

# Client Alert

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## The NYDFS Finalizes its BitLicense Proposal

By **Obrea Poindexter, Jeremy Mandell, and Trevor Salter**

On June 3, 2015, the New York Department of Financial Services (“NYDFS”) issued a final rule regarding its “BitLicense” regulatory regime (“Final Rule”). The Final Rule follows an initial proposal from July 2014 and a revised proposal from February 2015 (“Revised Proposal”).<sup>1</sup>

At a high level, the Final Rule requires licensing for any person that engages in “Virtual Currency Business Activity,” as defined in the Final Rule, and subjects licensees to extensive compliance obligations, capital requirements, examination, and approval requirements, among other things. The Final Rule also provides for a “conditional license” designed to reduce regulatory burden on startups and small businesses engaged in Virtual Currency Business Activities.

The Final Rule contains few material differences from the Revised Proposal, with the changes primarily clarifying certain definitions in the Revised Proposal. Concurrent with the release of the Final Rule, NYDFS Superintendent Benjamin Lawsky delivered remarks at the BITS Emerging Payments forum in Washington, D.C. Superintendent Lawsky confirmed that the Final Rule “does not include the major changes we saw in the last round,” which included the provisions regarding the transitional BitLicense.

The following bullets highlight noteworthy changes from the Revised Proposal:

- The Final Rule clarifies the prepaid card exclusion from the definition of virtual currency by amending the definition of a “prepaid card.” Specifically, the definition is clarified to cover only prepaid cards that are issued, can be reloaded and can be redeemed “in and for fiat currency.”
- The Final Rule further enumerates the circumstances under which a licensee must obtain approval for a material change to the licensee’s business. Specifically, the Final Rule states that a material change, or a “materially new product, service, or activity”—a new defined term—may occur where the proposed new product, service, or activity may raise (i) “a legal or regulatory issue about the permissibility of the product, service, or activity,” or (ii) “safety and soundness or operational concerns.” Approval for products, services, or activities that are “materially different” from those described on the licensing application is still required. Notwithstanding the new circumstances under which approval is required, Superintendent Lawsky stated that “companies will not need approval for standard software or app updates,” and when considering what would constitute a materially new product, service, or activity, Superintendent Lawsky provided an example of a firm that was licensed as a wallet provider that decided to begin offering exchange services.

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<sup>1</sup> Our analysis of the July 2014 proposal is available [here](#), and our analysis of the Revised Proposal is available [here](#). We also [reported](#) on Superintendent Lawsky’s November 2014 remarks at the Money 20/20 conference and the NYDFS approval of the [itBit](#) trust company application.

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- Superintendent Lawsky also made clear that the Final Rule applies only to financial intermediaries that are responsible for safeguarding customer funds. According to Superintendent Lawsky, software developers and other individuals who work with virtual currency from a design standpoint are exempted from the licensing requirement.
- Superintendent Lawsky described the care that the NYDFS took not to impose duplicative requirements on licensees. For example, in his prepared remarks, he stated that firms will be able to apply for a BitLicense and a money transmitter license simultaneously. In addition, the Final Rule clarifies that a licensee must only file suspicious activity reports with the Superintendent if the licensee is not already submitting the reports to the Financial Crimes Enforcement Network (“FinCEN”).
- Nonetheless, the Final Rule does impose additional reporting requirements for virtual currency transactions that are not currently subject to federal reporting requirements. Specifically, the Final Rule requires that a licensee notify the Superintendent within 24 hours of any virtual currency transaction or series of transactions made during a single business day that total more than \$10,000. As such, the Final Rule creates a virtual currency-to-virtual currency Currency Transaction Report (“CTR”) requirement, where such a transaction may otherwise avoid the FinCEN CTR reporting requirements.

We will continue to follow the implementation of the Final Rule, as well as the efforts of other state regulatory authorities with respect to virtual currency and provide updates as warranted.

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