
Crypto Currently: New York Department of Financial Services Issues Updated Expectations on the Adoption or Listing of Virtual Currencies

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I. Introduction

On September 18, the New York State Department of Financial Services (the DFS or the “Department”) issued proposed guidance for BitLicensees and limited-purpose trust companies (collectively, VCEs) seeking to list virtual currencies on their platforms. The proposed guidance updates the Department’s framework for self-certification of coins and establishes new policy requirements for coin listings and delistings (Proposed Guidance).¹ Concurrently, the Department updated its list of coins that VCEs can list without the DFS’s prior approval (the Greenlist) and revised the process for coins to be added to the Greenlist (the General Framework for Greenlisted Coins).²

The Proposed Guidance would require VCEs to develop and implement a coin-listing policy in compliance with heightened risk assessment standards and enhance requirements for retail consumer-facing businesses before self-certifying any coins. It also would require any VCE, regardless of whether it has a DFS-approved coin-listing policy, to establish a separate coin-delisting policy to ensure safety, customer protection and regulatory compliance. As part of the updates on September 18, the DFS revised its General Framework for Greenlisted Coins and

¹ See N.Y. Dept. Fin. Servs., Letter re: Proposed Updates to Guidance Regarding Listing of Virtual Currencies (Sept. 18, 2023),

https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing.

² N.Y. Dept. Fin. Servs., Letter re: General Framework for Greenlisted Coins (Sept. 18, 2023),

https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_gen_framework_greenlisted_coins.

significantly pared back the number of coins on its Greenlist to Bitcoin, Ethereum, and six stablecoins issued by DFS-regulated limited purpose trust companies.

The Proposed Guidance and updates to the Greenlist fit within a larger framework of the DFS's sustained efforts to both regulate and establish a nationwide standard for the regulation of the digital asset industry.³ In the press release announcing the Proposed Guidance, Superintendent Adrienne A. Harris highlighted the significant resources the Department has invested in digital asset regulation, including the hiring of more than 60 experts to license and supervise digital asset companies in the past two years.⁴ The Department also underscored "milestone achievements that have transformed agency operations and shaped virtual currency policy across the nation and around the world,"⁵ including the issuance of eight industry regulatory guidance documents related to digital assets, such as guidance focused on USD-backed stablecoins,⁶ custody of customer assets⁷ and the use of blockchain analytics tools to manage financial crime risks.⁸

The Proposed Guidance signals that the DFS remains committed to being a leading regulator of virtual currency. In furtherance of this goal, we can expect the DFS to continue to carve new paths in regulation, supervision and enforcement related to digital assets. VCEs to which this Proposed Guidance would apply should review the Proposed Guidance and evaluate its impact on their existing practices and coin-listing policies, procedures and processes. VCEs should also begin creating their newly required coin-delisting policies during the public comment period.⁹ The Proposed Guidance, if finalized, would require VCEs to meet with the DFS to discuss their draft coin-delisting policy by December 8, 2023, and submit such policy to the DFS for approval by January 31, 2024.

³ Note, obligations under the federal securities laws must be viewed separately. *See, e.g.*, Securities and Exchange Commission, Re: Proposed Coin Listing Policy Framework (Jan. 27, 2020), <https://www.sec.gov/files/staff-comments-to%20nysdfs-1-27-20.pdf> ("Market participants should not rely on a model framework, whitelist, or state license when evaluating compliance with the federal securities laws – without also undergoing careful legal analysis under the federal securities laws.").

⁴ Press Release, N.Y. Dept. Fin. Servs., "DFS Superintendent Adrienne A. Harris Announces Update on Two Year Transformational Initiative to Strengthen DFS' Nation-Leading Virtual Currency Oversight" (Sept. 18, 2023), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202309181.

⁵ *Id.*

⁶ See N.Y. Dept. Fin. Servs., Letter re: Guidance on the Issuance of U.S. Dollar-Backed Stablecoins (June 8, 2022), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220608_issuance_stablecoins.

⁷ See N.Y. Dept. Fin. Servs., Letter re: Guidance on Custodial Structures for Customer Protection in the Event of Insolvency (Jan. 23, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230123_guidance_custodial_structures; *see also* Franca H. Gutierrez, Tiffany J. Smith et al., *Crypto Currently: New York Department of Financial Services Issues Virtual Currency Custody Guidance* (Feb. 9, 2023), <https://www.wilmerhale.com/insights/client-alerts/20230208-new-york-department-of-financial-services-issues-virtual-currency-custody-guidance>.

