



**FIN-2014-R012**

**Issued: October 27, 2014**

**Subject: Request for Administrative Ruling on the Application of FinCEN's Regulations to a Virtual Currency Payment System**

Dear [ ]:

This responds to your letter of January 6, 2014, seeking an administrative ruling from the Financial Crimes Enforcement Network ("FinCEN") on behalf of [ ] (the "Company"), about the Company's possible status as a money services business ("MSB") under the Bank Secrecy Act ("BSA"). Specifically, you ask whether the convertible virtual currency payment system the Company intends to set up (the "System") would make the Company a money transmitter under the BSA. Based on the following analysis of the description of the System to provide payments to merchants who wish to receive customer payments in Bitcoin, FinCEN finds that, if the Company sets up the System, the Company would be a money transmitter and should comply with all risk management, risk mitigation, recordkeeping, reporting, and transaction monitoring requirements corresponding to such status.

You state in your letter that the Company wishes to set up a System that will provide virtual currency-based payments to merchants in the United States and (mostly) Latin America, who wish to receive payment for goods or services sold in a currency other than that of legal tender in their respective jurisdictions. The Company would receive payment from the buyer or debtor in currency of legal tender ("real currency"), and transfer the equivalent in Bitcoin to the seller or creditor, minus a transaction fee. The current intended market for the System is the hotel industry in four Latin American countries where, because of currency controls and extreme inflation, merchants face substantial foreign exchange risks when dealing with overseas customers.

According to your letter, a merchant will sign up with the Company to use the System, and incorporate the Company's software into its website. Customers purchasing the merchant's goods or services (e.g., hotel reservations) will pay for the purchase using a credit card. Instead of the credit card payment going to the merchant, it will go to the Company, which will transfer the equivalent in Bitcoin to the merchant. The Company pays the merchant using the reserve of Bitcoin it has acquired from wholesale purchases from virtual currency exchangers at the Company's discretion (thus the Company assumes any exchange risk that occurs during the time between the Company's wholesale purchases and its payment to a merchant). The Company has no agreement with the customer and will only make payment to the merchant.

You maintain that the Company should not be regulated as a money transmitter because it does not conform to the definition of virtual currency exchanger, due to the fact that the Company makes payments from an inventory it maintains, rather than funding each individual transaction. You also maintain that, should the Company be considered an exchanger of convertible virtual currency, the Company's business should be covered under an exemption that applies to certain payment processing activities,<sup>1</sup> and/or the Company's transmissions should be deemed integral to the transaction and thereby covered under another exemption from money transmission.<sup>2</sup>

### *FinCEN's Virtual Currency Guidance*

On March 18, 2013, FinCEN issued guidance on the application of FinCEN's regulations to transactions in virtual currencies (the "Guidance").<sup>3</sup> FinCEN's regulations define "currency" as "[t]he coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance."<sup>4</sup> In contrast to real currency, "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. In particular, virtual currency does not have legal tender status in any jurisdiction. The Guidance addresses "convertible" virtual currency. This type of virtual currency either has an equivalent value in real currency, or acts as a substitute for real currency.

For purposes of the Guidance, FinCEN refers to the participants in generic virtual currency arrangements, using the terms "exchanger," "administrator," and "user." An *exchanger* is a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency. An *administrator* is 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. A *user* is a person that obtains virtual currency to purchase goods or services.<sup>5</sup> Under the Guidance, both exchangers and administrators are considered to be money transmitters unless a limitation or exemption from the definition of money transmitter applies to that person.<sup>6</sup>

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<sup>1</sup> 31 CFR § 1010.100(ff)(5)(ii)(B).

<sup>2</sup> 31 CFR § 1010.100(ff)(5)(ii)(F).

<sup>3</sup> FIN-2013-G001 ("Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies," March 18, 2013).

<sup>4</sup> 31 CFR § 1010.100(m).

<sup>5</sup> FIN-2014-R001 "Application of FinCEN's Regulations to Virtual Currency Mining Operations" - 01/30/2014, clarified that a *user* is a person that obtains virtual currency to purchase goods or services on the user's own behalf. (emphasis added)

<sup>6</sup> See FIN-2013-G001.

FinCEN disagrees with your position that the Company does not convert the customer's real currency into virtual currency because the Company purchases and stores large quantities of Bitcoin that the Company then uses to pay the merchant. As described above, the Company is an exchanger under the Guidance because it engages as a business in accepting and converting the customer's real currency into virtual currency for transmission to the merchant. The fact that the Company uses its cache of Bitcoin to pay the merchant is not relevant to whether it fits within the definition of money transmitter. 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).

FinCEN concludes that the Company would be a money transmitter, specifically because it is acting as an exchanger of convertible virtual currency, as that term was described in the Guidance. Additionally, you then ask, if FinCEN determines that the Company is an exchanger, whether either an exemption for certain payment processing activities or an exemption for transactions integral to the sale of other goods or services would apply.

***FinCEN's definition of money transmission and existing exemptions***

On July 21, 2011, FinCEN published a Final Rule amending definitions and other regulations relating to MSBs (the "Rule").<sup>7</sup> The amended regulations define an MSB as "a person wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (ff)(1) through (ff)(7) of this section. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States."<sup>8</sup>

BSA regulations, as amended, define the term "money transmitter" to include a person that provides money transmission services, or any other person engaged in the transfer of funds. 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.<sup>9</sup> The regulations also stipulate that whether a person is a money transmitter is a matter of facts and circumstances, and identifies circumstances under which a person's activities would not make such person a money transmitter.<sup>10</sup>

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<sup>7</sup> Bank Secrecy Act Regulations – Definitions and Other Regulations Relating to Money Services Businesses, 76 FR 43585 (July 21, 2011).

