

February 5, 2018

## Financial Services Update

### Federal Regulation of Cryptocurrencies

#### Introduction

This memorandum will provide a survey of federal action on cryptocurrencies (aka virtual currencies), including enforcement and guidance. At present, some federal regulators have begun asserting oversight and enforcement authority under their existing powers while other potential regulators have not yet indicated publicly what, if any, oversight they will exercise. Other federal stakeholders on cryptocurrencies have also begun to engage. However, the U.S. government's approach to virtual currencies remains fluid.

#### SEC and CFTC

On January 24, 2018 Securities and Exchange Commission (SEC) Chairman Jay Clayton and Commodity Futures Trading Commission (CFTC) Chairman J. Christopher Giancarlo published an [op-ed](#) in the *Wall Street Journal* titled "Regulators Are Looking at Cryptocurrency," in which they explained, "[o]ur task, as market regulators, is to set and enforce rules that foster innovation while promoting market integrity and confidence." They noted "[e]arlier this month, the collective market capitalization of cryptocurrencies topped \$700 billion." Clayton and Giancarlo stated that "[d]irect participation by U.S. investors in cryptocurrencies is significant...[and] [t]he prices for these currencies are set by trading on 'spot' platforms." They stated that "[m]any of these platforms are based offshore—and none are registered with the CFTC or the SEC."

Clayton and Giancarlo asserted that "[a] key issue before market regulators is whether our historical approach to the regulation of currency transactions is appropriate for the cryptocurrency markets." They explained that "[c]heck-cashing and money-transmission services that operate in the U.S. are primarily regulated by states...[and] [m]any of the internet-based cryptocurrency-trading platforms have registered as payment services and are not subject to direct oversight by the SEC or the CFTC." Clayton and Giancarlo said "[w]e would support policy efforts to revisit these frameworks and ensure they are effective and efficient for the digital era."

Clayton and Giancarlo explained that "[i]n some areas, federal authority to police cryptocurrencies is clear." They stated that "[t]he Bank Secrecy Act and its implementing regulations establish federal

anti-money-laundering obligations that apply to most people engaged in the business of accepting and transmitting, selling or storing cryptocurrencies.” Clayton and Giancarlo said that “[i]n other areas, some say, federal authority is murkier.” They stated that “[s]ome proponents of cryptocurrencies note that the jurisdiction of the CFTC and SEC over cryptocurrency transactions is limited and cite the absence of U.S. and other government market regulation as an investment attribute. Such claims should give prospective investors pause.”

Clayton and Giancarlo explained that “[r]ecently, two of the largest CFTC-regulated exchanges listed bitcoin futures products...[and] [a]s a result, the CFTC gained oversight over the U.S. bitcoin futures market and access to data that can facilitate the detection and pursuit of bad actors in underlying spot markets.” They stated that “[t]he SEC does not have direct oversight of transactions in currencies or commodities...[y]et some products that are labeled cryptocurrencies have characteristics that make them securities.” Clayton and Giancarlo said that “[t]he offer, sale and trading of such products must be carried out in compliance with securities law...[and] [t]he SEC will vigorously pursue those who seek to evade the registration, disclosure and antifraud requirements of our securities laws. In addition, the SEC is monitoring the cryptocurrency-related activities of the market participants it regulates, including broker-dealers, investment advisers and trading platforms.

To date, both the SEC and CFTC have used their existing authorities to assert jurisdiction over some aspects of virtual or crypto currencies.

At a January 31 CFTC Market Risk Advisory Committee (MRAC) Committee [meeting](#), Giancarlo said:

In fact, it is Designated Contract Markets (DCMs) and Designated Clearing Organizations (DCOs) - and not CFTC staff - that must solicit and address stakeholder concerns in new product self-certifications. Interested parties, especially clearing members, should indeed have an opportunity to raise appropriate concerns for consideration by regulated platforms proposing virtual currency derivatives and DCOs considering clearing new virtual currency products.

