

The Ever-Evolving Cryptocurrency Legal Landscape

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06 / 19 / 18

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The market for cryptocurrencies and the current wave of initial coin offerings (ICOs) that seek to raise capital for blockchain-based projects have enjoyed a swell of popularity in recent years. U.S. regulatory agencies and private litigants have initiated proceedings that may affect the proliferation and regulation of cryptocurrencies, ICOs and the exchanges on which these digital assets are traded. Though the current legal landscape for cryptocurrency in the U.S. and other countries is subject to continual — and sometimes daily — changes, the outcomes of these various proceedings may provide an indication of what lies ahead.

Regulatory Oversight

In July 2017, the Securities and Exchange Commission (SEC) issued an investigative report in which it determined that certain ICO tokens called DAO tokens constituted investment contracts and thus were deemed securities under federal securities laws. (See our August 1, 2017, client alert [“SEC Issues Guidance on Regulation of Initial Coin Offerings.”](#)) In the report, the SEC applied the so-called “*Howey* test,” which provides that an investment contract exists where there is an investment of money in a common enterprise with a reasonable expectation of profits derived from the managerial efforts of others. In doing so, the SEC was careful to emphasize that this analysis was fact-specific and depended on individual circumstances, “including the economic realities of the transaction.” Shortly thereafter, in December 2017, the SEC issued a cease-and-desist order against Munchee Inc., a blockchain-based food review service and the issuer of MUN tokens. Again employing the *Howey* test, the SEC concluded that a MUN token was an “investment contract,” and thus a “security,” pursuant to Section 2(a)(1) of the Securities Act.

The SEC also has commenced a number of enforcement actions relating to ICOs and cryptocurrencies. The government recently asked Judge Raymond J. Dearie of the U.S. District Court for the Eastern District of New York to determine whether certain crypto tokens issued by REcoin Group Foundation fit the legal definition of “securities” under *Howey*. Oral argument was heard on May 8, 2018, though the court did not indicate when a ruling would be issued. On May 29, 2018, in *SEC v. Titanium Blockchain Infrastructure Services, Inc., et al.*, the SEC sought and received an order in federal court halting an ICO that had raised approximately \$21 million; the case involved allegations that the defendants provided false and misleading information regarding the services and customers of one of the defendant corporations.

At least some companies have responded to the SEC’s assertion of authority; on June 6, 2018, it was reported that both Coinbase Inc. and Circle Internet Financial Ltd., two of the largest cryptocurrency exchanges, would pursue registration as brokerages and trading venues with the SEC.

In September 2015, in *In re Coinflip, Inc.*, the Commodity Futures Trading Commission (CFTC) concluded that bitcoin and other cryptocurrencies fit within the definition of “commodities” under the Commodity Exchange Act (CEA). Judge Jack B. Weinstein of U.S. District Court for the Eastern District of New York recently reached the same conclusion in *CFTC v. McDonnell*, stating that the cryptocurrency at issue was a “commodity” subject to CFTC anti-fraud and anti-manipulation jurisdiction under the CEA, while also expressly recognizing that CFTC jurisdiction does not preclude regulation by other agencies. The CFTC has asked other courts to reach similar conclusions, including in *CFTC v. My Big Coin Pay, Inc., et al.* In addition, the CFTC issued guidance on May 21, 2018, to “help exchanges and clearinghouses effectively and efficiently

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discharge their statutory and self-regulatory responsibilities.” Importantly, the CFTC’s statements concern cryptocurrencies, and the commission has not taken a position on ICOs or the tokens they issue.

Additionally, various state regulators have begun investigating and pursuing cryptocurrency developers and exchanges, including the New York attorney general’s office, which launched an official inquiry into cryptocurrency platforms in April 2018. Moreover, the North American Securities Administrators Association announced a “wide ranging series of probes ... dubbed ‘Operation Crypto-Sweep’” on May 23, 2018, a move that SEC Chairman Jay Clayton has publicly supported.

How the various regulatory efforts outlined above may be coordinated and resolved remains an open question.

Private Actions

Beyond regulatory actions, numerous private civil litigations have cropped up across the country concerning various cryptocurrency-related issues. For example, a putative class action was recently initiated in federal court in California against Dynamic Ledger Solutions Inc. and others, alleging that the defendants offered the cryptocurrency Tezos in an improper unregistered securities offering in violation of California state laws. Numerous

similar actions have been filed against other cryptocurrency-related companies alleging that the ICO/cryptocurrency sale in question constituted an improper unregistered sale of “securities.”

Additionally, investors have brought lawsuits alleging securities fraud under Section 10(b) of the Securities Exchange Act. For example, in February 2018, a putative class action was brought in U.S. District Court for the District of New Jersey against Riot Blockchain, claiming that the company made material misstatements and omissions regarding the nature of its involvement in cryptocurrency and blockchain technologies.

Lastly, private plaintiffs have brought common law claims against companies and individuals operating in the cryptocurrency space, seeking remedies for breach of contract and unjust enrichment. Most of these cases remain in the preliminary stages, and none has yet to reach a final decision on the merits.

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The legal landscape regarding cryptocurrencies and ICOs continues to evolve. We intend to provide additional updates on such developments.

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