

October 20, 2014

Ms. Dana V. Syracuse  
New York State Department of Financial Services  
Office of General Counsel  
One State Street  
New York, NY 10004

By e-mail: [dana.syracuse@dfs.ny.gov](mailto:dana.syracuse@dfs.ny.gov)

**Re: Proposed New York Codes, Rules and Regulations  
Title 23. Department of Financial Services; Chapter I. Regulations of the Superintendent of  
Financial Services; Part 200. Virtual Currencies**

**Notice of Proposed Rulemaking I.D. No. DFS-29-14-00015-P**

Dear Ms. Syracuse:

The New York State Society of Certified Public Accountants (NYSSCPA), representing more than 28,000 CPAs in public practice, business, government and education, welcomes the opportunity to comment on the above captioned proposed regulations.

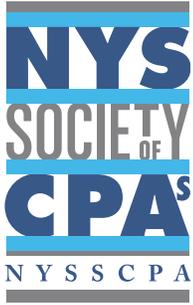
The NYSSCPA's Virtual Currency Task Force deliberated the proposed regulations and prepared the attached comments. If you would like additional discussion with us, please contact Edward Torres, Chair of the Virtual Currency Task Force at [REDACTED], or Ernest J. Markezin, NYSSCPA staff, at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "S. M. Adair". The signature is written over a faint, light blue watermark of the NYSSCPA logo.

Scott M. Adair  
President

Attachment



**NEW YORK STATE SOCIETY OF  
CERTIFIED PUBLIC ACCOUNTANTS**

**COMMENTS ON**

**NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES**

**PROPOSED NEW YORK CODES, RULES AND REGULATIONS  
TITLE 23. DEPARTMENT OF FINANCIAL SERVICES; CHAPTER I. REGULATIONS  
OF THE SUPERINTENDENT OF FINANCIAL SERVICES; PART 200. VIRTUAL  
CURRENCIES**

**Notice of Proposed Rulemaking I.D. No. DFS-29-14-00015-P**

**October 20, 2014**

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# **New York State Society of Certified Public Accountants**

## **Comments on**

### **New York State Department of Financial Services Proposed New York Codes, Rules and Regulations**

### **Title 23. Department of Financial Services; Chapter I. Regulations of the Superintendent of Financial Services; Part 200. Virtual Currencies**

### **Notice of Proposed Rulemaking I.D. No. DFS-29-14-00015-P**

#### **General Comments**

The New York State Society of Certified Public Accountants (NYSSCPA) appreciates the opportunity to comment on The New York State Department of Financial Services (DFS) Proposed New York Codes, Rules and Regulations: Title 23. Department of Financial Services; Chapter I. Regulations of the Superintendent of Financial Services; Part 200. Virtual Currencies (the Proposed Regulations).

Overall, we support the Proposed Regulations and believe that they are a significant first step in providing guidance and clarity to the new and emerging world of virtual currency. However, while we support most of the Proposed Regulations, we have concerns that some of them may have unintended consequences. Therefore, we have comments on specific sections as follows:

#### **Suggested Clarifications and Revisions to Specific Sections of the Proposed Regulations**

##### Section 200.2(n) Definition of Virtual Currency Business Activity

*Virtual Currency Business Activity means the conduct of any one of the following types of activities involving New York or a New York Resident: (1) receiving Virtual Currency for transmission or transmitting the same; (2) securing, storing, holding, or maintaining custody or control of Virtual Currency on behalf of others; (3) buying and selling Virtual Currency as a customer business; (4) performing retail conversion services, including the conversion or exchange of Fiat Currency or other value into Virtual Currency, the conversion or exchange of Virtual Currency into Fiat Currency or other value, or the conversion or exchange of one form of Virtual Currency into another form of Virtual Currency; or (5) controlling, administering, or issuing a Virtual Currency.*

The DFS press release accompanying the Proposed Regulations suggests that the definition of a Virtual Currency Business Activity would not include Virtual Currency mining or buying and selling Virtual Currency for personal use, but these exclusions are not expressly stated in the Proposed Regulations. To avoid confusion and for clarification, we suggest that the final regulatory definition for Virtual Currency Business Activity expressly exclude the activities of Virtual Currency mining or buying and selling Virtual Currency for personal use.

#### Section 200.4 (a)(7) Application

*[A] current financial statement for the applicant and each Principal Officer, Principal Stockholder, and Principal Beneficiary of the applicant, as applicable, and a projected pro forma balance sheet and income and expense statement for the next year of the applicant's operation[.]*

Overall, we agree that requiring the applicant and each principal officer, stockholder and beneficiary of the applicant to provide financial information is a sound practice to be followed, but we believe the applicant (business entity) should be required to provide the same financial information that is required of applicants submitting a money transmitter license application to the DFS. We expect that a license application for Virtual Currency Licensees will be very similar to the current application used to obtain a money transmission license. See Section H and I in the application.