That is why I have asked CFTC staff to add an additional element to its Review and Compliance Checklist for virtual currency product self-certifications. That is requiring DCMs and Swaps Execution Facilities (SEFs) to disclose to CFTC staff what steps they have taken in their capacity as self-regulatory organizations to gather and accommodate appropriate input from concerned parties, including trading firms and Futures Commission Merchants (FCMs). Further, I have asked staff to take a close look at DCO governance around the clearing of new virtual currency products and formulate recommendations for possible further action. There may well be other improvements to consider.

On January 18, the SEC’s Division of Investment Management released a staff [letter](#) regarding the creation of registered funds holding cryptocurrencies and cryptocurrency-related products. In the letter to the Investment Company Institute (ICI) and the Securities Industry and Financial Markets

Association (SIFMA), Division of Investment Management Director Dalia Blass stated that while the Division is open to engagement on these funds, “there are a number of significant investor protection issues that need to be examined before sponsors begin offering these funds to retail investors.” Blass went on to describe several areas in which the SEC has significant concerns: (1) valuation; (2) liquidity; (3) custody; (4) arbitrage; (5) potential manipulation and other risks.

Blass concluded by stating:

Until the questions identified above can be addressed satisfactorily, we do not believe that it is appropriate for fund sponsors to initiate registration of funds that intend to invest substantially in cryptocurrency and related products, and we have asked sponsors that have registration statements filed for such products to withdraw them.

In December 2017, Clayton released a “[Statement on Cryptocurrencies and Initial Coin Offerings](#).” Clayton said “[t]his statement is my own and does not reflect the views of any other Commissioner or the Commission...[and] is not, and should not be taken as, a definitive discussion of applicable law, all the relevant risks with respect to these products, or a statement of my position on any particular product.” Clayton detailed a list of questions and concerns those advising clients and those investing should consider when dealing with virtual or crypto currencies.

In November 2017, the SEC warned in a [public statement](#) that “virtual tokens or coins sold in ICOs may be securities, and those who offer and sell securities in the United States must comply with the federal securities laws”. Moreover, in July 2017, the SEC “issued a [Report of Investigation under Section 21\(a\)](#) of the Securities Exchange Act of 1934 describing an SEC investigation of The DAO, a virtual organization, and its use of distributed ledger or blockchain technology to facilitate the offer and sale of DAO Tokens to raise capital.” The SEC “applied existing U.S. federal securities laws to this new paradigm, determining that DAO Tokens were securities.” The SEC “stressed that those who offer and sell securities in the U.S. are required to comply with federal securities laws, regardless of whether those securities are purchased with virtual currencies or distributed with blockchain technology.”

In January 2018, the CFTC released a “[Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets](#),” that “provides clarity regarding federal oversight of and jurisdiction over virtual currencies; the CFTC’s approach to regulation of virtual currencies; the self-certification process generally, as well as specifically regarding the recent self-certification of new contracts for bitcoin futures products by designated contract markets (DCMs); background on the CFTC’s “heightened review” for virtual currency contracts; and a discussion of the constituencies the CFTC believes could be impacted by virtual currency futures.” The CFTC noted it “declared virtual currencies to be a “commodity” subject to oversight under its authority under the Commodity Exchange Act (CEA)” in 2014. The CFTC acknowledged that “US law does not provide for direct, comprehensive Federal oversight of underlying Bitcoin or virtual currency spot markets...[and] [a]s a result, US regulation of virtual currencies has evolved into a multifaceted, multi-regulatory approach:

- State Banking regulators oversee certain US and foreign virtual currency spot exchanges largely through state money transfer laws.
- The Internal Revenue Service (IRS) treats virtual currencies as property subject to capital gains tax.
- The Treasury’s Financial Crimes Enforcement Network (FinCEN) monitors Bitcoin and other virtual currency transfers for anti-money laundering purposes.
- The SEC takes increasingly strong action against unregistered initial coin offerings.

In October 2017, the CFTC released a [Primer on Virtual Currencies](#), which was “intended to be an educational tool regarding emerging FinTech innovations...[and] is not intended to describe the official policy or position of the CFTC, or to limit the CFTC’s current or future positions or actions.”

