



Benjamin M. Lawsky
Superintendent of Financial Services
New York Department of Financial Services
One State Street
New York, NY 10004
October 20, 2014

Dear Superintendent Lawsky:

BitPay, Inc. (BitPay) appreciates the opportunity to comment on the New York Department of Financial Services (NYDFS) proposed regulations for virtual currency business activities.

Background of BitPay

BitPay offers a Processing Service to merchants in order to facilitate their acceptance of bitcoin (the digital unit) as a method of payment from their customers in a similar manner as a traditional merchant processor, but only for bitcoin-based payments. The Processing Service allows merchants to receive their settlements in either bitcoin or their local bank currency. BitPay does not have any contracts or relationships with consumers. Consumers' only interaction with the Processing Service is through a Merchant's website or point-of-sale system that has integrated the Processing Service. As BitPay offers no consumer-facing services, consumers cannot engage BitPay to remit bitcoins to another person, buy or sell bitcoins for themselves, or store their bitcoins.

Given the open source nature of Bitcoin (the protocol), nothing would preclude a Merchant from accepting bitcoins directly from their customers, as there is no centralized network or administrator that establishes eligibility requirements in the same manner as, for example, the card associations such as Visa or MasterCard. However, BitPay's advanced software platform, coupled with our customer service, allows merchants to more easily accept bitcoin as a form of payment without having to interact with the underlying Bitcoin protocol. As a similar comparison, a small business could use the SMTP (simple mail transfer protocol) and setup their own email account, or use the services of Gmail for their emailing needs.

Innovative Opportunities for Bitcoin and Risk-Based Regulations

While we have only one singular business line of merchant payment processing, BitPay has been a strong advocate for the Bitcoin ecosystem as one of the oldest start-ups, established in May 2011. We anticipate significant innovation of Bitcoins (the protocol, decentralized network and payment system) in serving traditional use cases, such as validating ownership in real estate, stocks, bonds and even other digital units such as gaming or reward points. Furthermore, we are also excited about the possibilities of bitcoin (the digital unit that can be used as a currency) in assisting payments without interchange fees or chargebacks resulting from card fraud including counterfeits or lost & stolen activity. With that context, BitPay appreciates your intentions in wanting to foster Bitcoin innovation; however, the proposed regulation significantly misses the mark in four key areas:

- I. Lacks Innovative Rule Making That Will Unfortunately Deter Jobs & Innovation,
- II. Creates an Unlevel Playing Field with Other Payment Methods,
- III. Disregards Existing Local/National/International AML Frameworks, and
- IV. Lacks Clarity Whether Ancillary Bitcoin Activities Are Covered by Regulations.

BitPay believes that given the potential use cases and services that are just being built out by the Bitcoin ecosystem, the proposed regulations would stifle growth of jobs and innovation, rather than promote such. BitPay looks forward to engaging in a dialogue during this and subsequent comment periods in improving four key areas of the regulations with the specific suggestions below:

I. Lacks Innovative Rule Making That Will Deter Jobs & Innovation

BitPay recognizes the significant effort that NYDFS has invested in formulating and drafting rules to enable sound innovation. However, in our humble opinion, the construct of the rules feels more like a compilation of every banking rules and regulations that exist rather than a risk-based ensemble of controls that enables innovation in the Bitcoin ecosystem and bitcoins with sound consumer protection, anti-money laundering objectives and data security controls. As a result, we respectfully ask that the NYDFS be innovative itself similar to the Consumer Financial Protection Bureau proposing a new policy to consider innovative approaches to benefit consumers (see <http://www.consumerfinance.gov/blog/were-open-to-innovative-approaches-to-benefit-consumers/>). Additionally, when rules are proposed, consider utilizing the Bitcoin protocol to transform how regulators ensure financial soundness and consumer protections. For example, rather than require minimum capital ratios or audited financial statements (that are prepared by trusted third parties), consider requiring “proof of solvency” via bitcoins sent and validated over the Blockchain. As a result of innovative regulatory thinking, the following sections may be eliminated or limited:

- Eliminate requirements for audited annual financial statements (§200.14) and prohibiting investment in bitcoins (§200.8), and embrace the powerful features of Bitcoin, including to prove one’s solvency or ownership of such digital units and equivalent value.
- Eliminate compliance officer requirement, or at minimum, allow for duties to be fulfilled by a principal officer - §200.7
- While Cyber Security is important and a program is foundational, penetration testing, “employing cyber security personnel,” and having independent “source code review” are costly to small start-ups and entrepreneurs. This should be eliminated or risk-based (by transaction count and/or value) - §200.16.

II. Creates an Unlevel Playing Field for Bitcoin Transactions

The NYDFS as well as other government bodies have defined bitcoins and other virtual currencies as “digital units” and therefore, the regulatory structure should leverage the rules that already exists via on-ramps and off-ramps to our financial industry. The NYDFS should propose risk-based rules when Virtual Currency Business Activities (“VCBAs”) serve as on- and off-ramps to the fiat currency financial sector, such as when i) buying and selling consumers’ bitcoins for fiat currencies and vice versa, ii) safekeeping consumers’ bitcoins by “bitcoin banks” only when obtaining consumers’ private keys, and iii) remitting bitcoin from one person to another person as a fiduciary service similar to traditional money remittance businesses. The requirements for identifying transactions should be consistent to existing payment methods and balance consumer privacy and data security. With this construct in mind, the following suggestion are presented:

- Eliminate the need for “names, account numbers, physical address” be collected for “each transaction.” Merchants on Broadway do not collect such information for “each transaction” whether via cash for a hotdog or via debit cards to attend a show - §200.12 Books and Records.

