



October 21, 2014

**Via Electronic Submission**

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

Re: Notice of Proposed Rulemaking for the Regulation of the Conduct of Virtual Currency Businesses I.D. No. DFS-29-14-00015-P

Dear Mr. Syracuse:

Western Union Financial Services, Inc. and its licensed affiliates (collectively, "Western Union") are pleased to submit this letter to the New York State Department of Financial Services (the "DFS") in response to the Notice of Proposed Rulemaking, I.D. No. DFS-29-14-00015-P (the "Notice") published in the *New York State Register* on July 23, 2014 regarding the regulation of virtual currency. The Notice is the first comprehensive regulatory regime for virtual currency businesses proposed in the United States, and would establish a regulatory licensing framework for virtual currency businesses engaged in certain types of activities (each, a "Virtual Currency Business Activity") involving New York or a New York resident (each, a "VC Licensee"). The Notice requires any business that engages in a Virtual Currency Business Activity to obtain a license ("VC License") from the DFS and, among other things, adopt consumer protection, anti-money laundering ("AML") and cybersecurity policies, procedures and controls.

Western Union facilitates global money movement and payment services, providing people and businesses with fast, reliable and convenient ways to send money and make payments around the world. The Western Union brand is globally recognized and represents speed, reliability, trust and convenience. We provide consumer-to-consumer and consumer-to-business money transfer services through a variety of channels, including retail agent locations, online and mobile channels, and account-based services. We also act as a service provider and provide processing solutions to depository institutions that offer their customers account-to-account international remittance transfers.

Western Union appreciates the opportunity to comment on the Notice and recognizes the challenges faced by the DFS to issue rules to regulate virtual currency businesses in order to protect New York consumers and users and to ensure the safety and soundness of VC Licensees. We recognize that one of the factors the DFS must contend with is that, unlike fiat currency, virtual currencies are not issued by any central bank or authority that can use monetary policy to impact the value or stability of the virtual currency. We commend the DFS on its efforts to develop appropriate regulatory oversight without impeding continued development of the industry, such as its efforts to include broad consumer disclosures related to the risks and inherent volatility of virtual currencies, as well as its efforts to assure the safety and soundness of VC Licensees. We are concerned, however, that the approach suggested in the Notice does not clearly address the interaction of VC Licensees with New York money transmitter licensees

(each, a "MT Licensee") or provide enough clarity regarding select requirements applicable to VC Licensees, including the AML requirements.

Western Union respectfully requests that the DFS consider adopting the suggestions set forth herein, as we believe they will better effectuate the purposes of the Notice and provide needed clarity on certain matters. They are based on our experience in providing money transfer services to consumers in more than 200 countries and territories around the world. These suggestions reflect Western Union's commitment to helping consumers and to complying with the various regulatory regimes governing our services.

## **A. Coverage and Licensing Requirements**

1. The Final Rule Should Expressly Clarify that Engaging in Money Transmission Activity by a MT Licensee or Non-Financial Activity that Supports a VC Licensee is Not a Virtual Currency Business Activity.

Proposed section 200.2(n) of the Notice defines Virtual Currency Business Activity to include "buying and selling virtual currencies as a customer business" and "performing retail conversion services." Western Union believes that a basic money transfer falls outside the scope of this definition, and we are concerned that the proposed definition could be interpreted to include traditional money transmission activities where such activities are used in connection with the purchase and sale of virtual currency. We request clarification that if we provide a money transfer to a consumer who has separately agreed to a transaction directly with a VC Licensee as described in the following examples, we would not be engaged in a Virtual Currency Business Activity.<sup>1</sup>

*Example 1.* A consumer requests a licensed money transmitter to send fiat currency<sup>2</sup> (e.g., cash) to a VC Licensee for a virtual currency transaction that the consumer has already requested and staged with the VC Licensee (e.g., for the conversion of fiat currency to virtual currency, for the purchase of virtual currency, or to load the consumer's virtual currency wallet) ("Cash-In"). In this example, the money transfer acts as the payment method for the underlying virtual currency transaction between the consumer and the VC Licensee.

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<sup>1</sup> In both of these examples, we note that the consumer would be separately engaging in a transaction with the VC Licensee (either a first-time or existing customer), and the VC Licensee would be subject to the various compliance requirements related to the transaction. Prior to the money transfer transaction, the VC Licensee would be required to comply with applicable disclosure, customer identification, and other AML requirements under New York law. As further discussed below, however, the VC Licensee may contract with the MT Licensee for assistance in customer identification collection and verification.

<sup>2</sup> See proposed 23 N.Y.C.R.R. § 200.2(d) ("*Fiat Currency* means government-issued currency that is designated as legal tender in its country of issuance through government decree, regulation, or law.")

*Example 2.* A consumer requests a VC Licensee (1) to convert virtual currency to fiat currency and (2) to make the fiat currency available for pick up (as cash) from a money transmitter agent location ("Cash-Out").<sup>3</sup>

Currently, a consumer may use Western Union to purchase goods and services—such as airplane tickets—as part of a sales transaction between the consumer and a third party. In the airplane ticket transaction, a consumer may initiate a transaction with an airline online and then pay for the airplane ticket by providing cash at a Western Union agent location. Such transactions are similar to the Cash-In transaction described in example 1 above. Similarly, a consumer can currently fund a transfer using a bank account for payout at a Western Union agent location. Such transactions are similar to the Cash-Out transaction described in example 2 above.

