ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

March 1, 2017

Drafting Committee for the Uniform Regulation of
Virtual Currency Business Act
Uniform Law Commission

Re: EFF Comments on March 2017 Committee Meeting Draft of the ULC's Regulation of Virtual Currency Business Act

Dear Members of the Drafting Committee:

The Electronic Frontier Foundation (EFF)—a member-supported non-profit organization seeking to protect both innovation and consumers in the digital world—appreciates this opportunity to comment on the March 2017 Committee Meeting Draft of the Regulation of Virtual Currency Business Act (the "Act").

We have three significant concerns regarding the Act.

(1) A Drafting Error in the Definition of "Exchange" Must Be Corrected.

We believe there was a drafting error with regard to the definition of "exchange," which was changed from the last draft in a way that significantly expands the Act's scope. The old definition of "exchange"—which we supported—required the exchanger to at least momentarily have custody or control of the virtual currency being exchanged for the sale, trade, or other conversion of "virtual currency for legal tender or for one or more forms of virtual currency" *and* of "legal tender for one or more forms of virtual currency[.]"[1] The new definition breaks the old definition into two prongs—an (a) and a (b)—in a way that limits the "custody or control" language to the sale, trade, or conversion of legal tender for one or more forms of virtual currency, but not the other way around.[2]

We think this change was inadvertent, but it is an error that must be fixed. This error impacts what constitutes a "virtual currency business activity" and thus significantly expands the Act's scope. The error must be corrected to ensure that the Act is not overbroad. We support the fix proposed by Coin Center, which adopts the new definition's

[1] Pursuant to the old definition, "exchange" means "the sale, trade, or other conversion of virtual currency for legal tender or for one or more forms of virtual currency, or the sale, trade, or other conversion of legal tender for one or more forms of virtual currency, if the exchanger, at least momentarily, has custody or control of the virtual currency being exchanged."

[2] Pursuant to the new definition, "exchange" means "to sell, trade or convert: (A) virtual currency for legal tender or for one or more forms of virtual currency; or (B) legal tender for one or more forms of virtual currency by a person that, at least momentarily, has custody or control of the virtual currency being sold, traded, or converted."

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two-part structure while applying the necessary "custody or control" language to both parts:

> (7) "Exchange" means to assume custody or control of virtual currency on behalf of a resident, at least momentarily, in order to sell, trade, or convert:
>
> > (a) virtual currency for legal tender or for one or more forms of virtual currency; or
> >
> > (b) legal tender for one or more forms of virtual currency.

(2) The Committee Should Reject a Dual Licensure Requirement.

The Committee had not yet decided whether to require virtual currency businesses that also deal in fiat currency/legal tender to apply for licenses under both the Act *and* state money services or money transmission statutes—known as "dual licensure." *See* March 2017 Meeting Draft, pp. 19-20.

The Committee should reject dual licensure. EFF agrees with the comment letters submitted by Coin Center and Coinbase. Specifically, because licensure under this Act and under money transmission statutes accomplish the very same thing—protecting consumers—dual licensure will be needlessly redundant. And not only would it serve no purpose in terms of protecting consumers, but it would impose unnecessary burdens on virtual currency businesses, forcing them to jump through essentially the same hoops twice. This will lead to confusion and legal costs—and for no good reason. In short, dual licensure would be an unnecessary burden on innovation.

The Act should make clear that dual licensure is not required for a virtual currency business that also deals in fiat currency/legal tender.

(3) To Protect Innovation, the Committee Should Forego the Act's Complicated Provisional License Scheme and Replace it With a *Clear* Exemption For New and Growing Virtual Currency Businesses.

The Act currently includes a provisional license scheme intended to protect innovation by giving startups an "on-ramp" to full licensure. But the provisional license has two key problems.

First, the value for being required to apply for a provisional license ($50,000) is arbitrarily and unreasonably low. This will sweep up small, unsophisticated entities. Given that an entity's failure to obtain a provisional license before beginning any activity in a state could be seen as a basis for liability under federal criminal law, this is particularly troubling. *See* 18 U.S.C. § 1960.

Second, the requirements for obtaining a provisional license are not meaningfully less burdensome than the requirements for applying for a full license. For instance, these requirements, outlined Section 211 of the most recent draft, require a provisional license applicant to provide "the information for an investigation as described in Section 207"—*i.e*., the same information that a full license applicant would need to provide for an investigation prior to receipt of a full license. A provisional licensee must also be able to provide "evidence that it has adequate resources for compliance with Section 209(b)"—which brings in further rules applicable to full license applicants. *See* March 2017 Meeting Draft, pp. 40-42.

Furthermore, rather than setting a clear line that applies across the broad to all companies equally as the threshold for applying for a full license, the provisional license scheme ties the threshold to whether an entity "exceeds 75 percent of the [equivalent value, number of transactions, or number of residents] specified in its" required notice. This *ensures* that the threshold for applying for a full license is different for *each and every* company. And it seems that it would apply even in cases where the value of the company's applicable annual virtual currency business activity was far less than the yet-to-be-determined full license threshold. *See* March 2017 Meeting Draft, p. 41.

As a result, as currently drafted, the provisional license scheme threatens to make the Act's requirements even more confusing, burdensome, and costly. Indeed, we have talked to those working directly with startups and innovators in the digital currency space, and they have indicated that the provisional license scheme may provide no benefit to these companies and that startups may therefore not even use it.

To protect innovation, the Act should include a clear, reasonable, and complete exemption for small virtual currency businesses, and the threshold for qualifying for any type of license should be greater than the current $50,000 value. Without a simple, reasonable exemption for small entities—which granting qualifying entities a reasonable time (between 30 and 90 days) after growing out of the exemption to make good faith efforts to apply for a license—the Act will scare away innovators and chill future innovation in the developing digital currency industry.

We thank the Committee for the opportunity to highlight our concerns. Please contact Jamie Williams at (415) 436-9333 ext. 164 or jamie@eff.org if you have any questions.

Sincerely,

/s/ Jamie Williams

Jamie Williams
Staff Attorney