Currently, the money transmission license application requires: (1) audited financial statements for the applicant for the two fiscal years of operation preceding the application, and if the applicant's fiscal year ends more than 60 days prior to the date of application, a supplemental financial statement for a period ending not more than 60 days prior to the date of application; (2) personal financial statements for each director, principal officer or 10% equity owner of the application; (3) audited financial statements for the most recent two fiscal years of any company which directly or indirectly owns 10% or more of the equity securities of the applicant; (4) an affidavit that the applicant maintains permissible investments; (5) financial projections for two years of operations; (6) pro forma balance sheets and profit and loss statements.

In addition, we recommend that the applicant provide (7) business tax returns for the applicant entity for the two fiscal years of operation preceding the application; and (8) personal tax returns for each director, principal officer or 10% equity owner of the application.

#### Section 200.4 (9) Application

*[D]etails of all banking arrangements[.]*

If the applicant discloses any arrangements or relationships with foreign banks or the existence of any accounts maintained outside the United States, an explanation for the use of such accounts should be included and the applicant must advise if the account has been properly reported to both the IRS and the Treasury Department.

#### Section 200.4 (13) Application

*[A]n explanation of the methodologies used to calculate the value of Virtual Currency in Fiat Currency[.]*

For purposes of explaining the methodologies used to calculate the value of Virtual Currency in Fiat Currency, we recommend that a licensee's balance sheet (as required in proposed section 200.14(d)) be required to carry the value of the Virtual Currencies at fair value,

or if not carried at fair value, the fair value disclosed elsewhere in the financial statements. In addition, we believe that the cost basis of the Virtual Currency must be clearly defined so as to be in synchronization with other reporting requirements.

Section 200.9(a) Custody and protection of customer assets

*Each Licensee shall maintain a bond or trust account in United States dollars for the benefit of its customers in such form and amount as is acceptable to the superintendent for the protection of the Licensee's customers.*

Overall, we agree with this proposed regulation but we recommend that further guidance should be provided in clarifying the surety bond and trust account requirements. For example, the DFS should provide guidance as to where the trust account must be held (*i.e.*, with a qualified custodian). If the account is considered a reportable account in a foreign country, as defined in Section 1010.350 of Chapter X, Title 31 of the Code of Federal Regulations, proof of reporting to both the IRS and the Treasury Department must be submitted. We recommend that further guidance should also be provided regarding the amount of the bond or the amount to be held in the trust account (*i.e.*, an amount determinable as a percentage of overall deposits or as a percentage of annual transaction amounts).

We would expect that when an application is released for virtual currency licensees it will be substantially similar to that of money transmitter licensees. We expect the surety bond and trust account requirements for virtual currencies to be similar to the requirements for money transmitter licensees and to be maintained with the DFS as it is for money transmitter licensees.

Section 200.12(a)(1) Books and records

*[F]or each transaction, the amount, date, and precise time of the transaction, any payment instructions, the total amount of fees and charges received and paid to, by, or on behalf of the Licensee, and the names, account numbers, and physical addresses of the parties to the transaction.*

We agree in general with the regulation but we recommend that further guidance be provided in clarifying what is considered to be the "precise time" in which a transaction has occurred. Some Virtual Currencies operate in a decentralized manner and utilize a public ledger system whereby transactions are not recognized to have occurred by the users of the Virtual Currency until the transaction has been recorded in the public ledger. Updates to the public ledger occur in batches and, as such, a difference will often exist between the time that a transaction has been executed between parties and the time in which the transaction is considered irreversible through being recorded in the public ledger. We recommend specific guidance be included to define "precise time" so that it is consistently applied among all Licensees.

Section 200.14(a) Reports and financial disclosures

*Each Licensee shall submit to the superintendent quarterly financial statements within 45 days following the close of the Licensee's fiscal quarter in the form, and containing such*

*information, as the superintendent shall prescribe, including without limitation, the following information: (1) statement of liquid net assets, statement of net worth; . . . (6) a report of permissible investments by the Licensee as permitted under this Part.*

Overall, we agree that the Licensee should submit quarterly financial statements. However, clarification regarding what is required in a statement of liquid net assets and a statement of net worth should be included as part of the definitions in the final rule.

#### Section 200.14(b) Reports and financial disclosures

*Each Licensee shall submit audited annual financial statements, prepared in accordance with generally accepted accounting principles, together with an opinion of an independent certified public accountant and evaluation by such accountant of the accounting procedures and internal controls of the Licensee within one hundred and twenty days of its fiscal year end. All such annual financial statements shall include[.]*

We agree that the Licensee's audited financial statements should be submitted with an opinion from an independent certified public accountant on the preparation of those financial statements in accordance with generally accepted accounting principles. We believe that the requirement of independent certified public accountants to provide an opinion over the internal controls of the Licensee as a part of the financial statement opinion should be further clarified to state whether a separate report covering internal controls (similar to Rule 17a-5 under the Securities and Exchange Act of 1934 applicable to broker dealers) or an opinion of the internal controls over financial reporting is required. Further, it should be determined whether the audit should be conducted under Generally Accepted Auditing Standards (GAAS) or Public Company Accounting Oversight Board (PCAOB) standards, or if it could be under either set of standards depending on the reporting requirements of the Licensee.

