

Louisiana Serves Up New Virtual Currency Business Law Cajun Style

July 30, 2020

On June 13, Louisiana passed the Virtual Currency Businesses Act (VCBA), becoming the second state to enact a stand-alone virtual currency law and the first state to base virtual currency licensing requirements on the Uniform Regulation of Virtual-Currency Businesses Act (URVCBA) published by the Uniform Law Commission in October 2019.¹ Previously, New York State has instituted licensing requirements — known as a BitLicense — for persons engaged in virtual currency involving New York or a New York resident, but its provisions were not based on the URVCBA.²

According to the VCBA, effective August 1, persons engaging in virtual currency business activity with residents of the state must obtain a virtual currency business license (VCBL) from the Office of Financial Institutions (OFI), the Louisiana government department charged with administering the law.³ However, based on our communications with OFI staff, beginning August 1, no person currently conducting a virtual currency business lawfully in the state will be regarded as operating impermissibly without a license until such time as set forth in final rules to be adopted by OFI. These final rules will be issued sometime after proposed rules are published and open for public comment for 120 days.

Under the VCBA, a person includes an individual, partnership, estate, business or nonprofit entity, or other legal entity. Virtual currency business activity includes exchanging, transferring, or storing virtual currency or engaging in virtual currency administration and holding electronic precious metals. A license is not needed for persons using virtual currency as payment for the purchase or sale of goods or services for personal use or whose volume of virtual currency business does not exceed \$35,000 annually.

Specific Requirements

Applicability. Virtual currency business activity includes a wide range of activities, including exchanging, transferring or storing virtual currencies, among other activities. It also includes holding electronic precious metals or electronic certificates representing interests in precious metals on behalf of another person.

Virtual Currencies. The definition of virtual currency is broad and includes anything that is a digital representation of value that is used as a medium of exchange, unit of account, or store of value and that is not legal tender. It does not include value created by a merchant's affinity or rewards program or digital representations of value that exist only within online games.

Exemptions. Persons (including legal entities) using virtual currency as payment on their own behalf for personal or academic purposes do not need to obtain a license. Likewise, persons receiving payment in virtual currencies for the purchase or sale of goods and services do not need to obtain a license. It appears reasonable to view the statute as additionally authorizing the conversion of such received virtual currency into fiat currency without a license, but this is not entirely clear under the statute.

¹ <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=bd2ebf37-48a6-1d1e-8644-a9869bb4f0e7&forceDialog=0>.

² See https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulation_history.

³ <https://legiscan.com/LA/text/HB701/id/2194237/Louisiana-2020-HB701-Chaptered.pdf>.

Persons conducting virtual currency business with Louisiana residents that will not exceed an annual volume equivalent in value to US \$35,000 need not obtain a VCBL provided they file a notice and certain required information with OFI. However, prior to conducting a volume of business in excess of this threshold, a person must file an application for a license with OFI. However, a person may continue to conduct a virtual currency business during the pendency of the application process. It is not clear under the VCBA how “volume” is defined.

Application. Applicants must apply for a VCBL through the Nationwide Multi-State License System (NMLS) and provide certain required information, including information about money transmitter licenses held in other states, legal proceedings, the source of funds, persons who have control of the applicant and responsible individuals. Additional information may be required by later rules.

Information and documents for a large number of persons associated with a legal entity may have to be filed as part of the application process because control is defined broadly as the direct or indirect power to direct the management, operations or policies of the person through voting power or a prior agreement. Similarly, responsible individual is defined broadly as an individual with managerial authority.

After an applicant provides all required information, OFI will perform an investigation. OFI will review the applicant’s financial condition and the experience of the applicant, each executive officer, responsible individual, and any person with control of the applicant. OFI may also investigate the business premises. Once OFI receives all required information and its investigation is concluded, the application is deemed complete and the applicant should receive a notice of decision within 30 days. If the applicant does not receive notice within 30 days, the application is deemed denied. Because OFI is held to no time limit to complete its investigation, the application process appears able to continue indefinitely even after an applicant has submitted all required information to the department.

