

Crypto for Political Donations—A New Frontier for Legal Advisers

When it comes to cryptocurrency use for campaign donations, one of the challenges is confirming the identity of the donor to figure out who the account holder is in the crypto space.

BY CHRISTINE SCHIFFNER

Welcome to The National Law Journal's Inadmissible feature, a regular Q&A series with Washington, D.C., legal professionals. The interviews take a short, to-the-point look at an issue at the intersection of law and politics and highlight the type of work being led by professionals in the nation's capital. If you are interested in being profiled, reach out to cschiffner@alm.com.

In this edition, Skadden, Arps, Meagher & Flom partner and head of the firm's political law practice Ki P. Hong discusses the implications of cryptocurrency being used for campaign donations.

What are the latest trends, emerging issues and challenges you are seeing when it comes to cryptocurrencies being used in campaign financing? We should expect and have already seen an increase in crypto donations—and I expect to see a further increase in the near term, for a couple of reasons. First, there is now infrastructure in place that needed to be there to make crypto donations, including vendors that could do the valuation and processing.

Second, the regulations are starting to catch up to crypto. Despite the Federal Election Commission ruling at the federal level on how to treat crypto—the advisory opinion from 2014—there were a lot of smaller, but important, questions that had not yet been addressed, such as how do



Courtesy photo

Ki P. Hong, partner political law at Skadden.

you value crypto when you receive it? How do you value it when you liquidate it? How are you supposed to take care of the appreciation or the depreciation that occurs in between?

Those kinds of regulatory issues are now catching up to crypto. California just legalized crypto donations. The new rules went into effect on September 21, and other states are coming on board as well. So I do see an increase.

The challenges are in those small spaces that I just mentioned, particularly with valuation. Unlike a stock donation, crypto donations are

very volatile. The value can change at the drop of a hat within five minutes—so how do you value this crypto donation when you receive it, and when you liquidate? That's challenge No. 1.

The other challenge is confirming the identity of the donor, although that can usually be managed as there are ways to satisfy best effort standards in most states and at the federal level, too, to figure out at the very least who the account holder is in the crypto space. Those are some of the areas where the regulations are catching up and I think it's on the verge of cryptocurrencies [potentially] exploding in the political space.

How do you advise clients in relation to these recent developments? In my role as head of the political law group at Skadden, we deal with all of the laws that regulate or govern a company's interaction with the government or election-related activity. We advise clients not just on crypto, but all of the legal niceties that go around making political contributions—Pay-to-Play rules where a contribution by one of your executives or your board members or even their spouse's dependent children could automatically lead to a ban on the company's ability to contract with the government. In addition, we deal with lobbying rules and procurement lobbying rules, which is a subset of lobbying laws, government ethics and gifts and entertainment, conflict of interest laws as well as bidding.

We bring all of those laws to bear and look at the totality of the implications under all of these laws. That's the only real way to fully advise a client—to advise them on how all of these laws come together and can impact the circumstances at hand. And I think crypto is one of those areas. It's not just making political contributions—if I'm using crypto for other expenditures, let's say, transferring crypto to a certain organization

like a (c)4, that's not subject a lot of times to the political laws, but you have to think about those issues as well.

As counsel, our job is to meet the clients where they are and look at what their business is, where their stakeholders are and work with them to get to not just a legal resolution but a practical one that works for their business.

Looking forward, the crypto space is evolving quickly and legislators as well as regulators have some catching up to do. Where do you see the challenges? I still remember when emails and websites were new. It takes election boards and election commissions a while to catch up to new technology—this is one of those areas.

Part of the issue is that the regulators are still trying to understand crypto, which is the case with a lot of folks. They don't know whether to think of it as a fiat currency or whether they should just think of it as an asset—what the Federal Election Commission ended up viewing it as in the 2014 advisory opinion.

If it is an asset, how do you value it? How do you determine who owns it? Those are the questions they need to ask. I think they are starting to figure it out. For regulators, at least in the election law space, there's a consensus out there and they're viewing this like any other in kind contribution, such as if I were to hand you a stock in a company. There are long-standing analogies to that under most of these election laws.

I think the key areas to focus on are addressing transparency issues, addressing the valuation issue, and be very clear about it. That's what will bring much needed clarity as crypto continues to expand in this space.