Determination should be made if there should be a separate audit of the financial statements and a separate examination over the Licensee's compliance with the applicable laws, rules and regulations since these types of engagements are typically not reported together in one report. If it is determined that there should be a separate examination over the Licensee's compliance with the applicable laws, rules and regulations, we recommend that the examination report follow the provisions of PCAOB AT Section 601 (Compliance Attestation). This section enables true direct reporting on the subject matter. The audit and examination accounting firm requirements should also be clarified to specify whether the audit must be conducted by an accounting firm registered with, and subject to regular inspection by, the PCAOB.

#### Section 200.16 Cyber security program

Overall, we agree with this section of the Proposed Regulations, however we believe that in its current generalized state it leaves wide latitude in interpretation and implementation. We recommend that this section incorporate by reference an appropriate and comprehensive cyber security standard that is accepted in the financial services industry (*e.g.*, National Institute of Standards and Technology SP 800 Series) in the implementation of the cyber security program for Licensees. Consideration should be given to the following aspects of the program:

1. The frequency of testing should be at least semi-annually;
2. the scope of testing should be perimeter wide with respect to the entity, regardless of the legal entity's physical location within the network of other affiliated entities;
3. the results of the testing should be made part of the public record and be available to regulators, customers, counterparties and others; and
4. the timing of the testing should be planned, yet have an element of unpredictability in order to obtain results that are most representative of actual operations.

#### Section 200.19(b) Consumer protection

*Disclosure of general terms and conditions. When opening an account for a new customer, and prior to entering into an initial transaction for, on behalf of, or with such customer, each Licensee shall disclose in clear, conspicuous, and legible writing in the English language and in any other predominant language spoken by the customers of the Licensee, all relevant terms and conditions associated with its products, services, and activities and Virtual Currency generally, including at a minimum, the following, as applicable:*

We generally agree with the regulation but we believe that the requirements should be clarified as follows:

- Section 200.19(b)(5) *the customer's right to receive periodic account statements and valuations from the Licensee;*  
This should be clarified to mean monthly periodic account statements of the customer's account.
- Section 200.19(b)(6) *the customer's right to receive a receipt, trade ticket, or other evidence of a transaction;*  
This should be amended to include the underlined passage, as follows: "*the customer's right to receive a receipt, trade ticket, or other evidence of a transaction once it has been determined to be irreversible;*"
- Section 200.19(b)(7) *the customer's right to prior notice of a change in the Licensee's rules or policies;*  
This should be amended to include the underlined passage, as follows: "*the customer's right to receive at least 30-days prior notice of a change in the Licensee's rules or policies;*"
- Section 200.19(g) This section should include the underlined passage, as follows: *Prevention of fraud. Licensees are prohibited from engaging in fraudulent activity and customers of Licensees that are victims of fraud, through intentional acts or through negligence of the Licensee, its employees, agents or affiliates, shall be*

*entitled to claim compensation from any trust account, bond, or insurance policy maintained by the Licensee. Additionally, each Licensee shall take reasonable steps to detect and prevent fraud, including by establishing and maintaining a written anti-fraud policy. The anti-fraud policy shall, at a minimum, include:*

- (1) the identification and assessment of fraud-related risk areas;*
- (2) procedures and controls to protect against identified risks;*
- (3) allocation of responsibility for monitoring risks; and*
- (4) procedures for the periodic evaluation and revision of the anti-fraud procedures, controls, and monitoring mechanisms.*

## **Additional Considerations**

### Audit Committee Oversight of the Regulations

We suggest that the Audit Committee of an entity engaged with virtual currency be given the responsibility to oversee the following activities as they relate to the Proposed Regulations:

- Integrity of the financial statements as they relate to virtual currency.
- Sufficient updates to the entity’s risk assessment and risk management guidelines as they relate to virtual currency transactions.
- Confirmation of the scope of the internal audit function to include the design and operating effectiveness of the internal controls over virtual currency transactions.
- Compliance with the legal and regulatory requirements including anti money laundering regulations such as the Bank Secrecy Act, as amended by the USA PATRIOT Act.

### Timing of Transactions

Timing of transactions should to be addressed in order to prevent “double-counting” of currency units. Once a transaction is initiated by a customer, a second transaction should not be allowed from the same account until the ledger for the first transaction has settled. This will prevent the customer from committing fraud while the currency is under the Licensee’s possession or control. Using the same currency units for multiple transactions is a fraud risk unique to virtual currency.