<sup>8</sup> 31 CFR § 1010.100(ff).

<sup>9</sup> 31 CFR § 1010.100(ff)(5)(i)(A).

<sup>10</sup> 31 CFR § 1010.100(ff)(5)(ii).

FinCEN stipulates four conditions for the payment processor exemption to apply to a particular business pattern:

- (a) the entity providing the service must facilitate the purchase of goods or services, or the payment of bills for goods or services (other than money transmission itself);
- (b) the entity must operate through clearance and settlement systems that admit only BSA-regulated financial institutions;
- (c) the entity must provide 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.<sup>11</sup>

The Company fails to satisfy one of these conditions. The Company is not operating through clearing and settlement systems that only admit BSA-regulated financial institutions as members. According to your letter the real currency payments from the consumer take place within a clearing and settlement system that only admits BSA-regulated financial institutions as members (specifically, a credit card network), however, the payment of the Bitcoin equivalent to the merchant, by definition, takes place outside such a clearing and settlement system, either to a merchant-owned virtual currency wallet or to a larger virtual currency exchange that admits both financial institution and non-financial institution members, for the account of the merchant.

With regard to whether the money transmission is integral to the provision of the Company's service, and thus potentially eligible for exemption, FinCEN has concluded that the money transmission that takes place within the System does not qualify for the exemption. There are three fundamental conditions that must be met for the exemption to apply:

- a) The money transmission component must be part of the provision of goods or services distinct from money transmission itself;
- b) The exemption can only be claimed by the person that is engaged in the provision of goods or services distinct from money transmission;
- c) The money transmission component must be integral (that is, necessary) for the provision of the goods or services.

In FinCEN's view, the payment service that the Company intends to offer meets the definition of money transmission. Such money transmission is the sole purpose of the

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<sup>11</sup> See 31 CFR § 1010.100(ff)(5)(ii)(B); see also FIN-2013-R002 ("Whether a Company that Offers a Payment Mechanism Based on Payable-Through Drafts to its Commercial Customers is a Money Transmitter" - 11/13/2013). FIN-2013-R002 clarifies that for the payment processor exemption to apply, the entity must use a clearance and settlement system that intermediates solely between BSA regulated institutions.

Company's System, and is not a necessary part of another, non-money transmission service being provided by the Company. Although rendered before the 2011 modifications to MSB definitions and in some cases involving a different type of MSB, FinCEN reached the same conclusion in several administrative rulings that apply to this particular point.<sup>12</sup>

For the above reasons, FinCEN has determined that the Company is engaged in money transmission, and such activity is not covered by either the payment processor or the integral exemption. Please note that FinCEN would reach the same conclusions if payments were made in virtual currencies other than Bitcoin. As a money transmitter, the Company will be required to (a) register with FinCEN, (b) conduct a comprehensive risk assessment of its exposure to money laundering,<sup>13</sup> (c) implement an Anti-Money Laundering Program based on such risk assessment, and (d) comply with the recordkeeping, reporting and transaction monitoring obligations set down in Parts 1010 and 1022 of 31 CFR Chapter X. Examples of such requirements include the filing of Currency Transaction Reports (31 CFR § 1022.310) and Suspicious Activity Reports (31 CFR § 1022.320), whenever applicable, general recordkeeping maintenance (31 CFR § 1010.410), and recordkeeping related to the sale of negotiable instruments (31 CFR § 1010.415). Furthermore, to the extent that any of the Company's transactions constitute a "transmittal of funds" (31 CFR § 1010.100(ddd)) under FinCEN's regulations, then the Company must also comply with the "Funds Transfer Rule" (31 CFR § 1010.410(e)) and the "Funds Travel Rule" (31 CFR § 1010.410(f)).

This ruling is provided in accordance with the procedures set forth at 31 CFR Part 1010 Subpart G. In arriving at the conclusions in this administrative ruling, we have relied upon the accuracy and completeness of the representations you made in your communications with us. Nothing precludes FinCEN from arriving at a different conclusion or from taking other action should circumstances change or should any of the information you have provided prove inaccurate or incomplete. We reserve the right, after redacting your name and address, and similar identifying information for your clients, to publish this letter as guidance to financial institutions in accordance with our regulations.<sup>14</sup> You have fourteen days from the date of this letter to identify any other information you believe should be redacted and the legal basis for redaction.

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<sup>12</sup> See FIN-2008-R007 ("Whether a Certain Operation Protecting On-line Personal Financial Information is a Money Transmitter" - 06/11/2008); FIN-2008-R004 ("Whether a Foreign Exchange Consultant is a Currency Dealer or Exchanger or Money Transmitter" - 05/09/2008); FIN-2008-R003 ("Whether a Person That is Engaged in the Business of Foreign Exchange Risk Management is a Currency Dealer or Exchanger or Money Transmitter" - 05/09/2008); and FIN-2008-R002 ("Whether a Foreign Exchange Dealer is a Currency Dealer or Exchanger or Money Transmitter" - 05/09/2008).

<sup>13</sup> We caution the Company about incorporating into its comprehensive risk assessment the delicate balance between helping merchants avoid losses due to the fluctuation of their currencies of legal tender because of inflationary trends or devaluation, on the one hand, and collaboration with their potential evasion of foreign exchange control regulations applicable in their jurisdictions, on the other.

<sup>14</sup> 31 CFR §§ 1010.711-717.

If you have questions about this ruling, please contact FinCEN's regulatory helpline at (703) 905-3591.

Sincerely,

//signed//

Jamal El-Hindi  
Associate Director  
Policy Division