Where Western Union is used solely as a payment mechanism to facilitate the purchase or sale of virtual currency, Western Union is already subject to New York's regulatory regime applicable to such transactions, and such transactions should be clearly excluded from coverage under the Notice. As a licensed money transmitter in New York, we are subject to various regulatory requirements, including, for example, receipt requirements under 3 N.Y.C.R.R. § 406.3, recordkeeping requirements under 3 N.Y.C.R.R. § 406.9, and the requirement to maintain an AML program pursuant to 3 N.Y.C.R.R. Part 416. Further, we are obligated to maintain "permissible investments" against our outstanding obligations, and are responsible to deliver funds to third parties as instructed by our consumers, but we have no responsibility or liability with respect to goods or services received from third parties. Therefore, we request that the DFS expressly clarify that the definition of Virtual Currency Business Activity does not include the Cash-In and Cash-Out examples described above.

Additionally, we request clarification that a MT Licensee would not be required to obtain a VC License if it engages in non-financial activity with a consumer on behalf of a VC Licensee that does not include the conduct of Virtual Currency Business Activity outlined in section 200.2(n), but nevertheless supports a VC Licensee's operations. For example, in the course of either the Cash-In or Cash-Out examples described above, a MT Licensee may engage in a non-financial consumer service function which supports a VC Licensee's operations, such as assisting a VC Licensee in implementing the VC Licensee's AML program by conducting real-time, in-person customer identification and verification. *See Section B.2. infra* discussing the addition of a reliance provision to the AML CIP Requirement. The MT Licensee service provider would not be acting as a financial intermediary between the consumer and the VC Licensee.<sup>4</sup> Such non-financial activities are not included in the definition of Virtual Currency Business Activity in proposed section 200.2(n) and should not require a separate VC License.

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<sup>3</sup> It is our understanding that some virtual currency businesses may consider the conversion transactions described in these examples to be purchases and sales of virtual currency for fiat currency.

<sup>4</sup> We believe that the provision of these types of services, which support the operations of VC Licensees, is tantamount to those offered by a "software developer who creates and provides wallet software to customers for their own use," as outlined in the Superintendent's October 14, 2014 remarks delivered at the Benjamin N. Cardozo School of Law in New York, NY. *See NY DFS Release, "Excerpts from Superintendent Lawsky's remarks at the Benjamin N. Cardozo School of Law (Oct. 14, 2014), available at [http://www.dfs.ny.gov/about/speeches\\_testimony/sp141014.htm](http://www.dfs.ny.gov/about/speeches_testimony/sp141014.htm).*

Accordingly, we request that the proposed definition of "Virtual Currency Business Activity" at proposed section 200.2(n) should include the following express clarifications:

*For the avoidance of doubt, a money transmitter licensee shall not be deemed to be engaging in Virtual Currency Business Activity when (1) receiving Fiat Currency for transmission or transmitting the same to or from a person engaged in Virtual Currency Business Activity; or (2) engaging in a non-financial activity that supports a VC Licensee's operations, but does not otherwise include the conduct of Virtual Currency Business Activity.*

2. The Final Rule Should Exempt From Licensing Requirements MT Licensees that are Approved by the Superintendent to Accept Virtual Currency as Payment for Money Transfers.

Proposed section 200.3(c) provides an exemption from the DFS's licensing requirements for: (1) "persons that are chartered under the New York Banking Law to conduct exchange services and that are approved by the Superintendent to engage in Virtual Currency Business Activity" and (2) "merchants and consumers that utilize Virtual Currency solely for the purchase or sale of goods and services." We urge the DFS to expand this exemption to include MT Licensees that accept virtual currency as a funding source for money transfers, as described in the following example, and that the DFS has determined have requisite policies and procedures in place to address the risks relating to the acceptance of virtual currency as a funding source for a money transfer:

*Example 1.* A consumer would like to send \$100 (or its equivalent in another currency for a cross-border remittance) to a recipient but instead of paying in fiat currency, would like to pay in virtual currency. The consumer visits a licensed money transmitter's agent location or transacts online and funds the money transfer with virtual currency and the \$100 (or its equivalent) is delivered to the recipient's bank account or picked-up by the recipient at a money transmitter agent location. Prior to this transaction, the money transmitter has entered into a contract with a virtual currency provider to promptly exchange virtual currency for fiat currency at agreed time periods and rates. At no time would the licensed money transmitter secure, store, hold or maintain custody or control of virtual currency on behalf of the consumer.

We urge the DFS to expand this exemption as described because MT Licensees are already subject to strict licensing requirements and various consumer protection and AML controls, and this exemption would be limited only to MT Licensees that have been approved by the DFS to accept virtual currency as payment for money transfers.