### SEC and CFTC Statements and Guidance

- J. Christopher Giancarlo – January 4, 2018- statement on virtual currencies. Notes the risks of the technology and the CFTC’s response thus far. <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement010418>
- CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets- January 4, 2018- [http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/backgrounder\\_virtualcurrency01.pdf](http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf)
- Giancarlo Commends SEC Chairman Clayton on ICO Statement- December 11, 2017- <http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement121117>
- CFTC Launches Virtual Currency Resource Web Page- December 15, 2017- <http://www.cftc.gov/PressRoom/PressReleases/pr7665-17>
- CFTC Issues Proposed Interpretation on Virtual Currency “Actual Delivery” in Retail Transactions- December 15, 2017- <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2017-27421a.pdf>
- CFTC Statement on Self-Certification of Bitcoin Products by CME, CFE and Cantor Exchange- December 1, 2017- [http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/bitcoin\\_factsheet120117.pdf](http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/bitcoin_factsheet120117.pdf)
- Joint statement from CFTC and SEC Enforcement Directors Regarding Virtual Currency Enforcement Actions- January 19, 2018- <http://www.cftc.gov/PressRoom/PressReleases/mcdonaldstatement011918>
- SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities- July 25, 2017- <http://www.sec.gov/litigation/investreport/34-81207.pdf>
- Statement by the Divisions of Corporation Finance and Enforcement on the Report of Investigation on The DAO- July 25, 2017- <https://www.sec.gov/news/public-statement/corpfin-enforcement-statement-report-investigation-dao>

- SEC INVESTOR BULLETIN: INITIAL COIN OFFERINGS- July 25, 2017- <https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-initial-coin-offerings>

## DOJ

In 2015, then Assistant Attorney General Leslie R. Caldwell made [remarks](#) on the Department of Justice’s (DOJ) approach to cryptocurrencies. She asserted “virtual currency facilitates a wide range of traditional criminal activities as well as sophisticated cybercrime schemes.” Caldwell explained that “we rely principally on money services business, money transmission and anti-money laundering statutes.” She said that “[w]hether the currency involved is virtual or traditional, the [DOJ] enforces these critical laws to prosecute money services businesses that engage in money laundering or facilitate crime by flouting registration and licensing requirements.” She added that the DOJ’s enforcement actions have evolved along with the virtual currency ecosystem.” Caldwell stated that “[a]s the virtual currency markets attempt to move past their association with the Silk Roads and Liberty Reserves of the online world, are used to finance legitimate activity, and are becoming increasingly subject to regulation, robust compliance with existing anti-money laundering laws and regulations is necessary – indeed, critical – to bolster the reliability and value of virtual currency.”

## Treasury

A number of the Department of the Treasury’s component agencies have addressed various aspects of cryptocurrencies, including the assertion of jurisdiction.

In March 2014, the Internal Revenue Service (IRS) released [Notice 2014-21](#) that “describes how existing general tax principles apply to transactions using virtual currency...[and] provides this guidance in the form of answers to frequently asked questions.”

In March 2013, the Financial Crimes Enforcement Network (FinCEN) issued an [interpretive guidance](#) to clarify the applicability of the regulations implementing the Bank Secrecy Act (BSA) to persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies.” FinCEN determined that “[a] user of virtual currency is not an MSB under FinCEN’s regulations and therefore is not subject to MSB registration, reporting, and recordkeeping regulations...[h]owever, an administrator or exchanger is an MSB under FinCEN’s regulations, specifically, a money transmitter, unless a limitation to or exemption from the definition applies to the person.”

In January 2018, the Department of the Treasury’s Office of Foreign Assets Control (OFAC) updated its [FAQs](#) on sanctions levied on Venezuela in response to media reports that the country may issue commodity backed cryptocurrency. OFAC explained that “[a] currency with these characteristics would appear to be an extension of credit to the Venezuelan government...[and] Executive Order 13808 prohibits U.S. persons from extending or otherwise dealing in new debt with a maturity of greater than 30 days of the Government of Venezuela.” OFAC cautioned that “U.S.

persons that deal in the prospective Venezuelan digital currency may be exposed to U.S. sanctions risk.”