Licenses last one year and must be renewed no later than 15 days before a license expires.

Security Requirement. Licensees must maintain a surety bond, which depends on the dollar amount of virtual currency activity, ranging from \$100,000 to one million dollars. However, Louisiana retains discretion to increase the amount of security to seven million dollars.

Capital Requirement. In addition to security surety bond, licensees must maintain a tangible net worth of the greater of \$100,000 or three percent of total assets.

Open Issues

- **What is going to happen to preexisting virtual currency businesses?** The VCBA does not provide for any safe harbor or other transition rules for persons currently conducting virtual currency business activity when OFI begins requiring a VCBL. It is anticipated this will be addressed in OFI’s final rules.
- **What does control mean?** Applicants must provide information about persons with control over the applicant. The language about control is taken directly from the URVCB, but neither the VCBA nor the URVCB discuss how much ownership or voting power is needed to evidence control.
- **Who has managerial authority?** Applicants must report certain information about responsible individuals, defined broadly as individuals with managerial authority over the virtual currency business activity. The law does not provide a threshold for managerial authority and does not even suggest “material” managerial authority is necessary.
- **What will the regulations cover?** There are important provisions of the URVCBA dealing with obligations of a licensee regarding ongoing compliance programs and monitoring that have not been included in the VCBA. It is possible that these provisions will be included in the final rules.

Louisiana is the first state to enact an independent licensing requirement based on the model provision. The URVCB was proposed by the Uniform Law Commission to create fair and predictable rules tailored towards virtual currency businesses, encourage new businesses to enter the market, provide consumer protection, and create legitimacy for virtual currency businesses building investor relationships.⁴ The model law proposes the regulation of all persons engaged in a “virtual currency business activity” absent an exemption. Among other things, such activity includes exchanging, transferring or storing virtual currency with or on behalf of residents. Under the VCBA, virtual currency is any digital representation of value that is used as a medium of exchange, unit of account or store of value and does not constitute legal tender.

Comparison of Virtual Currency State Laws

Applicants should be aware of key differences between BitLicenses and VCB licenses.⁵ For example, VCB licenses are valid for only one year whereas in New York a BitLicense is perpetual and a conditional license is valid for two years. Unlike New York, Louisiana does not require consumer disclosures.

Although the VCBA largely tracks the URVCBA, the VCBA differs significantly by adding a surety bond requirement.

A side-by-side comparison of the laws is provided below.

	New York’s BitLicense	Louisiana’s Virtual Currency Businesses Act	URVCB
Applicability	<ul style="list-style-type: none"> Any person who engages in a virtual currency business activity involving New York or a New York resident Applies to transmission, custody, buying and selling, performing exchange services and controlling, administering or issuing virtual currency 	<ul style="list-style-type: none"> Applies to “virtual currencies” and “virtual currency business activities” with Louisiana residents Anyone who controls, exchanges, or transfers a virtual currency and is involved in virtual currency business activities 	<ul style="list-style-type: none"> Applies to “virtual currencies” and “virtual currency business activities” with a state resident Anyone who controls, exchanges, or transfers a virtual currency and is involved in virtual currency business activities
Application Requirements	<ul style="list-style-type: none"> NMLS \$5,000 application fee Description of the firm’s proposed business activities Relevant written policies and procedures Organization charts Current financial statements for the applicant, principal stockholder, and principal beneficiary of the applicant 	<ul style="list-style-type: none"> Application through NMLS List of money transmitter licenses held in other states Source of funds and credit and documentation proving adequate net worth and reserves Financial statements of persons with control of the applicant Unspecified application fee to be determined by OFI, and reasonable costs of any investigation and examination are paid for by the applicant 	<ul style="list-style-type: none"> Application through NMLS List of money transmitter licenses held in other states Source of funds and credit and documentation proving adequate net worth and reserves Financial statements of persons with control of the applicant Application, investigation and examination are paid for by the applicant

⁴ Gary DeWaal, *Bridging the Week* (August 20, 2017), <https://www.bridgingtheweek.com/Commentary/PostDetails/2478#.XyBzkWhKh-1>.