As a MT Licensee in New York, Western Union (including its principals and affiliates) has been subject to the application and approval process of section 641 of the New York Banking Law, which, as implemented by the DFS, is substantially similar to proposed section 200.4. In addition, the DFS maintains current information about existing MT Licensees

through periodic reporting requirements and supervisory examinations. In particular, the Superintendent has approved, has supervisory oversight over, or has obtained information related to our: (1) directors, principal officers, and principal stockholders, (2) financial statements and information, (3) policies and procedures, and (4) various other information about our operations, products, and services. The DFS would not gain any additional useful information by requiring Western Union to apply for a VC License under proposed section 200.4 for the limited purpose of accepting virtual currency to fund and pay applicable fees for money transfers.

Additionally, as discussed herein, Western Union is already required to comply with various consumer protection and AML requirements, and its products and services, including traditional money transfers, are subject to its robust risk-based policies and procedures aimed at protecting consumers and the financial system from fraud and abuse. If this limited exemption were to be granted by the DFS to Western Union, this transaction would also be subject to these same requirements and controls. Further, given that Western Union would not be holding or maintaining virtual currency on behalf of its consumers, it would not be subject to increased cybersecurity risks or different capital requirements. Additionally, since the money transfer will always be denominated in fiat currency, Western Union's permissible investment obligation will not change. Accordingly, because MT Licensees are already subject to strict licensing requirements and various consumer protection and AML controls, and this type of activity will not materially impact Western Union's financial stability, we urge the DFS to extend the limited exemption from the VC licensing requirement to MT Licensees that have been approved by the DFS to accept virtual currency as payment for money transfers.

3. Proposed Part 200 Should Include Provisions Related to Conducting Virtual Currency Business Activity Through ATMs, Kiosks, or Similar Technologies.

Earlier this year certain companies began establishing ATMs, kiosks, or similar technologies that permit virtual currency transactions to be conducted without human interaction (collectively, "Kiosks").<sup>5</sup> Consumers can buy virtual currency with fiat currency at Kiosks and may be able to redeem virtual currency for fiat currency at Kiosks. For example, Kiosks will accept fiat currency from a consumer with the promise of near immediate delivery of virtual currency to the consumer's digital wallet (minus the Kiosk operator's mark-up or fees). Kiosk operators may use their own inventory of virtual currency for transactions with consumers.<sup>6</sup> The Notice does not contemplate or address the use of Kiosks for purposes of engaging in Virtual Currency Business Activity. It is unclear whether operators of Kiosks would be required to be separately licensed as a VC Licensee, or whether any oversight or other requirements would be imposed on the physical locations that host Kiosks or on the operations of the Kiosks themselves.

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<sup>5</sup> See, e.g., Texas Department of Banking Supervisory Memorandum 1037, dated Apr. 3, 2014, available at <http://www.dob.texas.gov/public/uploads/files/Laws-Regulations/New-Actions/sm1037.pdf>; see also Gardner Jr., Ralph "A Trip to New York's Bitcoin Center." *The Wall Street Journal Online* (Jul. 9, 2014), available at <http://online.wsj.com/articles/a-trip-to-the-new-yorks-bitcoin-center-1404958068>; "First Virtual Currency Bitcoin ATMs Coming to America." *NBC News Online* (Feb. 20, 2014), available at <http://www.nbcnews.com/business/personal-finance/first-virtual-currency-bitcoin-atms-coming-america-n34546>.

<sup>6</sup> See, e.g., Idaho Department of Finance Letter, dated Oct. 10, 2014, available at <http://www.finance.idaho.gov/MoneyTransmitter/Documents/MT%20Interpretations%202014.pdf>.

We believe that the types of activities that are conducted at Kiosks—for example, buying and selling virtual currency, including that which uses the Kiosk operator's own inventory of virtual currency—clearly fall within the definition of Virtual Currency Business Activity and should require a VC License. The regulatory regime should establish a level playing field between transactions conducted at Kiosks and other transactions conducted with a licensee. Accordingly, we request that the DFS clarify that only VC Licensees will be permitted to establish or operate Kiosks and, accordingly, that the operations of Kiosks will be subject to consumer protections and AML requirements.

Based on our experience, Western Union believes that virtual currency transactions conducted at Kiosks may pose unique risks which differ from person-to-person fiat currency transactions conducted using Kiosk-like devices, personal electronic devices or in-person transactions. For example, it may be difficult to determine the physical location or identity of a recipient to a virtual currency transaction. Also, virtual currency transactions may be at increased risk for illicit or fraudulent activities which can only be identified by observing unusual consumer behavior in person, such as whether individuals are using stolen information, loitering, or engaging in organized group planning, or whether there are individuals who appear to be using pressure techniques that happen outside of an actual transaction. For these reasons, it is our view that some level of oversight is warranted at this time for virtual currency transactions conducted through Kiosks. Accordingly, we believe the establishment and placement of Kiosks should be subject to the Superintendent's approval and oversight.

In an effort to address concerns posed by virtual currency transactions, some operators of Kiosks have proposed entirely technological solutions such as the use of palm vein scanning for identity verification purposes<sup>7</sup> and transaction value and volume limits. While we applaud these efforts, they may be inconsistently adopted by Kiosk operators, and we believe that they warrant careful study as technology and virtual currency systems continue to evolve. Given that not all Kiosks have the same technological capabilities or controls, it is our view that VC Licensees should demonstrate to the DFS that the specific operations and features of Kiosks adequately protect consumers and comply with all applicable laws before they are placed into service. Taking these measures will ensure that consumers and the financial system are better protected against fraud and abuse.