⁸ See N.Y. Dept. Fin. Servs., Letter re: Guidance on Use of Blockchain Analytics (Apr. 28, 2022), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220428_guidance_use_blockchain_analytics.

⁹ In the letter announcing the Proposed Guidance, the DFS "strongly encouraged" VCEs to begin creating their coin-delisting policies during the public comment period. *See* N.Y. Dept. Fin. Servs., Letter re: Proposed Updates to Guidance Regarding Listing of Virtual Currencies (Sept. 18, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing.

The DFS is soliciting comments on the Proposed Guidance until October 20, 2023. VCEs and other industry participants should consider submitting a comment to the DFS to identify and address any potential concerns or issues.¹⁰ The DFS has stated that it will issue its final guidance following the closure of the comment period.

II. Key Points

A. Heightened Standards for Coin-Listing Policies

The Proposed Guidance would require VCEs to develop and implement a coin-listing policy in compliance with the guidance before self-certifying any coins. Until the VCE has received written approval of its coin-listing policy from the Department, it may not self-certify any coins. Even after receiving written approval, the VCE, prior to listing any coin under the coin-listing policy, must provide written notice to the DFS of its intent to use or offer the coin in connection with its virtual currency business activity and keep the DFS informed of all coins used or offered on its platform.

Among other things, the Proposed Guidance advises VCEs to include in their coin-listing policy “robust procedures that comprehensively address all steps involved in the review and approval of coins.”¹¹ Further, the coin-listing policy must be customized to fit the VCE’s “specific business model, operations, customers and counterparties, geographies of operations, and service providers, and must also account for the use, purpose, and specific features of the coins being considered.”¹²

Like the original guidance, the Proposed Guidance organizes its requirements for coin-listing policies according to three pillars: (1) governance, (2) risk assessment and (3) monitoring. The following table identifies the principal revised or new requirements as set forth in the Proposed Guidance. Revised terms are indicated in **bold**.

Governance Requirements	
Original Guidance	Proposed Guidance
The board of directors or equivalent governing authority (the Governing Authority) must annually review and approve the coin-listing policy.	No change.

¹⁰ Comments should be submitted to innovation@dfs.ny.gov using “Proposed Coin-Listing Policy Framework” in the subject line.

¹¹ N.Y. Dept. Fin. Servs., Letter re: Proposed Updates to Guidance Regarding Listing of Virtual Currencies (Sept. 18, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing.

¹² N.Y. Dept. Fin. Servs., Letter re: Proposed Updates to Guidance Regarding Listing of Virtual Currencies (Sept. 18, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing.

The Governing Authority must oversee the review and approval process for listing new coins.	No change.
None.	<u>New Requirement:</u> The Governing Authority must remain independent from those who recommend listing and/or delisting coins.
Required to assess and address any conflicts of interest related to the VCE and its owners, principals, employees or their respective families.	<u>Revised Requirement:</u> Required to assess, address and publicly disclose any conflicts of interest related to the VCE or its affiliates , and to their owners, principals, employees or their respective families.
Required to keep records of (1) any Governing Authority’s meeting minutes and (2) all documents they reviewed in connection with each coin’s approval or disapproval.	<u>Revised Requirement:</u> Required to keep records of (1) any Governing Authority’s meeting minutes, (2) all documents they reviewed in connection with each coin’s approval or disapproval, (3) documentation reviewed and produced by those responsible for approval and/or disapproval recommendations related to coin-listing and (4) the risk assessment conducted on the specific coin(s) under consideration.
Risk Assessment Requirements	
Original Guidance	Proposed Guidance
Required to perform a comprehensive risk assessment of each coin and its uses in accordance with the consumer protection and other standards embodied in 23 NYCRR Part 200.	No change.
None.	<u>New Requirement:</u> Required to incorporate the DFS’s guidance on preventing market manipulation in the risk assessment process. ¹³
None.	<u>New Requirement:</u> Not permitted to self-certify any coins that are not included on the Greenlist and shares any of the following features (or it

¹³ N.Y. Dept. Fin. Servs., Letter re: Guidance on Prevention of Market Manipulation and Other Wrongful Activity (Feb. 7, 2018), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20180207_guidance_prevention_market_manipulation_and_other_wrongful_activity.