⁵ Katten, *New York BitLicense Regulations Virtually Certain to Significantly Impact Transactions in Virtual Currencies* (July 8, 2015), <https://katten.com/New-York-BitLicense-Regulations-Virtually-Certain-to-Significantly-Impact-Transactions-in-Virtual-Currencies>.

Katten, *New Empire State of Mind? Potential Easing of Restrictions for New York Virtual Currency Business Licenses* (July 22, 2020), <https://katten.com/Potential-Easing-of-Restrictions-for-New-York-Virtual-Currency-Business-Licenses>.

	New York's BitLicense	Louisiana's Virtual Currency Businesses Act	URVCB
Length of License	<ul style="list-style-type: none"> Perpetual or two-year conditional period 	<ul style="list-style-type: none"> One year Renewed no sooner than 15 days before the license expires 	<ul style="list-style-type: none"> One year Renewed no sooner than 15 days before the license expires
Security Requirements	<ul style="list-style-type: none"> Each licensee must have a surety bond, which is generally at least \$500,000 Each licensee must hold capital in proportions acceptable to the superintendent 	<ul style="list-style-type: none"> Surety bond of at least \$100,000 to \$1 million Surety bond can be increased to \$7 million Applicant must submit and maintain a tangible net worth of the greater of one hundred thousand dollars or three percent of total assets 	<ul style="list-style-type: none"> Surety bonds and letters of credit are not required. The department can accept funds, investment property, surety bonds, letters of credit or other security from the licensee.
Exemptions	<ul style="list-style-type: none"> An entity chartered under the New York Banking Law and approved by the superintendent Merchants and consumers using virtual currency solely for purchase or sale of goods or services or for investment purposes Financial advisors providing advice to their clients on buying or selling virtual currency 	<ul style="list-style-type: none"> A person who provides only computing power or connectivity software Digital currencies that exist within a game A person earning \$5,000 or less from virtual currency activities On-ramping provision allows those controlling less than \$35,000 of crypto assets annually to begin without filing if they give notice and required information. Before they reach \$35,000 they must file an application for a license 	<ul style="list-style-type: none"> A person who provides only computing power or connectivity software Digital currencies that exist within a game A person earning \$5,000 or less from crypto activities On-ramping provision allows those controlling less than \$35,000 of crypto assets to begin without filing if they give notice and required information. Before they reach \$35,000 they must file an application for a license
Compliance	<ul style="list-style-type: none"> Designate a compliance officer Maintain and enforce written policies regarding anti-fraud, anti-money laundering, cyber security, privacy and information security 	—	<ul style="list-style-type: none"> Outlines compliance programs and monitoring
Approval of Virtual Currencies	<ul style="list-style-type: none"> Pre-approval for specified virtual currencies and self-certification process for new virtual currencies 	—	—

	New York's BitLicense	Louisiana's Virtual Currency Businesses Act	URVCB
Consumer Protection	<ul style="list-style-type: none"> Must disclose material risks and Terms and Conditions. 	<ul style="list-style-type: none"> No disclosures mandated 	<ul style="list-style-type: none"> Requires disclosures of risk from licensee to customers Holders with control over a resident's virtual currency must maintain an amount of each type of virtual currency sufficient to satisfy the aggregate entitlements of the persons of each type of virtual currency for the benefit of its resident customers
Enforcement	<ul style="list-style-type: none"> By the New York State Department of Financial Services 	<ul style="list-style-type: none"> OFl can assess penalties and revoke and suspend licenses 	<ul style="list-style-type: none"> Can assess penalties and revoke and suspend licenses
Relation to Other Laws	<ul style="list-style-type: none"> BitLicense holders must comply with additional New York anti-money laundering requirements The BitLicense does not replace any other licenses required by New York law, including a money transmission license under New York Banking Law 	<ul style="list-style-type: none"> Louisiana Securities Law supersedes the VCBA, if applicable Statute does not mention Louisiana money transmitter law 	<ul style="list-style-type: none"> Intended to update and replace money transmitter laws for the cryptocurrency space

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