As a licensed money transmitter with an extensive agent network, Western Union's agent network is subject to a comprehensive regulatory framework, and we enforce a robust agent oversight program. Consistent with the DFS guidance on agent oversight,<sup>8</sup> Western Union implements a risk-based enhanced agent oversight program, which includes: (1) conducting due diligence when appointing agents (such as requiring background checks); (2) monitoring agent compliance with laws and regulations, ongoing training, and testing; and (3) identifying agents to terminate for non-compliance. Placing Kiosks at locations approved by

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<sup>7</sup> See "First Virtual Currency Bitcoin ATMs Coming to America." *NBC News Online* (Feb. 20, 2014), available at <http://www.nbcnews.com/business/personal-finance/first-virtual-currency-bitcoin-atms-coming-america-n34546>.

<sup>8</sup> See the DFS (f/k/a the New York State Banking Department) Industry Letter on Agent Oversight, dated Jul. 15, 2005.

the DFS, such as at money transmitter agent locations would enhance consumer protection and assist in the prevention of illicit or fraudulent cash or virtual currency transactions.

For the reasons set forth above, we believe that the DFS should clarify that Kiosk operators should be separately licensed, and that the placement of Kiosks should only be at locations approved by the DFS. We further recommend that the following definition of "Kiosk" be added to the definitions and that the following section be added to proposed Part 200:

*Kiosks means an automated teller machine, an unmanned terminal or unmanned electronic POS device that can be used (1) to engage in a Virtual Currency Business Activity with a Licensee or (2) to accept or to receive cash or payment instruments in connection with a Virtual Currency Business Activity.*

*Section 200. Establishment and Operations of Kiosks*

*Only VC Licensees shall be permitted to establish and operate Kiosks. A Kiosk shall only be established at a location approved by the Department. Prior to establishing a Kiosk, a VC Licensee shall submit to the Department an application which demonstrates that the VC Licensee is capable of monitoring the operations of the Kiosk, the Kiosk has appropriate controls in place to protect consumers, and that the Kiosk operations and features comply with all applicable laws.*

## **B. AML Requirements**

1. The Final Rule Should Require VC Licensees to Comply with Applicable Federal AML Requirements And Certain Additional AML Requirements to Address the Unique Risks Posed by Virtual Currency.

Proposed section 200.15 imposes various AML requirements on VC Licensees based in part on the AML requirements from the Bank Secrecy Act (the "BSA"),<sup>9</sup> and its implementing regulations (the "FinCEN Regulations").<sup>10</sup> Proposed section 200.15 imposes certain additional AML requirements discussed below in Sections B.2 and B.3 that are not currently applicable to virtual currency businesses that are registered as money services businesses ("MSBs") with the U.S. Department of Treasury's Financial Crimes Enforcement Network ("FinCEN"). In order to facilitate compliance, we respectfully request the DFS to consider restructuring section 200.15 so that it expressly requires VC Licensees to comply with applicable federal AML requirements and separately requires VC Licensees to comply with the additional AML requirements the DFS wants to impose, subject to our proposed comments and clarifications discussed in more detail below. This approach would be consistent with the DFS' approach taken with respect to MT Licensees under 3 N.Y.C.R.R. § 416.1 and with the approach

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<sup>9</sup> Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970), 31 U.S.C. §§ 5311-30.

<sup>10</sup> See 31 C.F.R. Chapter X (formerly 31 C.F.R. Part 103).

taken by state banking regulators for other financial institutions as well.<sup>11</sup> In our experience, this approach works well and promotes compliance efficiencies.

We emphasize, too, that we have developed a comprehensive AML program designed to continuously evaluate and address the risks presented by the transactions and products we offer, and the consumers and geographic locations we serve. For example, in applicable situations, we implement AML customer identification requirements and controls, conduct enhanced due diligence on certain consumers, and interdict transactions that meet internal transaction monitoring parameters, including parameters which may appear to some to exceed the minimum requirements of federal black letter law applicable to MSBs. Western Union believes that these controls are in fact necessary because of the requirement to develop and implement a risk-based AML program. As the DFS knows, our AML program recognizes that certain Western Union products and services present different levels of risk, and that these risks need to be appropriately managed through comprehensive AML controls. Moreover, in recognition of the trust that our consumers place in our service and our brand, we invest millions of dollars each year in AML compliance, which continues to be a significant expense.<sup>12</sup> Because we take our responsibility to guard against illegal money laundering and other illicit activity very seriously, we continue to invest in compliance to prevent money laundering, fight fraud and protect consumers around the globe. To gain the public trust, the virtual currency industry must undertake a similarly comprehensive written risk-assessment and develop AML compliance programs that specifically address such risks, including those identified by the law enforcement community.<sup>13</sup> Accordingly, we recommend that the final rule require VC Licensees to comply with applicable federal AML requirements and certain additional AML requirements subject to our comments discussed below.

