involving stablecoins are subject to money transmission regulation, even though activities involving other virtual currencies (e.g., bitcoin) may not necessarily be.

Of note, despite this uneven and unclear regulatory regime across US states with respect to virtual currency activities, a number of well-known exchanges and trading platforms have been able to obtain money transmission licenses, and are therefore subject to safety and soundness examination and oversight in most states.

What now?

Given recent and persistent volatility in the digital asset space, the trend toward crypto-specific state legislation is likely to continue, even as there are increased calls for federal regulation. In the near term, however, any company engaging in virtual currency activities will need to consider whether the Louisiana VCBA applies and, if so, start the application process soon in order to remain in operation in the state when the law takes final effect at the end of June 2023.

Key Contacts

Adam Fleisher Washington, DC	afleisher@cooley.com +1 202 776 2027
Nancy Wojtas Palo Alto	nwojtas@cooley.com +1 650 843 5819