



Gateway Bulletin GB-2014-08

Gateway Advisory: Recent FinCEN Rulings

December 18, 2014

Overview

The purpose of this bulletin is to summarize the implications of two recent FinCEN rulings issued in response to requests by businesses involving virtual currency, seeking exemption from classification as Money Services Businesses (MSBs). MSBs are required to register with FinCEN, must maintain a robust Anti-Money Laundering (AML) program and may be subject to state licensing requirements. Although some of the key facts in these two rulings are specific to the companies that requested the exemption, FinCEN's definitions and rulings may apply to your gateway business. The first ruling [FIN-2014-R011](#) is regarding the application of FinCEN's regulations to virtual currency trading platforms, while the second ruling, [FIN-2014-R012](#), is regarding payment systems. Gateways are encouraged to review these two rulings in consultation with counsel to determine if and how they apply to your business.

Background

In guidance issued on [March, 18, 2013](#), FinCEN clarified the application of its regulations to virtual currency firms through its definitions of "Administrators," "Exchangers," and "Users." According to the guidance, exchangers and administrators are considered MSBs and must comply with applicable Bank Secrecy Act (BSA) requirements.

On October 27, FinCEN issued two rulings (See [FIN-2014-R011](#) and [FIN-2014-R012](#)) that further clarify the circumstances under which a virtual currency-related business will be considered to be an MSB. The rulings apply the definitions of an MSB contained in an earlier ruling, issued [July 21, 2011](#) which states: "The Rule defines the term "money transmitter" to include a person that provides money transmission services, or any other person engaged in the transfer of funds." FinCEN's view is that ***any person or company that accepts "currency, funds or other value that substitutes for currency" from one person and transmits it to another person is providing "money transmission services."*** This definition applies to all companies engaging in covered activities within the United States (i.e. to US customers), [regardless of the gateway's physical location](#).

The October FinCEN Rulings

In the October rulings, FinCEN rejected two requests for exemption from the general rule articulated in its March 2013 guidance that acting as an intermediary for a customer who is transacting in either fiat or virtual currency constitutes money transmission.

In [FIN-2014-R011](#) FinCEN ruled that a trading platform that enabled users to fund trading accounts and make trades from various fiat currencies to virtual currencies was a money transmitter. In [FIN-2014-R012](#), FinCEN ruled that a company that accepted credit card payments from customers and subsequently paid merchants in Bitcoin for services such as hotel reservations was a money transmitter.

According to ruling [FIN-2014-R012](#) a gateway that engages as a business in accepting and converting a customer's real currency into virtual currency for transmission to a merchant is considered to be an exchanger and must comply with applicable BSA requirements. FinCEN ruled that this is the case regardless of whether the company uses its own supply of Bitcoin or other currency to make payments on behalf of its customers.

FinCEN expressed in both October rulings that having a reserve of currency to issue customer balances does not qualify a company for an MSB exemption. For example, a company may operate as a broker "attempting to match two (mostly) simultaneous and offsetting transactions involving the acceptance of one type of currency and the transmission of another" or dealer, "transacting from its own reserve in either convertible virtual currency or real currency". Under both examples, the company is an exchanger and required to register as an MSB.

FinCEN also [ruled](#) that "[t]he fact that Customers are never identified to each other does not affect FinCEN's analysis of the transactions." A company that operates as an exchange cannot compare itself to a commodities and securities exchange when determining its obligations as an MSB. The fact that a commodities and securities exchange does not disclose the identity of their customers is not relevant for analysis of a company's obligations under the BSA.

In addition, according to FinCEN, the fact the transaction ultimately occurs between a customer and a merchant does not change the analysis, if there is a company that stands between them, effecting the exchange between fiat and virtual currency. The transmission occurs between the customer selling the virtual or fiat currency and the exchange, as well as the exchange and the purchasing customer, not between the customer selling and the customer buying the currency.

FinCEN's interpretation and ruling on "integral" exemption

Under certain circumstances, FinCEN may permit an "integral" exemption from classification as an MSB. This exemption is available to a company that provides a money transmission

business, as part of another non-money service, such as a good or service in exchange for money. FinCEN ruled that if money transmission is the sole purpose of a company's system, such as a third party payment provider that transmits payments for an exchange of goods or service between two parties, that third party would fall outside of the exemption. In this example, the third party payment provider's sole business purpose is to transmit money between two parties, and would not qualify for an exemption. In both cases considered in the October rulings, FinCEN rejected the request for exemption, stating that "the payment service that the Company intends to offer meets the definition of money transmission" and is the sole purpose of the "Company's System, and is not a necessary part of another, non-money transmission service being provided by the Company."

FinCEN outlined the three fundamental conditions that must be met for the integral exemption to apply:

- The money transmission component must be part of the provision of goods or services distinct from money transmission itself.
- The exemption can only be claimed by the person that is engaged in the provision of goods or services distinct from money transmission.
- The money transmission component must be integral (that is, necessary) for the provision of the goods or services.

Gateways are encouraged to carefully consider the exemptions and how they would apply. Gateways that have a consumer interfacing business in which they use a cash reserve to transmit currency to merchants for goods or services issued by the merchant are encouraged to consider how the recent FinCEN ruling apply.

Additional Resources

[FIN-2014-R011](#), October 27, 2014, Request for Administrative Ruling on the Application of FinCEN's Regulations to a Virtual Currency Trading Platform
[FIN-2014-R012](#), October 27, 2014, Request for Administrative Ruling on the Application of FinCEN's Regulations to a Virtual Currency Payment System