

FinCEN and Virtual Currency: Always Money Transmission

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The Theory: A Level Playing Field

- “One strategy we use . . . is to promote consistency, where possible, in our regulatory framework across different parts of the financial services industry. It ensures a level playing field for industry and minimizes gaps in our AML/CFT coverage.”

*FinCEN Director Jennifer Shasky Calvary
(on “Mitigating Money Laundering Vulnerabilities in
Virtual Currencies”)*

- “The definition of a money transmitter does not differentiate between real currencies and convertible virtual currencies.”

FinCEN 2013 Virtual Currency Guidance

- Virtual currency is “no more dangerous” than banking.

FinCEN Deputy Director Jamal El-Hindi

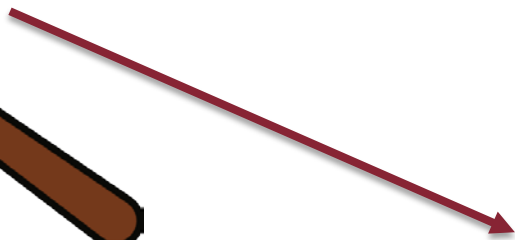
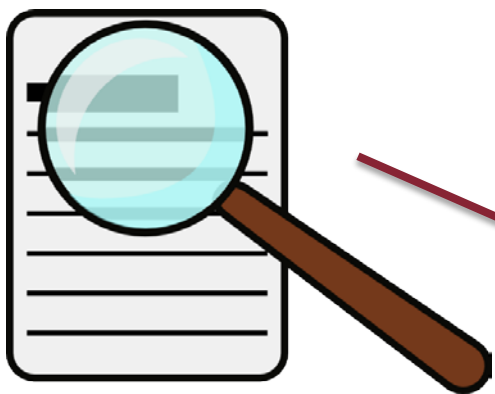


The Reality

Activity	Traditional Funds	Virtual Currency
Remittances	Money Transmission	Money Transmission
Currency Exchange	Dealer in Foreign Exchange	Money Transmission
Custody	Prepaid Access or Not FinCEN-Regulated	Money Transmission
Small-value currency exchange	Not FinCEN-Regulated	Money Transmission
“Closed” virtual currency, large amounts	Prepaid Access	Money Transmission
“Closed” virtual currency, small amounts	Not FinCEN-Regulated	Money Transmission



The Root Cause: 2013 Guidance



“An administrator or exchanger that (1) accepts and transmits a convertible virtual currency or (2) buys or sells convertible virtual currency for any reason is a money transmitter under FinCEN’s regulations, unless an [exemption applies]”



The Rationale: Dealing

Exchange real currency (or currency-denominated instruments) for real currency



Dealer in Foreign Exchange

Exchange real currency (or currency-denominated instruments) for virtual currency



Not a Dealer in Foreign Exchange

But virtual currency exchangers can't go unregulated!



The Rationale: Dealing

“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...or as a dealer (transacting from its own reserve in either convertible virtual currency or real currency).”

Amin. Ruling FIN-2014-R012.



The Rationale: Dealing

- It hasn't always been this way.

- Company is both a dealer in foreign exchange and a money transmitter when:
 - [Forex Company] **does not limit** its business activity to accepting and transmitting funds for the purpose of executing and settling foreign exchange transactions with its unaffiliated business customers...
 - ...but **additionally** settles transactions by moving funds between its customers and their third-party foreign counterparts through [Forex Company's] own accounts.

Admin. Ruling FIN-2008-R002



The Rationale: Custody

- Prepaid Access:
 1. Funds paid in advance
 2. Funds can later be retrieved or transferred electronically.

- Prepaid Access does not include virtual currency:
 - If FinCEN had intended prepaid access to cover funds denominated in a virtual currency . . . it would have used language in the definition of prepaid access like that in the definition of money transmission, which expressly includes the acceptance and transmission of “other value that substitutes for currency.”

FinCEN 2013 Virtual Currency Guidance



The Rationale: Custody

- FinCEN's 2010 Prepaid Access Proposal:
 - FinCEN “striv[es] for regulatory flexibility so that the rule will not become obsolete with the next innovative product.”
 - FinCEN “believe[s] the proposed language has regulatory elasticity to survive future technological advancements.”
- FinCEN can exempt virtual currency activity that “[a]ccepts and transmits **funds** only integral to the sale of goods or provision of services...”

31 C.F.R. § 1010.100(ff)(5)(ii)(F)



Other Approaches



“An exchanger that sells its own stock of virtual currency is generally not considered a virtual currency transmitter.”



Exemption “where the transaction is undertaken for non-financial purposes and does not involve the transfer of more than a nominal amount of Virtual Currency”



“[E]xtending the perimeter of anti-money laundering regulations beyond digital currency exchange firms (e.g., to wallet providers) would not deliver any benefits in terms of mitigating money laundering and terrorist finance risk, and would place significant burdens on firms in this innovative and embryonic sector.”



Why This Matters

Functional vs. activity-based regulation

Small-dollar exceptions and startups

Created through guidance, fixed by guidance



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