

# Client Alert.

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## FinCEN Issues Additional Clarifications Regarding Bitcoin and other Convertible Virtual Currency Activities

By **Obrea O. Poindexter, Ryan H. Rogers and Jeremy R. Mandell**

On January 30, 2014, the Financial Crimes Enforcement Network (“FinCEN”) issued two administrative rulings that address the application of Bank Secrecy Act (“BSA”) regulations to convertible virtual currency-related activities. FinCEN is the bureau within the Department of the Treasury that administers Regulation X, the regulation which implements the BSA requirements, including regulatory requirements applicable to “money transmitters” and other types of money services businesses (“MSBs”).

The administrative rulings were issued in response to written requests from companies for guidance on the applicability of Regulation X to different activities in the virtual currency ecosystem. The first ruling states that to the extent a person creates or “mines” a convertible virtual currency solely for the person’s own use, and not the benefit of another, the person is not a money transmitter under the BSA.<sup>1</sup> The second ruling states that a person is not a money transmitter if that person: (i) produces or distributes software that facilitates the purchase and/or sale of virtual currency; or (ii) buys and sells convertible virtual currency solely for the person’s own investment purposes.<sup>2</sup>

FinCEN’s most recent rulings follow the bureau’s March 2013 guidance on administering, exchanging and using virtual currency (“March 2013 Guidance”).<sup>3</sup> The March 2013 Guidance, which was intended to clarify the applicability of the BSA and Regulation X to persons involved in activities related to Bitcoin or other virtual currencies, left many open questions. The recent rulings are intended to address some of these open questions.

### Applicability of FinCEN’s Regulations to Virtual Currency Mining Operations

FinCEN’s ruling on whether Bitcoin miners are covered by Regulation X was issued to clarify statements in FinCEN’s March 2013 Guidance, which said that “user” activities related to the purchase of real or virtual goods or services with convertible virtual currency would generally not be covered by FinCEN’s regulations because such activity, in and of itself, does not fit within the definition of money transmission.<sup>4</sup> In this first ruling, FinCEN says that the analysis regarding coverage under Regulation X for users of convertible virtual currency turns on what the person uses the currency for, and for whose benefit.

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<sup>1</sup> See FinCEN Ruling FIN-2014-R001, Application of FinCEN’s Regulations to Virtual Currency Mining Operations (Jan. 30, 2014), accessible at: [http://www.fincen.gov/news\\_room/rp/rulings/pdf/FIN-2014-R001.pdf](http://www.fincen.gov/news_room/rp/rulings/pdf/FIN-2014-R001.pdf).

<sup>2</sup> See FinCEN Ruling FIN-2014-R002, Application of FinCEN’s Regulations to Virtual Currency Software Development and Certain Investment Activity (Jan. 30, 2014), accessible at: [http://www.fincen.gov/news\\_room/rp/rulings/pdf/FIN-2014-R002.pdf](http://www.fincen.gov/news_room/rp/rulings/pdf/FIN-2014-R002.pdf).

<sup>3</sup> See FIN-2013-G001, Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (Mar. 18, 2013), accessible at: [http://fincen.gov/statutes\\_regs/guidance/pdf/FIN-2013-G001.pdf](http://fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf).

<sup>4</sup> In the March 2013 Guidance, FinCEN defined a “user” as a person that obtains virtual currency to purchase goods or services on the user’s own behalf.

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Under the first ruling, Bitcoin miners (both individuals and companies) should not be covered by Regulation X if the products of their activities are used solely for the miner's own purposes and not for the benefit of another. According to FinCEN, Regulation X does not cover "mining" or "harvesting" activity because such action does not involve "acceptance" or "transmission" of Bitcoin. FinCEN says in the ruling that the same conclusion applies where the miner is doing any of the following: (i) purchasing goods or services for the miner's own use; (ii) paying debts that are incurred in the ordinary course of business; or (iii) making distributions to shareholders (in the case of a company). In a footnote, however, FinCEN cautions that payments to third parties at the direction of a seller or creditor could be considered money transmission under FinCEN's regulations.

## **Applicability of the BSA to Virtual Currency Software Development and Certain Investment Activities**

The second ruling was issued in response to a company that asked whether the "periodic investment" in convertible virtual currency, and the production and distribution of software to facilitate the company's purchase of such currency, would make the company a money transmitter under the BSA. As an initial matter, FinCEN explains that the production and distribution of software that facilitates the sale of virtual currency does not, in and of itself, constitute money transmission services, because that activity does not constitute "acceptance and transmission" of value and is not covered by Regulation X.

More interestingly, the second ruling also addresses whether a company that purchases convertible virtual currency for investment purposes is a money transmitter under the BSA. In the course of reaching its determination on this issue, FinCEN restates many of the interpretive views regarding Regulation X that are addressed in the guidance for Bitcoin miners. For example, FinCEN reiterates that the guiding principle is to determine what the person uses the convertible virtual currency for, and for whose benefit. FinCEN restates that the process by which a person obtains a convertible virtual currency is "not material to" a determination of whether a person is engaging in sending currency or its equivalent value to any other person or place.

Applying these views to investment activities (or, for the sake of simplicity, purchasing activities), FinCEN states that the determining factor is whether the activities are entirely or "exclusively" for the entity's "own account." Thus, under the ruling, an entity is not a money transmitter for the purposes of Regulation X if the entity strictly limits its activities to investing in virtual currency for its own account.

### **Contact:**

**Obrea O. Poindexter**  
(202) 887-8741  
[opoindexter@mofo.com](mailto:opoindexter@mofo.com)

**Ryan H. Rogers**  
(202) 887-1507  
[rrogers@mofo.com](mailto:rrogers@mofo.com)

**Jeremy R. Mandell**  
(202) 887-1505  
[jmandell@mofo.com](mailto:jmandell@mofo.com)

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