Some Legal Issues Surrounding Blockchain and Cryptocurrency
Part 3: Regulation of Cryptocurrencies.
Published September 11, 2018

This is Part 3 of a seven-part series of posts looking at some broad legal issues affecting crypto-currencies.

A. Regulatory Catch-Up.

As is often true of emerging technologies, the crypto-rush of the last few years has left regulators of all types struggling to catch up. The resulting confusion increases entrepreneurial and transactional risks, and also increases fraud risks (about the only thing all regulators agree about).

Various United States federal regulators have expressed interest in crypto-currencies, and claimed some jurisdiction over,

The Securities and Exchange Commission (“SEC”) has been active in policing many ICOs as unregistered securities offerings, has denied several applications for exchange-traded funds (“ETFs”) of cryptocurrencies, and is considered some broker-dealer and exchange registration applications focused on cryptocurrency (e.g., Coinbase).

The Commodities Futures Trading Commission (“CFTC”) regards cryptocurrencies as commodities subject to the Commodities Exchange Act and its accompanying regulations.

The Consumer Financial Protection Bureau (“CFPB”) has issued consumer warnings, but on July 18, 2018, appointed Paul Watkins to head up its Office of Innovation – a FinTech Regulatory Sandbox (like the one Watkins ran for Arizona).

The Office of the Comptroller of the Currency (“OCC”) just began accepting applications for national bank charters from nondepository banking institutions (in August 2018), with a view toward regulatory oversight of some cryptocurrency activities (and that might bring such activities into a “recognized banking product” exception to the Commodities Exchange Act (and CFTC jurisdiction).
The IRS, of course, is looking to tax digital assets and has collected 14,000 Coinbase account user’s activity logs. Financial Crimes Enforcement Network (“FINCEN”) within the Department of Treasury has indicated that cryptocurrency exchanges and administrators are subject to the Bank Secrecy Act (“BSA”) (with its anti-money laundering [“AML”] provisions) and must register as Money Services Businesses. The Office of Foreign Asset Control (“OFAC”) has indicated that it may be adding some crypto-wallet addresses to sanctions lists. Similarly, the G-20 is reported to be looking at the AML implications of cryptocurrencies – which pose heightened money-laundering risks.

Most of these federal regulators have resources devoted to cryptocurrencies on their websites.

Various States within the United States have gotten into the game as well. Most states have long-existing Money Transmitters Acts (think Western Union to wire money) and are applying them to cryptocurrency activities. Some states have implemented actual licensing, most famously New York’s “BitLicense” (Georgia and Connecticut also require licensing).


**B. “Commodity” under CFTC Jurisdiction.**

In 2014, the CFTC first held Bitcoin and other virtual currencies were “commodities” subject to regulation under the Commodity Exchange Act: 7 U.S.C. § § 1-27; 17 C.F.R. § 1 et seq.


The Chicago Mercantile Exchange (“CME”) and CBOE Futures Exchange (“CFE”) self-certified new contracts for bitcoin futures in late 2017. The self-certification process is sort of a “sandbox-lite” to encourage innovation in the futures and derivatives markets, but the CFTC has engaged in “heightened review” of these self-certified cryptocurrency contracts. *See CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets, here: [https://www.cftc.gov/sites/default/files/idc/groups/public/%40%20customerprotection/documents/file/backgrounder-virtualcurrencymarkets01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/%40%20customerprotection/documents/file/backgrounder-virtualcurrencymarkets01.pdf).*

The CFTC’s resource page is here: [https://www.cftc.gov/Bitcoin/index.htm](https://www.cftc.gov/Bitcoin/index.htm)

**C. Spot Market & Leveraged Retail Transactions.**

Under the CFTC’s more recent actions, cash-delivery spot trades may avoid regulation. However, if a transaction involves a “retail” customer and leverage, it will be subject to regulation unless it complies with 28-day physical delivery (entitling it to “spot-market” treatment). We’ll look more closely at the evolution this CFTC view in the rest of the series.
Next, in Part 4: Commodities Before Dodd-Frank: Zelener & Erskine.

Thomas K. Potter, III ([tpotter@burr.com](mailto:tpotter@burr.com)) is a partner in the Securities Litigation Practice Group at Burr & Forman, LLP. Tom is licensed in Tennessee, Texas and Louisiana. He has over 32 years’ experience representing financial institutions in litigation, regulatory and compliance matters. [See attorney profile.](mailto:tpotter@burr.com) © 2018 by Thomas K. Potter, III (all rights reserved).

Author

[Thomas K. Potter III](mailto:tpotter@burr.com)
Partner
Nashville, TN