



Benjamin M. Lawsky
Superintendent of Financial Services
New York Department of Financial Services
One State Street
New York, NY 10004-1511

August 5, 2014

Dear Superintendent Lawsky:

The Bitcoin Foundation is pleased to offer this preliminary, procedural comment on DFS-29-14-00015-P, “Regulation of the conduct of virtual currency businesses.” Given the prospects Bitcoin holds out for global financial inclusion, enhanced liberty and dignity, improved privacy protection, and stable money supplies, the Bitcoin community is very passionate about digital currency and keenly interested in the proposed regulation. Your engagement with the community so far is appreciated, and we are confident that continuing to engage with the community by conducting a fully open, transparent, participatory, and collaborative rulemaking will help produce a credible and workable regulation for digital currency businesses located in New York or serving New York customers.

Below we suggest not only that you extend the comment period by more than a nominal period, but also consider conducting hearings on the proposal and adopting an iterative process, in which you issue drafts, take comment, and re-issue drafts until all issues are fully vetted. The Bitcoin community will be able to comment more cogently if you share the research and analysis that underlies the proposal. The community can help you fit regulatory means to public interest ends if they have access to the risks your study of digital currencies identified. The department should use modern tools to conduct a rulemaking that befits the coming era, the Bitcoin era.

Extend the Comment Period, Iterate on Drafts, Hold a Hearing

You have already received a letter signed by over 400 individual Bitcoin enthusiasts, Bitcoin industry executives, members of the Bitcoin Foundation’s leadership, and Bitcoin venture investors, all asking for an extension of the comment period. As you know, 45 days is the minimum comment period, and a proposal does not expire until 365 days after being published or after the last public hearing. New York agencies frequently accept comments for periods beyond the minimum 45 days.

The proposed regulation is sweeping, and it must be digested not only by existing New York financial services business, which have the greatest capacity to assess the regulation, but also by U.S.-based businesses outside of New York, international Bitcoin businesses, and fledgling Bitcoin businesses around the world. All of them may have content they can usefully contribute to the process given sufficient time. Language in the proposed regulation that may draw both commercial and non-commercial software providers within its scope requires giving an even broader circle of potentially affected participants in the digital economy ample opportunity to comment.

To put our extension request in context, your office announced that it was inquiring into digital currencies in August, 2013.¹ In late November, you announced your intention to hold a hearing on digital currency and a potential “BitLicense” proposal,² with those hearings coming in late January.³ With the release of the proposed regulation late last month, almost a year’s work had gone into its drafting. Given the complexity of the issues, few would have faulted your office for taking even longer.

The process does not conclude with the issuance of a proposed rule, however. The second, arguably more important phase of your inquiry is to submit your proposal to the public for review. Given the complexities, it would not be inconceivable for the public comment phase of the rulemaking process to take at least as long as the initial research and drafting.

With some important, sophisticated exceptions, the Bitcoin community is not well-versed in New York financial services law or regulation. It takes time to gather the meanings of legal terms of art and to compare them with emerging technologies, processes, and business models in the Bitcoin world. The Bitcoin community will be able to more meaningfully comment with more time to consider the proposal.

Given that the initial research and drafting took New York financial regulatory experts nearly a year to produce, a comment period reaching even six months would be appropriate. Better still, you could adopt an iterative process, in which you issue drafts, take comments for three months, re-draft, and take comments again until the many, many issues raised by the proposed regulation are thoroughly vetted in true collaboration with the community.

You could match your January hearing on the questions around digital currency regulation with a hearing on the proposed solution. While eliciting needed discussion, doing so would signal to the Bitcoin community that you are serious about a collaborative effort.

¹ New York Department of Financial Services, “Notice of Inquiry on Virtual Currencies,” August 12, 2013, see: <http://www.dfs.ny.gov/about/press2013/memo1308121.pdf>.

² New York Department of Financial Services, “Notice of Intent to Hold Hearing on Virtual Currencies, Including Potential NYDFS Issuance of a ‘BitLicense,’” <http://www.dfs.ny.gov/about/press2013/virtual-currency-131114.pdf>.

³ New York Department of Financial Services, “NYDFS Outlines Additional Details on Witnesses and Panels for Virtual Currency Hearing on January 28 and 29 in New York City,” http://www.dfs.ny.gov/about/panels_witnesses_virtual_currency_hearing.pdf.

A token deadline extension of 45 days would be welcomed by the Bitcoin community, among whom many expressed consternation at the broad sweep of the regulations and the compressed time frame for comments. But your options are far broader. A longer deadline extension, the commitment to an iterative process, and a hearing on the proposed regulation each would signal your willingness to work with the Bitcoin community on creating a workable, credible regulatory environment in New York.

Articulate/Release the Public Interest Outcomes the Proposed Regulation Would Produce

As you know, New York's State Administrative Procedure Act (SAPA) requires a statement of "needs and benefits" to accompany proposed regulations. Such a statement must set forth:

the purpose of, necessity for, and benefits derived from the rule, a citation for and summary, not to exceed five hundred words, of each scientific or statistical study, report or analysis that served as the basis for the rule, an explanation of how it was used to determine the necessity for and benefits derived from the rule, and the name of the person that produced each study, report or analysis. N.Y. SAP. LAW § 202-a(2)(b).