## **Federal Reserve**

So far, the Federal Reserve Board has not asserted oversight authority over virtual or crypto currencies. Instead, the agency released a staff working paper titled “[Distributed ledger technology in payments, clearing, and settlement](#),” which “examined how distributed ledger technology (DLT) can be used in the area of payments, clearing and settlement and identifies both the opportunities and challenges facing its long-term implementation and adoption.”

## **NIST**

A key authority weighed in on these issues with a general survey of blockchain. In January 2018, the National Institute of Standards and Technology (NIST) has released for comment the “[Draft NIST Interagency Report \(NISTIR\) 8202: Blockchain Technology Overview](#),” which “provides a high-level technical overview of blockchain technology.” Comments are due by February 23, 2018. NIST noted that the draft report “discusses its application to electronic currency in depth, but also shows its broader applications...[and its] purpose is to help readers understand how blockchains work, so that they can be appropriately and usefully applied to technology problems.” NIST added that its report “explores some specific blockchain applications and some examples of when a blockchain system should be considered for use.”

NIST stated that “[b]ecause there are countless news articles and videos describing the “magic” of the blockchain, this paper aims to describe the method behind the magic (i.e., how a blockchain system works).” NIST stated that “[t]here is a high level of hype around the use of blockchains, yet the technology is not well understood.” NIST explained that “[i]t is not magical; it will not solve all problems...[and] [a]s with all new technology, there is a tendency to want to apply it to every sector in every way imaginable.”

NIST acknowledged that “blockchain technology is the foundation of modern cryptocurrencies, so named because of blockchain’s heavy usage of cryptographic functions.” NIST noted that “blockchain technology is more broadly applicable than its application to cryptocurrencies.” NIST explained that “[c]ompanies that need to maintain a public record, such as holding land title, marriage, or birth records, should consider how their problem sets might be addressed by blockchain technologies.” NIST stated that “[b]lockchains also have strong potential for storing and recording supply chain records...[because a] blockchain can record each step in a product's life, from when it was created in a factory, to when it was shipped and subsequently delivered to a store, and finally to when a consumer purchased it.” NIST stated that “[t]here may even be new industries, such as digital notaries who can prove a person had access to a specific piece of information by recording the hash of it into the blockchain.” NIST claimed “[t]here are many potential uses and opportunities for blockchain technologies.”

## GAO

In April 2017, the Government Accountability Office (GAO) released a report titled “[FINANCIAL TECHNOLOGY: Information on Subsectors and Regulatory Oversight](#),” which covers the area of financial technology more broadly than crypto currencies. Interestingly, it listed a number of agencies that may be able to assert jurisdiction over these activities including:

- Federal Reserve System
- Federal Deposit Insurance Corporation
- National Credit Union Administration
- Office of the Comptroller of the Currency
- Bureau of Consumer Financial Protection
- Department of the Treasury FinCEN
- Federal Communications Commission
- Federal Trade Commission
- SEC
- CFTC
- State banking regulators
- State securities regulators

However, in June 2014, the GAO looked more closely at these issues and released its report “[VIRTUAL CURRENCIES: Emerging Regulatory, Law Enforcement, and Consumer Protection Challenges](#),” which “discusses (1) federal financial regulatory and law enforcement agency responsibilities related to the use of virtual currencies and associated challenges and (2) actions and collaborative efforts the agencies have undertaken regarding virtual currencies.”

The GAO stated that “Bitcoin and other virtual currencies are technological innovations that provide users with certain benefits but also pose a number of risks.” The GAO stated that “[b]ecause virtual currencies touch on the responsibilities of multiple federal agencies, addressing these risks will require effective interagency collaboration.” The GAO stated that “[t]hus far, interagency efforts have had a law enforcement focus, reflecting the attractiveness of virtual currencies to those who may want to launder money or purchase black market items...[and] [i]f virtual currencies become more widely used, other types of regulatory and enforcement issues may come to the forefront.”