2. VC Licensees Should be Required to Comply With Additional AML Requirements Specific to Virtual Currency Transactions Subject to Certain Clarifications and Refinements.

Western Union recognizes that the DFS is taking a proactive approach with regard to developing additional AML requirements for VC Licensees which are not currently required

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<sup>11</sup> See 3 N.Y.C.R.R. § 416.1(d) ("Compliance with applicable federal requirements shall constitute compliance with the provision of this Part."); *see also, e.g.*, Cal Fin Code § 2123 (California); Colo. Rev. Stat. § 12-52-110.5 (Colorado); Conn. Gen. Stat. §36a-606a (Connecticut); HRS § 489D-16 (Hawaii); 205 Ill. Comp. Stat. § 685/4 (Illinois); Ind. Code Ann. § 28-8 -4-46 (Indiana); Miss. Code Ann. § 75-15-19(4) (Mississippi); Tex. Fin. Code Ann. § 151.203 (Texas).

<sup>12</sup> In 2013, the Company spent over \$150 million on its compliance and regulatory programs.

<sup>13</sup> See Financial Action Task Force, Virtual Currencies—Key Definitions and Potential AML/CFT Risks (June 2014) available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> (describing that virtual currency systems can be traded on the internet, have no central server or service provider, do not require or provide identification and verification of participants, do not generate historical records of transactions associated with real world identity, and have no central oversight body) (hereinafter, "FATF Virtual Currencies Report").

of virtual currency administrators or exchangers under FinCEN Regulations.<sup>14</sup> In this regard, Western Union believes that law enforcement comments at the hearings the DFS held on virtual currency ("Hearings")<sup>15</sup> related to the unique risks that virtual currency poses merit special consideration. Consistent with these observations, and to the extent appropriate, Western Union believes that the DFS' additional AML requirements for virtual currency transactions should mirror current federal AML requirements for fiat currency transactions. This approach would permit VC Licensees to draw upon existing federal regulatory guidance and the knowledge of AML compliance personnel for purposes of determining how to comply with such requirements, where applicable. We also note that clear and prescriptive requirements may be helpful when developing and implementing new AML compliance programs similar to the one contemplated for Virtual Currency Business Activity.

For these reasons, we propose the following clarifications and refinements, which Western Union believes are necessary to "strike an appropriate balance that helps protect consumers and root out illegal activity—without stifling beneficial innovation."<sup>16</sup>

- Given that the DFS is proposing to regulate Virtual Currency Business Activity as if it involved fiat currency cash transactions, we recommend that the virtual currency transaction reporting requirement in proposed section 200.15(d)(2) be amended to be consistent with similar requirements for certain fiat currency cash transactions under federal law. Specifically, we propose the following amendments: (1) VC Licensees must file virtual currency transaction reports ("VCTRs") with the DFS within 15 days following the day on which the reportable transaction occurs (not within 24 hours of the transaction);<sup>17</sup> (2) VC Licensees should not be required to file a VCTR for transactions they conduct on their own behalf;<sup>18</sup> (3) the VCTR requirement should have a knowledge qualification similar to the federal currency transaction report ("CTR") requirement;<sup>19</sup> and (4) the final rule should expressly explain how virtual currency transactions should be aggregated.<sup>20</sup> At a minimum, we recommend that the DFS adopt clear and comprehensive guidance with respect to how to aggregate virtual currency transactions and split

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<sup>14</sup> See FinCEN Guidance FIN-2013-G001, "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies" (Mar. 18, 2013)- *available at* [http://www.fincen.gov/statutes\\_regs/guidance/pdf/FIN-2013-G001.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf).

<sup>15</sup> See information regarding the DFS Virtual Currency Hearing held on Jan. 28, 2014, *available at* [http://www.dfs.ny.gov/about/panels\\_witnesses\\_virtual\\_currency\\_hearing.pdf](http://www.dfs.ny.gov/about/panels_witnesses_virtual_currency_hearing.pdf) and <http://www.totalwebcasting.com/view/?id=nysdfs>.

<sup>16</sup> NY DFS Press Release, "NY DFS Releases Proposed BitLicense Regulatory Framework for Virtual Currency Firms" (July 17, 2014), *available at* <http://www.dfs.ny.gov/about/press2014/pr1407171.html>.

<sup>17</sup> See 31 C.F.R. § 1010.306(a)(1).

<sup>18</sup> See 31 C.F.R. § 1010.315.

<sup>19</sup> See 31 C.F.R. § 1010.313(b).

<sup>20</sup> *Id.*

transactions (*i.e.*, those involving both virtual currency and fiat currency), and that such guidance be consistent with federal guidance for the aggregation of fiat currency transactions for CTRs.<sup>21</sup> We emphasize that clear and prescriptive guidance on how to aggregate virtual currency transactions is necessary to ensure the value and quality of VCTR received.

