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Crypto, DeFi, and Money Transmitter Laws: Navigating the Maze

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On January 1, 2021, the Anti-Money Laundering Act of 2020 became law. Under the law, Congress gave the Treasury Department power to declare that cryptocurrency is a monetary instrument and that certain cryptocurrency transactions must be reported to federal regulators, just like certain traditional currency transactions must be reported as part of a financial institution's anti-money laundering ("**AML**") program.

On December 23, 2020, before the Anti-Money Laundering Act even became law, Treasury used its Congressionally sanctioned power to publish a notice of proposed rulemaking that would in fact require reporting of crypto transactions. RIN 1506-AB47. Although these new rules are not final yet, this scrutiny from Congress and the Treasury Department has forced many crypto businesses to ask: *What are my legal obligations? Do I need to register with federal financial regulators? With state financial regulators? Do I have to report certain transactions to the authorities?*

Money Transmitter Laws – What Are They?

Financial transactions do not always happen through banks and credit cards. Companies like Western Union, MoneyGram, and PayPal are prominent examples of money transmitters that help people and businesses around the world pay bills, make online purchases, and send money to friends and family. In the U.S., 49 of 50 states and the District of Columbia regulate and require licensure of money transmitters, unless they are exempt entities like banks. (Montana is currently the sole outlier. Massachusetts only regulates those engaged in foreign money transmission.)

New York specifically regulates those engaged in "virtual currency business activities" and requires them to maintain a BitLicense or a virtual currency limited purpose trust company charter from the New York State Department of Financial Services. 23 NYCRR 200.2(q). These regulated activities include (i) receiving cryptocurrency for transmission or transmitting cryptocurrency, (ii) storing, holding, or maintaining custody or control of cryptocurrency on behalf of others, (iii) buying and selling cryptocurrency as a customer business, (iv) performing exchange services as a customer business, or (v) controlling, administering or issuing a cryptocurrency. In the six years since the BitLicense scheme was created, New York has issued few licenses and denied, or held up, many applications, and the process to obtain one is long, expensive and intrusive. However, Wyoming's recent adoption of the Special Purpose

Depository Institutions Act (Wy. Stat. §§ 13-12-101 *et seq.*) allows cryptocurrency transmitters and certain other cryptocurrency businesses to obtain a state bank charter which may exempt them from the onerous BitLicense requirements in New York.

The U.S. federal government also regulates money transmitters. Specifically, the Financial Crimes Enforcement Network ("**FinCEN**"), a division of the U.S. Treasury Department, administers the Bank Secrecy Act (P.L. 91-508), which requires registration of "money services businesses," including money transmitters, and imposes reporting obligations on them.

Do Money Transmitter Laws Apply to My Crypto Activity?

U.S. State Money Transmitter Laws

Each state's money transmitter law defines when someone is a money transmitter, and when someone is operating in the state. For example, the Wyoming Money Transmitters Act says:

> 'Money transmission' means to engage in business to sell or issue payment instruments, stored value or receive money or monetary value for transmission to a location within or outside the United States by any and all means, including but not limited to wire, facsimile or electronic transfer." Wy. Stat. § 40-22-102(a)(xiii).

And, Wy. Stat. § 40-22-103(b) says:

> A person is engaged in the business of money transmission if the person advertises, offers or provides services to Wyoming residents, for personal, family or household use, through any medium including, but not limited to, internet or other electronic means.

Wyoming's money transmission statute (along with certain other states, such as Indiana) applies only to those who advertise, offer or provide money transmission services to Wyoming residents for personal, household or family purposes, and not to businesses or to individuals for business purposes. However, many other states regulate money transmission activities conducted with businesses or for a business purpose.

Some states, such as New York, have taken the clear position that an out-of-state business which advertises, offers or provides money transmission services or virtual currency business activities for New York businesses or individuals is subject to New York's laws and licensing requirements.

Painting in broad strokes, if someone has nexus to a state (e.g., customers in the state or business operations in the state) and is selling or issuing crypto (e.g., coins, fungible tokens, non-fungible tokens "NFTs", etc.) or is receiving crypto for transmission, he or she unfortunately needs to consider whether each state's money transmitter or virtual currency business laws apply. The Wyoming Money Transmitter Act explicitly exempts crypto transactions, but not all states are so generous. Wy. Stat.

§ 40-22-104(a)(vi).[1]

U.S. Federal Money Transmitter Laws

At the federal level, the same questions apply: When is someone a money transmitter and when are they subject to federal jurisdiction?

> A person wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States….This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States.

In 2011, FinCEN was one of the first U.S. federal agencies to think about cryptocurrency regulation, and this culminated in the issuance of guidance in 2013. FIN-2013-G001, *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies* (Mar. 18, 2013).[2] The guidance sets out three categories of crypto participants: users, exchangers, and administrators. Users use currency to purchase real or virtual goods, and they are not money transmitters. In contrast, administrators or exchangers that (1) accept and transmit convertible crypto or (2) buy or sell convertible crypto for any reason generally are money transmitters under the FinCEN regulations.[3] Thus, the 2013 guidance is very broad, and, like at the state level, crypto businesses need to carefully consider whether the FinCEN rules apply to their business model based on the factors set forth in the guidance.

Additionally, the federal criminal racketeering law (18 USC 1960) makes failure to maintain any required state money transmitter license a federal crime. Federal authorities have been known to raid and shut down unlicensed money transmitter businesses and confiscate assets under the racketeering law.

If Money Transmitter Laws Apply to My Crypto Activity, What Do I Need to Do to Comply?

U.S. State Money Transmitter Laws

If a crypto business determines that it is subject to (and not exempt from) the money transmitter or virtual currency business activity laws in a given state, compliance requirements typically include maintenance of a license in that state, including being subject to examinations by state regulators (which are typically at the business' expense) and submission of audited reports to background and character examination for key executives, surety bonds, and minimum net worth and/or collateral requirements. These requirements are designed to protect consumers, but compliance can be onerous and time-consuming for the business. If there is grey area about whether a state's laws apply, it can be helpful to confer with experienced attorneys familiar with money transmission laws and/or state regulators, where possible.

U.S. Federal Money Transmitter Laws

If a crypto business is a money services business under the FinCEN regulations, the business must register with FinCEN as a money services business and renew that registration every two years. Registration is electronic and is much easier than state-level registration. The business must maintain an anti-money laundering program, which includes recordkeeping for certain transactions and reporting those transactions to FinCEN.

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[1] New Hampshire also statutorily exempts crypto transactions from its money transmitter laws. N.H. REV. STAT. ANN. § 399-G:3(VI-a) (2017).

[2] Available at, https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf.

[3] Convertible means that the crypto either has an equivalent value in real currency, or acts as a substitute for real currency.

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