

# Summary of New York Department of Financial Services Virtual Currency Guidance for Banking Organizations

On December 15, 2022, the New York Department of Financial Services (“NYDFS”) issued an [industry letter](#) providing guidance to certain NYDFS-regulated institutions seeking to engage in “virtual currency-related activity”. Specifically, the guidance applies to all New York banking organizations<sup>1</sup> and NYDFS-licensed branches and agencies of foreign banking organizations (collectively referred to in the guidance as “[Covered Institutions](#)”). This guidance follows guidance that NYDFS issued in June 2022 for institutions that issue U.S. dollar-backed stablecoins (see our summary [here](#)).

Although the guidance became effective immediately upon issuance, NYDFS stated that stakeholders are invited to provide comments (by sending them to [bankingcomments@dfs.ny.gov](mailto:bankingcomments@dfs.ny.gov)) and that NYDFS will take such comments into account as it continues to supplement and refine the supervisory framework applicable to Covered Institutions.

## VIRTUAL CURRENCY-RELATED ACTIVITY

In the guidance, virtual currency-related activity is defined to include “all ‘virtual currency business activity,’ as that term is defined in [New York’s virtual currency regulation]<sup>2</sup>, as well as the direct or indirect offering or performance of any other product, service, or activity involving virtual currency that may raise safety and soundness concerns for the Covered Institution or that may expose New York customers of the Covered Institution or other users of the product or service to risk of harm”.

The guidance provides certain examples of virtual currency-related activities:

- offering digital wallet services to customers, whether the services are in fact provided by the Covered Institution or by a third party with which the Covered Institution has contracted;
- lending activities collateralized by virtual currency assets;
- activities in which a Covered Institution facilitates its own customers’ participation in virtual currency exchange or trading, including by carrying fiat currency on behalf of customers (*e.g.*, in an omnibus account);
- services related to stablecoins, including providing stablecoin reserve services for stablecoin issuers; and
- engaging in traditional banking activities involving virtual currency through the use of new technology that exposes the Covered Institution to different types of risk (*e.g.*, underwriting a loan, debt product or equity offering effected partially or entirely on a public blockchain).

## APPROVAL REQUIRED

The guidance reminds Covered Institutions that, as a matter of safety and soundness, they must seek prior

approval before commencing any new or significantly different virtual currency-related activity.

The guidance states that: “[f]or the purposes of [the guidance], a new or significantly different virtual currency-related activity includes a new virtual currency-related product or service or a proposed change to an existing virtual currency-related product or service that: (1) may raise a legal or regulatory issue about the permissibility of the product, service, or change; (2) may raise safety and soundness, including operational, concerns; or (3) may cause the product or service to be significantly different from that previously approved”.

The guidance also outlines the process that a Covered Institution should follow to seek prior approval for a proposed virtual currency-related activity and the types of information that NYDFS may consider in deciding whether to provide such approval. The process is intended to enable NYDFS to evaluate the potential risks that the particular virtual currency-related activity may pose to the Covered Institution, consumers and the market in general. The guidance states that it does not interpret existing law or regulation or otherwise address the types of activities that may be permissible for Covered Institutions to engage in under New York Law.

As a part of that process, a Covered Institution should make such outreach a minimum of 90 days prior to the date when the Covered Institution intends to commence the activity. If NYDFS confirms that prior approval of the proposed activity is required (either under New York’s virtual currency regulation or otherwise), a Covered Institution must prepare and submit a written submission addressing, at a minimum, certain information requirements (summarized at a high level in the next section).

The guidance makes clear that obtaining prior approval in respect of a particular virtual currency-related activity does not constitute general consent for the Covered Institution to engage in other types of virtual currency-related activities, nor does it authorize other Covered Institutions to undertake

that same activity. Further, virtual currency-related activity performed by or through a third-party service provider that has been engaged by a Covered Institution may also require the Covered Institution to seek prior approval from NYDFS. In addition, a Covered Institution currently engaged in virtual currency-related activities should immediately notify NYDFS of the relevant activity; the guidance states that NYDFS may review the activity and impose supervisory requirements, as required.

## WRITTEN SUBMISSION INFORMATION REQUIREMENTS

NYDFS requests that a Covered Institution submit in writing sufficient information “to assess the scope of the proposal and any impact on the institution’s safety and soundness, including implications for New York customers of the Covered Institution and other users of the proposed product or service”. The list of information requirements for the written submission in the guidance is not exhaustive and other pertinent information not specifically listed in the guidance may be submitted or requested. Further, to the extent that responsive information has been included in an application or other submission by a Covered Institution to a federal banking regulator, the Covered Institution may submit a copy of those materials with appropriate cross-references.

The informational requirements cover the following areas:

- the business plan for the proposed activity;
- the Covered Institution’s risk management approach for the proposed activity;
- the corporate governance framework applicable to the proposed activity;
- analysis of whether and to what extent the proposed activity will have any impact on customers and other users, including where they interact with a third-party service provider engaged by the Covered Institution, rather than with the Covered Institution directly;
- expected capital and liquidity impacts; and

- application of all relevant laws and regulations to the proposed activity, including analysis of the permissibility of the proposed activity and key legal risks and mitigants.

The guidance also includes a checklist of materials that may be relevant in evaluating a proposed virtual currency-related activity. NYDFS intends the checklist to help Covered Institutions assess whether any of the materials included on the checklist are applicable to the proposal.

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- 1 Under the New York Banking Law (“NYBL”), “banking organizations” is defined to include “all banks, trust companies, private bankers, savings banks, safe deposit companies, savings and loan associations, credit unions and investment companies”. NYBL § 2.11.
  - 2 New York’s virtual currency (BitLicense) regulations exempt from licensing (and, therefore, other) requirements under the regulation “[entities] that are chartered under the [NYBL] and are approved by the superintendent to engage in virtual currency business activity,” among other persons. 23 NYCRR 200.3(c)(1) (emphasis added).

Under New York’s virtual currency regulation, “[v]irtual currency business activity means the conduct of any one of the following types of activities involving New York or a New York resident: (1) receiving virtual currency for transmission or transmitting virtual currency, except where the transaction is undertaken for non-financial purposes and does not involve the transfer of more than a nominal amount of virtual currency; (2) storing, holding, or maintaining custody or control of virtual currency on behalf of others; (3) buying and selling virtual currency as a customer business; (4) performing exchange services as a customer business; or (5) controlling, administering, or issuing a virtual currency”. 23 NYCRR 200.2(q).

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