The GAO stated that “[t]o help ensure that federal interagency collaboration on virtual currencies addresses emerging consumer protection issues, we recommend that the Director of the Consumer Financial Protection Bureau (CFPB) (1) identify which interagency working groups could help CFPB maintain awareness of these issues or would benefit from CFPB’s participation; and (2) decide, in coordination with the agencies already participating in these efforts, which ones CFPB should participate in.”

### Enforcement Actions

Below are lists of SEC, CFTC, and DOJ enforcement actions on crypto or virtual currencies.

## SEC:

- *SEC v. Trendon T. Shavers and Bitcoin Savings and Trust*, Civil Action No. 4:13- CV-416 (E.D. Tex., complaint filed July 23, 2013), <https://www.sec.gov/litigation/complaints/2013/comp-pr2013-132.pdf> - This case involves fraudulent offers and sales of securities by Shavers and BTCST, a Bitcoin-denominated Ponzi scheme.
- *In re Erik T. Voorbees*, Rel. No. 33-9592 (June 3, 2014), <https://www.sec.gov/litigation/admin/2014/33-9592.pdf> - unregistered offerings of shares of FeedZeBirds and SatoshiDICE in exchange for Bitcoins- SEC filed a cease and desist order, \$15,000 disgorgement and \$35,000 in civil monetary penalties.
- *In re BTC Trading, Corp. and Ethan Burnside*, Rel. No. 33-9685 (Dec. 8, 2014), <https://www.sec.gov/litigation/admin/2014/33-9685.pdf> - cease and desist order for unregistered, online, virtual currency-denominated securities exchanges and broker- dealers – disgorgement of \$58,387.07 and \$10,000 in civil monetary penalties.
- *SEC v. Homero Joshua Garza, Gaw Miners, LLC, and ZenMiner, LLC (d/b/a Zen Cloud)*, Civil Action No. 3:15-CV-01760 (D. Conn., complaint filed Dec. 1, 2015) , <https://www.sec.gov/litigation/complaints/2015/comp23415.pdf> - defendants sold – to over 10,000 investors – investment contracts representing shares in the profits they claimed would be generated from using their purported computing power to “mine” for virtual currency- SEC requests permanent injunction.
- *In re Bitcoin Investment Trust and SecondMarket, Inc.*, Rel. No. 34-78282 (July 11, 2016), <https://www.sec.gov/litigation/admin/2016/34-78282.pdf> - SecondMarket purchased 85,721 BIT shares from shareholders during the restricted period in violation of Rule 101 of Regulation M of the Exchange Act – cease and desist order, disgorgement of \$53,755.79.
- *In re Sunshine Capital, Inc.*, File No. 500-1 (Apr. 11, 2017), <https://www.sec.gov/litigation/suspensions/2017/34-80435.pdf> - The Commission temporarily suspended trading in the securities of SCNP because of questions regarding the accuracy of assertions by SCNP in press releases to investors concerning, among other things, the liquidity and value of the company’s assets.
- AriseBank, charged by the SEC with alleged fraud and issuing unregistered securities during its recent initial coin offering (ICO), <https://www.sec.gov/news/press-release/2018-8> , <https://www.sec.gov/litigation/complaints/2018/comp-pr2018-8.pdf>
- The Crypto Company - <http://money.cnn.com/2017/12/19/investing/bitcoin-cryptocurrencies-sec-bubble/index.html> - The Securities and Exchange Commission suspended trading December 19 until January 3, citing “concerns regarding the accuracy and adequacy of information” about compensation paid to promote the firm and plans for insider sales.
- PLEXCORPS - <https://www.sec.gov/litigation/complaints/2017/comp-pr2017-219.pdf> - emergency asset freeze to halt a fast-moving Initial Coin Offering (ICO) fraud that raised up to \$15 million from thousands of investors since August by falsely promising a 13-fold profit in less than a month.