	<p>cannot be determined that such coin does not have these features) for retail consumer-facing products or services:</p> <ul style="list-style-type: none">• Coins designed or substantially used to circumvent laws and regulations,• Coins that may facilitate the obfuscation or concealment of customer or counterparty identities,• Stablecoins (including any coin designed to serve as collateral for a stablecoin that is not included on the Greenlist),• Exchange coins (i.e., coins issued by a cryptocurrency exchange or can otherwise be used to provide benefits on an exchange),• Bridge coins (including any coin designed to serve as collateral or governance for an application that enables the transfer of coins across different protocols),• Coins native to a protocol where there are concerns related to the protocol's decentralization (i.e., if a single entity or individual controls more than 51% of the hash power for protocols with proof of work or similar consensus mechanisms), or• Coins with a circulation supply less than 35% of the total supply. <p>Any VCE seeking to list coins with any of these characteristics for its retail consumer-facing business must request approval from the DFS as a material change to its business operations. This request must include a comprehensive risk assessment that aligns with the Proposed Guidance. The DFS will review the request and conduct its own analysis.</p>
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Ongoing Monitoring Requirements	
Original Guidance	Proposed Guidance
Required to adopt, document and implement control measures to manage risks associated with the coin.	No change.
Required to have a process for delisting the coin, including notice to affected customers or counterparties.	Revised Requirement: Required to establish a coin-delisting policy in accordance with the Proposed Guidance (described in more detail below).
None.	New Requirement: Required to integrate coin-listing policies into the VCE’s broader risk and compliance framework.
None.	New Requirement: Required to ensure that independent testing includes coin-listing and coin-delisting in its scope as part of annual planning.

B. Heightened Standards for Coin-Listing Policies

The Proposed Guidance further requires any VCE, regardless of whether it has a DFS-approved coin-listing policy, to establish a separate coin-delisting policy to ensure safety, customer protection and compliance with 23 NYCRR Part 200 and the Proposed Guidance. In other words, whereas the above changes to the coin-listing policy would not apply to VCEs that solely custody or list coins on the Greenlist, all VCEs would need to adopt a coin-delisting policy.

Like the coin-listing policy, the coin-delisting policy must be approved by the DFS and tailored to the VCE’s “specific business model, operations, customers and counterparties, geographies of operations, and service providers, and must also account for the use, purpose, and specific features of the coins being considered.”¹⁴ In this way, the DFS is recognizing the wide range of services and offerings related to digital assets and encouraging VCEs to take a risk-based approach to coin listings and delistings that is appropriate to their risk profile and the risk level of a particular coin.

The Proposed Guidance advises VCEs to include many of the same governance measures as in the coin-listing policy, such as annual review and approval by the Governing Authority. The

¹⁴ N.Y. Dept. Fin. Servs., Letter re: Proposed Updates to Guidance Regarding Listing of Virtual Currencies (Sept. 18, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing.

Proposed Guidance further requires a VCE to provide 10-day written notice to the DFS and customers of a delisting decision.

A coin-delisting policy must outline the specific process for initiating a delisting event. This includes defining roles and responsibilities, designating individuals with the authority to initiate a delisting, establishing an approval chain within the organization, and specifying how the matter escalates to the Governing Authority for final approval. Further, the policy must incorporate ongoing monitoring procedures and be periodically updated to adapt to changes in supported coins. It should set clear criteria and thresholds that may trigger a delisting event, such as new findings from periodic evaluations, shifts in the legal or regulatory landscape or a directive from the DFS to delist a coin. Roles and responsibilities for each type of delisting event should be clearly defined to guide stakeholders based on the circumstances.

Once a decision has been made to delist a coin, a VCE must communicate the decision clearly to its customers in advance of delisting the coin in order to mitigate risk of potential consumer harm. A VCE is required to provide customers with 30 days' prior written notice, which must include details about the coin(s) to be delisted, the reasons for the delisting, the timing of the delisting, and instructions for impacted customers on how to sell or transfer the delisted coin from the VCE's platform. The coin-delisting policy should (1) specify how and when customers will receive the required communication; (2) ensure the availability of customer support to address inquiries and assist affected customers; (3) require proper documentation of the delisting decision, which must be readily available to the DFS; and (4) dedicate resources for ongoing monitoring of safe and soundness issues associated with a delisting.

As noted above, the Proposed Guidance, if finalized, would require VCEs to meet with the DFS to discuss their draft coin-delisting policy by December 8, 2023, and submit such policy to the DFS for approval by January 31, 2024. The DFS is soliciting comments on the Proposed Guidance until October 20, 2023. The DFS has stated that it will issue its final guidance following the closure of the comment period.