- Eliminate identification required for large transactions (and at a minimum for purchases of goods and services). Shoppers do not need to present identification to purchase a good for over \$3,000 with a credit or debit card or even cash at merchants on 5th Avenue. Some merchants may ask for an ID to ensure that the credit or debit card is not stolen as the merchants would bear chargeback risk - §200.15.

III. Disregards Leveraging Existing Local/National/International AML Frameworks

The NYDFS should leverage the existing AML regulations and frameworks and consider risk-based principles for VCBA's, including New York's agent of a payee exemption. NYDFS could also leverage the significant efforts at the national level to establish virtual currency regulations for income tax and anti-money laundering purposes. On an international level, regulators should continue to work with the Financial Action Task Force (FATF) to produce sound, international standards. The following suggestions leverages these principles:

- Provide an "Agent of a Payee" money transmission exemption similar to the New York Banking Law Section 641 that states, "No person shall engage in the business of selling or issuing checks, or engage in the business of receiving money for transmission or transmitting the same, without a license therefor obtained from the superintendent as provided in this article, nor shall any person engage in such business as an agent, except as an agent of a licensee or as agent of a payee ..."

- Provide similar money transmission exemptions to the US Treasury Department Financial Crimes Enforcement Network's (FinCEN), including (a) "Acts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller" and (b) "Accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds." 31 CFR § 1010.100(ff)(5)(ii)(B and F).

- Eliminate Virtual Currency Transaction Reports (VCTR) and leverage FinCEN's existing physical cash currency transaction reports if virtual currencies are paid out or sold for over \$10,000 in physical fiat currency. Transacting with only bitcoins would be synonymous to paying with electronic wallets, checks, or credit cards, which presently do not require VCTR reporting.

- Provide a blanket risk-based di minimus thresholds for no identification nor verification similar to 1) United States Postal Service selling money orders up to \$3,000 without any ID[i], 2) European Union's 3rd Money Directive requiring no know-your-customer details to purchase and maintain reloadable prepaid cards up to €2,500[ii], and 3) FinCEN's US Prepaid Access Rules provided a \$1,000 di minimus threshold as "potential for misuse is significantly lessened"[iii] - §200.15

- Expand the "Transmission" definition to include "One person instructing to the third party to remit/send Virtual Currency to another person" and that "Transmission shall not be construed to include 'accepting and transmitting funds only integral to the sale of goods or the provision of services, other than money transmission licensed services" consistent with FinCEN regulations - §200.2

- Provide clarification of "customer business" and "retail conversion services"; the activity of buying and selling of virtual currency as a customer business may become applicable to an

investment or mutual fund company, while performing retail conversion services may become applicable to an exchanger, "bitcoin bank," or a wallet provider that takes control of the consumers' private keys - §200.2

IV. Lacks Clarity Whether Ancillary Bitcoin Activities are Covered by Regulations

The definition of a Virtual Currency Business Activity including "securing, storing, holding, or maintaining custody or control of Virtual Currency on behalf of others" and "controlling, administering, or issuing a Virtual Currency" under §200.2 (n)(2) and (5), respectively, should be modified or clarified to exclude ancillary related services.

Ancillary services include a) developing and releasing open-source software that enable further development of applications, products or services, b) providing encrypted data backup services (where the data being stored may include elliptic curve private keys) that assist in storing and protecting any form of data (i.e. provider of open-source wallet software that enables backup or recovery of wallets), c) providing data escrow services that would require multiple designated people and a standardized protocol to recover/reclaim the owner's data, which might be information needed to access bitcoins (i.e. person walks into a physical location and presents government ID and/or a few other forms of ID or secret questions)[iv], and/or d) third party notarization services that are common in traditional escrow or innovative server based multi-signature services, or instant transaction services. It is important to note that traditional escrow services that may include ancillary transmission of funds are exempt under Federal AML guidelines as stated in FinCEN's 2014-R004 Interpretation Letter.

In summary, given the significant prospects for Bitcoin the protocol and bitcoin the digital unit, BitPay respectfully requests that the NYDFS consider innovation itself in formulating regulations, establish risk-based rules that help to create jobs rather than eliminate them, leverage existing Anti-Money Laundering frameworks, and clarify that providers of ancillary activities do not require a BitLicense.

Sincerely,



Tim Byun
Chief Compliance Officer

[i] See <http://faq.usps.com/adaptivedesktop/faq.jsp?ef=USPSFAQ>, under "Money Order Purchase Limits:

- The single money order maximum is \$1,000.00 if sending within the United States.
- For international money orders, the maximum amount varies by country, but cannot exceed \$700.00.
- Multiple money orders may be purchased during the same visit (no daily limit).
- If you purchase more than \$3,000.00 in money orders, you are required to complete a special form and produce acceptable ID."

[ii] See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0060&from=EN> page L309/25 under Simplified Due Diligence stating, "...if the device cannot be recharged, the maximum amount stored in the device is no more than EUR 150, or where, if the device can be recharged, a limit of EUR 2 500 is imposed on the total amount transacted in a calendar year ..."

[iii] See <http://www.gpo.gov/fdsys/pkg/FR-2011-07-29/pdf/2011-19116.pdf> as it states, "ii. Funds not to exceed \$1,000 maximum value and from which no more than \$1,000 maximum value can be initially or subsequently loaded, used, or withdrawn on any day through a device or vehicle. We believe that the potential for misuse is significantly lessened where the prepaid access is to funds limited to a \$1,000 maximum limitation ..."

[iv] This service may be welcomed by consumers that are not comfortable with other means of backup and prefers a non-technical means to recover their funds.