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FINCEN ISSUES GUIDANCE ON VIRTUAL CURRENCIES

On March 18, 2013, the Financial Crimes Enforcement Network ("FinCEN") issued interpretive guidance to clarify the applicability of the regulations implementing the Bank Secrecy Act ("BSA") to persons creating, obtaining, distributing, exchanging, accepting or transmitting "virtual currencies," including "users," "administrators" and "exchangers." The guidance draws a distinction between so-called "real" currency (*i.e.*, "the coin and paper money of the United States or of any other country that [i] is designated as legal tender and that [ii] circulates and [iii] is customarily used and accepted as a medium of exchange in the country of issuance") and "virtual" currency, which is "a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency," such as legal tender status in any jurisdiction. "Convertible" virtual currency either has an equivalent value in real currency, *or acts as a substitute for real currency*. One key point is that FinCEN considers digital mediums of exchange to be "currency," not mere tokens or commodities.

FinCEN concluded that virtual currency "administrators" (*i.e.*, persons engaged as a business in putting into circulation a virtual currency and have the authority to withdraw from circulation such currency, such as those offering in-game mediums of exchange) and "exchangers" (*i.e.*, persons engaged as a business in the exchange of virtual currency for real currency, funds or other virtual currency) are money services businesses (MSBs) under the BSA regulations, specifically "money transmitters," if the administrator or exchanger (i) accepts and transmits a convertible virtual currency or (ii) buys or sells convertible virtual currency for any reason, unless one of a few enumerated exceptions applies. MSBs are subject to registration, reporting and recordkeeping regulations. The guidance expressly states that administrators and exchangers are not providers or sellers of prepaid access or dealers in foreign exchange for purposes of FinCEN's regulations (because these concepts are limited to real currency). A "user" (*i.e.*, a person that obtains virtual currency to purchase goods or services) of virtual currency, on the other hand, is not a money transmitter or MSB under the regulations. A person may in fact operate in more than one capacity.

FinCEN describes its determinations regarding the appropriate regulatory treatment of administrators and exchangers under three scenarios: (i) brokers and dealers of e-currencies and e-precious metals; (ii) centralized convertible virtual currencies (which have a central repository); and (iii) de-centralized convertible virtual currencies (which has no central repository or single administrator). Trading in e-currencies or e-precious metals, for example, is subject to the same rules as for real currency. An administrator of a centralized virtual currency will be a money transmitter to the extent that it allows transfers of value (whether denominated in real or convertible virtual currency) between persons or from one location to another. An exchanger also may be a money transmitter if it accepts and transmits value unless a limitation or exemption from the definition of money transmitter applies.

FinCEN's characterization of administrators and exchangers as "money transmitters" under federal law may have important state law implications. Most states require "money transmitters" to be licensed. State regulation is not uniform and relevant definitions are often broad and vague. State regulators or legislatures may follow FinCEN's lead and require virtual currency businesses that qualify as "money transmitters" under the FinCEN regulations to obtain state licenses.

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