The statement of needs and benefits published in the proposed regulation's SAPA notice asserts the existence of needs and benefits, but it does not articulate what they are except in gross summary. (We reproduce it here for the benefit of other readers of this comment.)

Extensive research and analysis by the Department of Financial Services (the "Department"), including a two-day hearing held in January 2014, has made clear the need for a new and comprehensive set of regulations that address the novel aspects and risks of virtual currency. Existing laws and regulations do not cover proposed or current virtual currency business activity. The proposed regulation is therefore necessary to ensure that: (a) persons or entities engaged in virtual currency business activity operate in a safe and sound manner; (b) New York consumers and other residents are protected from the risks posed by virtual currency business activity; and (c) persons or entities engaged in new virtual currency business activity have a framework within which they can grow.

The Bitcoin community has a lot to offer in comments on the proposed regulation, but it will not be able to comment cogently unless the benefits summarized here are actually articulated in a publicly released document.

We commend to you the methodology (if not the outcome) of a July report issued by the European Banking Authority (EBA).⁴ The EBA report assessed some benefits of digital currencies, and it listed and categorized the risks it perceived from digital currencies. We believe the EBA report could be improved, but it has the benefit of using a methodology—risk

⁴ European Banking Authority, "EBA Opinion on 'Virtual Currencies,'" EBA/Op/2014/08 (July 2014) <https://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf>.

management and cost-benefit—that will permit constructive engagement between the Bitcoin community and regulatory authorities in Europe.

The Bitcoin community would like to know—and could comment more helpfully if it did know—what novel aspects of digital currency your research and analysis identified. In the view of your office, what risks exist with digital currencies that don't exist with other currencies? There certainly are risks⁵—the community would benefit from understanding how your office frames them. We recommend that you publish the research and analysis referred to in the statement of needs and benefits as soon as possible, but well before the close of the first round of comments.

If you choose not to do your own public release, please treat this comment as a request under the New York Freedom of Information Law, N.Y. Pub. Off. Law sec. 84 et seq., for the opportunity to inspect or obtain copies of any risk management and cost-benefit analysis (or any other systematic assessment) that is a part of the “extensive research and analysis” referred to in the statement of needs and benefits for the proposed regulation. If there are any fees for searching or copying these records, please inform us if the cost will exceed one bitcoin. We would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the proposed regulation. This information is not being sought for commercial purposes.

The New York Freedom of Information Law requires a response time of five business days, but we will happily toll this deadline until 15 days ahead of the current/original comment deadline. We will happily toll it further in the event of an extension of the comment deadline. Our goal is not to be burdensome, but to get for the Bitcoin community the most information we can about the proposed regulation, allowing the community to better inform you about the effects of your proposal.

If access to the records we are requesting will take longer than the amounts of time we propose above, please contact us with information about when we might expect copies or the ability to inspect the requested records. If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify us of the appeal procedures available to us under the law.

Engage Creatively with the Community

The Bitcoin Foundation can't speak for all in the Bitcoin community, of course, and views range widely, but the bulk of the community appreciates your willingness to engage with it, such as by participating in community discussion on Reddit. Given this willingness to use modern tools, the department should resist the constraints of administrative procedures

⁵ Many can be inferred from our systematic assessment of risks to Bitcoin. See Bitcoin Foundation, “Removing Impediments to Bitcoin's Success: A Risk Management Study” (Spring 2014) <https://uranus.bitcoinfoundation.org/static/2014/04/Bitcoin-Risk-Management-Study-Spring-2014.pdf>.

developed in the era of postage stamps. Notice-and-comment rulemaking arose during an era when communication was cumbersome and crowdsourcing was impossible.

A truly open rulemaking would allow participation far richer than the ability to comment once or twice on draft regulations. The department could take comments and amendments, and interact with commenters, in a better organized and more interactive fashion. Shortly after the release of the proposed “BitLicense” regulation, a copy of it was placed on the News Genius web site,⁶ which permits annotations of the text. There are copies of the “BitLicense” proposal on Github.⁷ These tools provide decentralized administrative procedures that are appropriate for public comment, information-gathering, and language selection for any Bitcoin regulation. We are confident that the community will meet you wherever you announce you will be engaging with them.

The Bitcoin community is eager to have full participation in the department’s proceeding. That participation should benefit Bitcoin and digital currencies. It should be open, transparent, participatory, and collaborative. Notice-and-comment, and a 45-day comment period, are the minimum requirements of New York law. While extending the comment period to a generous, appropriate length, the Department of Financial Services should plan to iterate on the drafting of the regulation, it should make its research and analysis available to the public, and it should use modern tools to collect comments and amendments and to interact with the Bitcoin community.

Thank you very much for considering these views. We intend to file thorough and constructive comments on the substance of the proposed regulation in the near future.

Sincerely,

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The Bitcoin Foundation

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⁶ See “Proposed BitLicense Regulations,” News.Genius.com <http://news.genius.com/New-york-department-of-financial-services-proposed-bitlicense-regulations-annotated>.

⁷ See “BitLicense,” Github.com <https://github.com/pmlaw/BitLicense>; “Proposed BitLicense Regulations for the State of New York,” Github.com <https://github.com/onenameio/proposed-bitlicense-regulations>; “BitLicense,” Github.com <https://github.com/walne/BitLicense>.