- My Big Coin Pay, Inc., along with its agents Randall Crater and Mark Gillespie, <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfmybigcoinpaycomplt011618.pdf> -for allegedly making materially misleading statements in connection with the offer and sale of a “fully functioning” virtual currency called My Big Coin (“MBC”), and misappropriating customer funds for Ponzi-style payments and personal enrichment.
- In the Matter of MUNCHEE INC., <https://www.sec.gov/litigation/admin/2017/33-10445.pdf> - California-based company selling digital tokens to investors to raise capital for its blockchain-based food review service halted its initial coin offering (ICO) after being contacted by the Securities and Exchange Commission, and agreed to an order in which the Commission found that its conduct constituted unregistered securities offers and sales.
- RECOIN GROUP FOUNDATION, LLC, DRC: WORLD INC. a/k/a DIAMOND RESERVE CLUB: and MAKSIM ZASLAVSKIY, <https://www.sec.gov/litigation/complaints/2017/comp-pr2017-185.pdf> - Maksim Zaslavskiy and his companies have been selling unregistered securities, and the digital tokens or coins being peddled don’t really exist.
- DAO Tokens- <https://www.sec.gov/litigation/investreport/34-81207.pdf> - found that tokens offered and sold by a “virtual” organization known as “The DAO” were securities and therefore subject to the federal securities laws.

***CFTC:***

- CFTC v. Dillon Michael Dean and The Entrepreneurs Headquarters Limited-<http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfentrepreneurscomplt011818.pdf>, alleged Ponzi scheme for options fraud, failure to register as a Commodity Pool Operator (“CPO”) and as an Associated Person of a CPO, and CPO fraud.
- CFTC v. Patrick K. McDonnell and CabbageTech, Corp. d/b/a Coin Drop Markets-<http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcdmcomplaint011818.pdf> - asserts that the Defendants fraudulently induced customers to send them funds in exchange for purported virtual currency trading advice and investment and trading services.
- CFTC v. Nicholas Gelfman, and Gelfman Blueprint, Inc. (GBI), <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfgelfmancomplaint09212017.pdf> - charging them with fraud, misappropriation, and issuing false account statements in connection with solicited investments in Bitcoin, a virtual currency.

***DOJ:***

- *United States v. Faiella*, 39 F. Supp. 3d 544 (S.D.N.Y. 2014)-holding that Bitcoin qualifies as ‘money’ or ‘funds’ for purposes of unlicensed money transmitting business and conspiracy to commit money laundering.

- *United States v. Murgio*, No. 15-cr-769, 2016 WL 5107128, at \*4 (S.D.N.Y. Sep. 19, 2016)-holding that the [I.R.S. Notice 2014-21](#) does not forestall criminal liability under 18 USC §1960.
- *United States v. Budovsky*, No. 15-cr-368, 2015 WL 5602853 (S.D.N.Y. Sep. 23, 2015))-holding that the [I.R.S. Notice 2014-21](#) does not forestall criminal liability under 18 USC §1960.
- *United States v. Mansy*, No. 2:15-cr-198-GZS, 2017 U.S. Dist. LEXIS 71786 (D. Me. May 11, 2017)-holding that virtual currencies are money or funds and are therefore subject to 18 USC §1960.
- *United States v. Klein*, No. 17-03056-01-CR-S-MDH, 2017 U.S. Dist. LEXIS 74799 (W.D. Mo. May 17, 2017)-holding that virtual currencies are money or funds and are therefore subject to 18 USC §1960.

## Conclusion

There continues to be great uncertainty with federal regulation of crypto and virtual currencies by the federal agencies that are or may be able to assert oversight and jurisdiction. However, it appears no one agency will be able to assert complete jurisdiction over these new instruments, meaning there may continue to be overlapping, possibly even conflicting regulation. Unless Congress chooses to clear away ambiguities, a number of agencies will continue to be stakeholders on crypto and virtual currencies.

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