C. Heightened Standards for Coin-Listing Policies

In addition to the Proposed Guidance, the DFS revised its General Framework for Greenlisted Coins as part of the updates on September 18. Under the revised framework, VCEs do not need the Department's prior approval to list coins included on the Greenlist. However, VCEs that choose to list Greenlisted coins must (1) provide advance notice to the DFS prior to beginning support of the coin and (2) have a DFS-approved coin-delisting policy.

The DFS will consider adding a coin to the Greenlist if (1) the coin or coin issuer has a history of safety, soundness and customer protection, as well as broad market adoption, or (2) the coin is a stablecoin approved by the DFS for issuance in New York by a VCE. According to the updated guidance, at any time and in its sole discretion, the DFS has the authority to add, remove or modify coins on the Greenlist; prohibit or otherwise limit a coin's use before or after a VCE begins using a coin; or require a VCE to delist, halt, limit or curtail activity with respect to any coin.

D. Revised Greenlist

The DFS also significantly pared back the number of coins on its Greenlist. There had been more than 20 Greenlisted tokens prior to September 18, 2023. The list now contains only eight—including Bitcoin, Ethereum and six stablecoins (Gemini Dollar, GMO JPY, GMO USD, Pax Gold, Pax Dollar and PayPal Dollar). Notably, all have been issued by DFS-regulated limited purpose trust companies. Among the coins removed from the prior Greenlist are Bitcoin Cash, Dogecoin, Ripple’s XRP and Litecoin. Whereas the prior Greenlist distinguished between coins that were approved for listing versus custody (or both),¹⁵ the new Greenlist does not make such distinction. Instead, the Department has clarified that the new Greenlist identifies the coins the Department has approved for VCEs “to custody or list without first establishing an approved coin-listing policy or otherwise seeking prior approval.”¹⁶

VCEs that currently list coins that are no longer included on the Greenlist are not required to immediately delist the removed coins. The DFS will instead coordinate with all VCEs as appropriate to ensure each VCE has an approved coin-delisting policy and associated procedures prior to requiring the delisting of any coin. The DFS retains the authority to require VCEs to delist or otherwise limit access to coins that are not included on the Greenlist “at any time and in its sole discretion.”¹⁷ Any such action, according to the DFS, “will be taken over an appropriate timeline to mitigate any impact to New Yorkers and the broader marketplace.”¹⁸

III. Looking Forward

The Proposed Guidance comes as Superintendent Harris approaches her two-year mark on the job as New York’s top financial regulator and one of the most high-profile state regulators in the country. Under her leadership, the DFS has expanded its oversight over digital assets and engaged in active enforcement. The Proposed Guidance also comes in the midst of a debate between Representatives Patrick McHenry (R-NC) and Maxine Waters (D-CA), the respective chair and ranking member of the House Financial Services Committee, who have been negotiating legislation to create a federal framework for the issuance and oversight of payment stablecoins at the federal level. Key areas of negotiation between the Republican and Democratic proposals include the extent to which federal and state regulators should share oversight of the stablecoin industry.

Given the DFS’s prominence in regulation of the digital asset industry, the Proposed Guidance is poised to set a new benchmark for digital asset regulation in the United States. Under this backdrop, VCEs to whom this Proposed Guidance would apply should review the Proposed Guidance and their existing practices and evaluate the extent of the impact this proposal would have on their coin listings and delistings and associated policies, procedures and processes. VCEs

¹⁵ For example, among the coins identified above, Bitcoin Cash and Litecoin were approved for listing and for custody. In contrast, Dogecoin and XRP were only approved for custody.

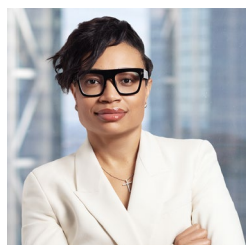
¹⁶ N.Y. Dept. Fin. Servs., Letter re: Proposed Updates to Guidance Regarding Listing of Virtual Currencies (Sept. 18, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing.

¹⁷ *Id.*

¹⁸ *Id.*

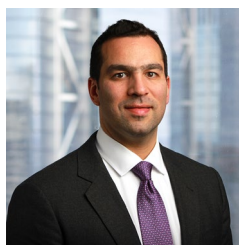
and other industry participants should also consider submitting a comment to the DFS to identify any questions that are not addressed by the Proposed Guidance and any potential concerns about compliance with the guidance. As noted above, the comment period for the Proposed Guidance is open until October 20, 2023.

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