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NYDFS Implements Virtual Currency Assessments Rule



The New York Department of Financial Services (NYDFS) formally implemented its Virtual Currency Assessments Rule as 23 NYCRR 102 on Wednesday, April 19, 2023, by publishing a notice of adoption in the *State Register*. Under the new assessments rule, entities that hold a virtual currency business activity license, the "bitlicense," will be charged an assessment for their supervision and examination by NYDFS.

Bitlicense Rule

The bitlicense rule was adopted under the New York Financial Services Law in 2015. While NYDFS had standing authority to charge assessments for charters and licenses issued under the New York banking and insurance laws, there was no corresponding authority for licenses granted under the Financial Services Law. Section 206 of the Financial Services Law was amended at the start of this year to grant NYDFS that authority. The amendment entitles NYDFS to charge "for the operating expenses of the department that are solely attributable to regulating such persons in such proportions as the superintendent shall deem just and reasonable." NY Fin Serv Law 206(a). The assessments rule took effect with no amendments from its initial public comment period in January 2023.

The total assessment calculation is driven by two components: a regulatory component and a supervisory component. The regulatory component corresponds to the cost of examining bitlicensees. It is based on NYDFS' overall examination costs, which are split evenly between license holders.

The supervisory component corresponds to the cost of ongoing supervision of bitlicensees, including responding to inquiries and monitoring. It is calculated as a combination of a bitlicensee's "custody basis" and "transaction

basis," with each making up half of the supervisory component. Custody basis is calculated based on the average amount of customer assets under custody as of the last day of the prior four quarters. Transaction basis is calculated based on the total number of virtual currency transactions over the prior year. Within each of these calculations, license holders are categorized into small, medium, or large tiers based on their individual reported totals and are assessed the same amount as other license holders within those three tiers for both components. As a result, different entities' individual assessments may vary based on business activity. For example, a custodial entity may be in the 'large' tier for its Custody Basis but the 'small' tier for its Transaction Basis. A noncustodial exchange may result in the inverse.

Appeals Process

NYDFS received and responded to public comments and declined to include an appeals process in the assessments rule. However, it noted the long practice of engaging in a dialogue with licensees, as well as the ability to pursue formal administrative challenges under CPLR Article 78.

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