- We recommend that proposed section 200.15(e) be eliminated in its entirety. It is not clear how the terms "structure" and "structuring" relate to Virtual Currency Business Activity. In the context of fiat currency, these terms are used to describe the practice of consumers executing cash transactions in a specific pattern to avoid the creation of certain records and reports required by law.<sup>22</sup> There are no equivalent New York or federal laws related to virtual currency transactions applicable to consumers.
- We recommend that the customer identification program ("CIP") requirement in proposed section 200.15(g) (the "CIP Requirement") define the terms "account" and "customer" to clarify whether the CIP Requirement is applicable to VC Licensees engaged in all five categories of activities included in the definition of Virtual Currency Business Activity, or only certain activities such as "securing, storing, holding, or maintaining custody or control of Virtual Currency on behalf of others." We also recommend that the term "acountholders" in proposed section 200.15(g)(4) be amended to the term "customers" to account for those VC Licensees which may not have acountholders, and for consistency with federal recordkeeping requirements applicable to MSBs.<sup>23</sup> We propose that the verification requirement for large transactions in proposed section 200.15(g)(4) be lowered from \$3,000 to \$1,000, which would be consistent with Financial Action Task Force ("FATF") guidance relating to cross-border wire transfers.<sup>24</sup> Further, consistent with the federal rules applicable to banks, we also recommend the inclusion of a reliance provision in the CIP Requirement permitting VC Licensees to rely upon a MSB to perform CIP on behalf of a VC Licensee and in accordance with the AML program requirements of a VC Licensee.<sup>25</sup>

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<sup>21</sup> See FinCEN Guidance, "Frequently Asked Questions Concerning Completion of Part II of FinCEN Form 104, Currency Transaction Report" (Aug. 12, 2005), *available at* [http://www.fincen.gov/statutes\\_regs/guidance/pdf/faq08122005.pdf](http://www.fincen.gov/statutes_regs/guidance/pdf/faq08122005.pdf); *see also* 31 C.F.R. §1010.313(b).

<sup>22</sup> See 31 U.S.C. § 5324 and 26 U.S.C. § 6050I.

<sup>23</sup> See 31 C.F.R. § 1010.410(e).

<sup>24</sup> See, *e.g.*, The FATF Recommendations, Interpretive Note to FATF Recommendation 16 at 72 (Feb. 2012) *available at* [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf).

<sup>25</sup> See 31 C.F.R. § 1020.220(a)(6).

- We recommend that the recordkeeping requirement in proposed section 200.15(d)(1) (the "AML Recordkeeping Requirement") clarify which specific information is to be captured by the phrase "a description of the transaction" and whether this phrase requires VC Licensees to capture each virtual currency address or "digital address"<sup>26</sup> used for each transaction. Western Union recommends that VC Licensees should, at a minimum, be required to capture and maintain each digital address and also associate that digital address to a VC Licensee customer or account.
- In addition, given that FinCEN may impose similar AML requirements to virtual currency transactions in the future,<sup>27</sup> we believe that aligning state law with federal law, to the extent appropriate, will facilitate compliance with such requirements and ensure a more workable and sustainable AML compliance framework. As discussed above, this approach would be consistent with the DFS' current approach for imposing AML requirements on MT Licensees under 3 N.Y.C.R.R. § 416.1.
- We recommend that the DFS clarify proposed section 200.15(h) (the "OFAC Requirement") to avoid a conflict between federal and state law. The phrase "to the maximum extent practicable" does not exist in federal law, and it is unclear how a conflict between the OFAC Requirement and federal law would be resolved. Under the OFAC Requirement as currently drafted, it is possible to be in compliance with state law but in violation of federal law.

3. The Proposed Suspicious Activity Report Filing Requirement Should be Eliminated From the Final Rule.

The suspicious activity report ("SAR") filing requirement proposed in section 200.15(d)(3) requires (1) each VC Licensee that has filed a SAR in accordance with FinCEN Regulations to also file a separate report with the DFS, and (2) each VC Licensee not required to file a SAR with FinCEN to file a SAR with the DFS in a form to be prescribed by the DFS. For the reasons discussed below, Western Union recommends that the DFS remove this SAR filing requirement from the final rule.

Under the BSA and FinCEN Regulations, financial institutions that file SARs, including MSBs, are ensured that they will be protected from liability stemming from such

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<sup>26</sup> A digital address (or virtual currency address) is known as a string of letters and numbers that functions like an account number or transaction identifier. A digital address is not currently systematically linked to an individual. See FATF Virtual Currencies Report.

<sup>27</sup> See Remarks from Under Secretary of Terrorism and Financial Intelligence David S. Cohen on "Addressing the Illicit Financial Risks of Virtual Currency" (Mar. 18, 2014), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl236.aspx> (stating "if virtual currencies achieve much greater adoption and it appears that daily financial life can be conducted for long stretches fully 'within' a virtual currency universe, we will need to consider whether to apply 'cash-like' reporting requirements to the virtual currency space").

filings (commonly referred to as, the "Safe Harbor") and that any SARs filed with FinCEN will remain confidential.<sup>28</sup> No such protections exist under the DFS' proposed SAR requirement. Even if they did, however, it is unclear whether such protections would shield a VC Licensee from liability under federal law or the laws of another state to the extent a claim is brought under such laws. In addition, entities that are not "financial institutions" as defined by the BSA and FinCEN Regulations that voluntarily file SARs with FinCEN are not protected by the Safe Harbor.<sup>29</sup> Thus, VC Licensees that are not MSBs under FinCEN Regulations will not be protected by the Safe Harbor if they voluntarily file SARs with FinCEN or are required to file SARs under state law. By imposing a state-specific SAR requirement on VC Licensees, the DFS may inadvertently subject VC Licensees to liability under other laws and in other jurisdictions.

Additionally, the Notice does not provide information regarding how SARs will be filed with the DFS (via paper or electronic format) or if law enforcement will be able to access SARs for analytical purposes, which has led to confusion regarding how the SAR Requirement will be implemented. SARs inherently contain personally identifiable information (*i.e.*, addresses, dates of birth and social security numbers) and sensitive financial information, the collection of which may pose unique privacy and data integrity risks that may need to be managed carefully.<sup>30</sup> For the reasons discussed above, and given that FinCEN Regulations permit MSBs to share federally-filed SARs with any state regulatory authority that requires MSBs to comply with the BSA,<sup>31</sup> Western Union believes that the final rule should only require SARs to be filed with FinCEN in accordance with federal law and should require VC Licensees to include the phrase "Virtual Currency" (or an equivalent marker) in the SAR narrative field, so that the database containing BSA reports can be quickly searched by the DFS for any SARs filed by VC Licensees. Similarly, if FinCEN were to amend the SAR form itself to expand the suspicious activity form fields to include suspicious activity involving virtual currency transactions, the DFS would also be in position to search for SARs filed by VC Licensees or those involving virtual currency.

If the DFS does not amend the proposed SAR filing requirement to require only federally-filed SARs, Western Union recommends that any state-specific SAR requirement that is adopted: (1) provide filers with confidentiality and safe harbor protections similar to those

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<sup>28</sup> See 31 U.S.C. § 5318(g)(2) and (3); *see also* 31 C.F.R. § 1022.320(d) and (e).

<sup>29</sup> See 31 U.S.C. § 5318(g)(3) (providing a liability safe harbor to any "financial institution" (as defined in 31 U.S.C. §§ 5312(a)(2) or (c)(1)) making a "voluntary disclosure of any possible violation of law or regulation to a government agency"); *see also* 31 C.F.R. § 1010.320 (imposing a SAR reporting requirement on "[e]ach financial institution (as defined in 31 U.S.C. 5312(a)(2) or (c)(1))").

<sup>30</sup> For example, it is our understanding that FinCEN was recently required to modernize the database containing BSA reports (formerly known as WebCBRS) because of mounting concerns related to data integrity and antiquated analytical capability. This modernization effort occurred at a great expense to taxpayers and filing institutions, which were required to upgrade their systems and filings to make them compatible with the new BSA database. Western Union recognizes that there are unique challenges presented regarding the collection, maintenance, and dissemination of sensitive information and recommends that the DFS coordinate with federal authorities regarding the maintenance of SARs. For additional information regarding FinCEN's efforts to modernize the WebCBRS database, including FinCEN's mandated electronic filing of all BSA reports, please visit [http://www.fincen.gov/about\\_fincen/wwd/ITModernizationEffortsFAQ.html](http://www.fincen.gov/about_fincen/wwd/ITModernizationEffortsFAQ.html).

<sup>31</sup> See 31 C.F.R. § 1022.320(d)(1)(ii)(A)(1).

under federal law;<sup>32</sup> (2) apply only to virtual currency transactions valued at more than US\$2,000,<sup>33</sup> the current federal threshold;<sup>34</sup> (3) clarify that VC Licensees must file a SAR within 30 days from the date a VC Licensee learns of the suspicious activity;<sup>35</sup> and (4) require electronic filing of such information.

### C. Additional Recommendations

#### 1. The Final Rule Should Contain Interpretive Guidance to Better Assist the Industry in Understanding and Complying With the Final Rule.

It is Western Union's experience that when regulations provide official interpretive commentary, they are much easier to understand and provide a clear pathway for those seeking to comply. Interpretive commentary—such as "Official Staff Interpretations" commonly provided by federal banking regulators to their regulations<sup>36</sup>—provides useful guidance and examples of how to apply statutes and regulations correctly and appropriately by showcasing the correct interpretation of a regulation, and, in cases of ambiguity, provide industry insight into how to comply with the intent or spirit of the regulation.

Given that the virtual currency industry is continuing to evolve and develop, it is likely that significant questions will remain about the scope and applicability of this rule; there will likely continue to be outstanding interpretive matters to be resolved as the technology and virtual currency business infrastructure develops. Accordingly, Western Union asks the DFS to provide interpretive commentary (with examples and illustrations) to the final rule, or ensure that the final rule is accompanied or followed by formal interpretive guidance. For example, including examples or illustrations of what Virtual Currency Business Activity *does not* include (*e.g.*, virtual currency mining, firms chartered under the New York Banking Law to conduct exchange services, or "utiliz[ing] Virtual Currency for the purchase or sale of goods or service"<sup>37</sup>) would serve to narrow the scope of the rule and, possibly, prevent the misallocation of scarce resources to extensive analysis to determining whether certain activity requires a VC License. Additionally, the Official Staff Interpretations to the remittance transfer rule clarified that the foreign language disclosure requirement is not triggered by general marketing activities, and illustrate the types of general marketing activities that would be permissible without violating the rule.<sup>38</sup> Imposing a similar framework in the development and

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<sup>32</sup> See 31 C.F.R. § 1022.320(d) and (e).

<sup>33</sup> The proposed SAR filing requirement appears to apply to all transactions.

<sup>34</sup> See 31 C.F.R. § 1022.320(a)(2).

<sup>35</sup> The proposed SAR filing requirement contains inconsistent time frames for filing SARs. Proposed section 200.15(d)(3) indicates that a SAR must be filed "immediately upon detection of such transaction(s)", and proposed section 200.15(d)(3)(ii) indicates that a SAR must be filed within 30 days from the detection of suspicious activity.

<sup>36</sup> See, *e.g.*, Supp. I to 12 C.F.R. Part 1005 (Official Interpretations to Regulation E); Supp. I to 12 C.F.R. Part 1026 (Official Interpretations to Regulation Z).

<sup>37</sup> See NY DFS Press Release, NY DFS Releases Proposed Bitlicense Regulatory Framework For Virtual Currency Firms (July 17, 2014), available at <http://www.dfs.ny.gov/about/press2014/pr1407171.html>.

promulgation of the final rule, or providing the public with formal interpretive guidance upon publication of the final rule, would serve industry's needs in understanding and implementing the final rule.

2. The Final Rule Should Not Require a Compliance Assessment by a VC Licensee's Management.

Proposed section 200.14(b)(2) requires management of a VC Licensee to certify to the DFS whether a VC Licensee has complied with "all applicable laws, rules and regulations." We believe that the final rule should eliminate this requirement in its entirety or, alternatively, provide an exemption from this requirement for publicly traded companies. Publicly traded companies such as Western Union are already subject to detailed disclosure laws about their financial condition, operating results, management compensations, and the various risks affecting their business, and are required to disclose this information on a regular basis to the U.S. Securities and Exchange Commission and to company's stockholders. For example, publicly traded companies file annual reports (on a Form 10-K), quarterly reports (on a Form 10-Q), and current reports (on a Form 8-K), the contents of which are strictly governed by federal law. These securities filings require a discussion of material laws applicable to the company's business, rather than an assessment of whether such laws have been violated. Requiring management to conclude whether it has complied with applicable laws, rules and regulations, would be unduly burdensome and costly, and would likely be of little value to the DFS, which will, pursuant to its examination authority, conduct its own assessment of a VC Licensee's compliance with laws.

3. The Final Rule Should Specify that the DFS will Retain the Confidentiality and Privilege of Information VC Licensees Share with it.

Western Union urges the DFS to confirm that all information it maintains regarding a VC Licensee (whether collected from a VC Licensee directly or compiled indirectly)—including, but not limited to, reports and records relating to a VC Licensee's financial condition, operations, AML compliance, cybersecurity plan, or business continuity plan—will remain confidential and privileged. To that end, the final rule should clarify that the protections of confidentiality present in section 36(10) of the New York Banking Law extend to VC Licensees, and that such information will be protected from public disclosure under New York's Freedom of Information Law.<sup>39</sup> Further, we urge the DFS to provide expressly that privileged information shared with the DFS will remain privileged.<sup>40</sup>

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<sup>39</sup> See N.Y. Banking Law § 36(10) (providing that "all reports, investigations, memoranda, in possession of licensee, shall not be subject to subpoena or made public"); N.Y. Pub. Off. § 87(a)(2) (protecting records that are specifically exempted from disclosure by state or federal statute).

<sup>40</sup> See, e.g., N.Y. Banking Law § 599-q (stating that any privileged information shall remain privileged after being disclosed to the Nationwide Mortgage Licensing System and Registry, and that such information may be shared with certain state and federal regulators without the loss of privilege or the loss of certain confidentiality protections); 12 U.S.C.S. § 1828(x) ("The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any

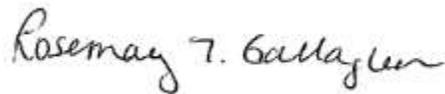
4. The Final Rule Should Clarify Which Persons will Qualify for the Limited Exemption Provided in Proposed Section 200.3(c)(1).

Proposed section 200.3(c)(1) provides a limited exemption for "persons that are chartered under the New York Banking Law to conduct exchange services and that are approved by the Superintendent to engage in Virtual Currency Business Activity." To encourage business growth in the virtual currency industry, the DFS should publish its criteria for qualifying persons under this exemption, so that others know what they need to do to qualify. We further urge the DFS to confirm in the final rule that any exempt entity nevertheless is subject to an equally robust regulatory regime as a VC Licensee.

**D. Conclusion**

Western Union appreciates the opportunity to provide comments to the Notice. We urge the DFS to consider the clarifications and proposals we have suggested. Our suggestions reflect a thorough understanding of the operational and practical issues, as well as the challenges, of complying with regulatory regimes in multiple jurisdictions and serve to further advance our goal of protecting and informing consumers. If there are any questions concerning these comments, or if Western Union may be of assistance in providing additional information, please do not hesitate to contact us.

Very truly yours,



Rosemary T. Gallagher  
Associate General Counsel

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privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.").