

MEET THE NEW BOSS, SAME AS THE OLD BOSS: HOW FEDERAL AGENCIES
HAVE LEVERAGED EXISTING LAW TO REGULATE CRYPTOCURRENCY

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INTRODUCTION

In December 2017, Bitcoin mania gripped the world. In the space of a year, the digital currency's price skyrocketed, increasing from around \$1,000 per Bitcoin to nearly \$20,000.¹ In just a few days, it crashed below \$11,000.² For many casual observers, Bitcoin's story ended with this wild fluctuation. In the years since, however, the blockchain technology underlying Bitcoin has matured into an industry of its own. Applications built on blockchain protocols have proliferated, and digital assets, many of them cryptocurrencies modeled after Bitcoin, have similarly multiplied.

Cryptocurrency and its increasingly varied uses present a new regulatory frontier. As is the case with many new technologies, criminals proved among the first adopters of cryptocurrency.³ For a time, it was not clear how the government would impose discipline on what seemed a lawless environment. Absent legislation on the subject, the Internal Revenue Service (IRS), the Financial Crimes Enforcement Network (FinCEN), the Commodity Futures Trading Commission (CFTC), and the Securities and Exchange Commission (SEC) have all leveraged existing laws to bring cryptocurrencies within their jurisdiction. These laws typically include a criminal element, though the agencies have generally opted for civil enforcement over referral to the Department of Justice (DOJ) for criminal prosecution.

In light of the above, this contribution provides a survey of how different agencies have regulated cryptocurrencies under their existing laws, and considers some criminal implications of this regulatory action.

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¹ David Z. Morris, *Bitcoin Hits a New Record High, But Stops Short of \$20,000*, FORTUNE, Dec. 17, 2017, <https://fortune.com/2017/12/17/bitcoin-record-high-short-of-20000/>.

² Nathaniel Popper & Tiffany Hsu, *Bitcoin Plummets More Than 30 Percent in Less Than a Day*, N.Y. TIMES, Dec. 22, 2017, <https://www.nytimes.com/2017/12/22/business/bitcoin-plunges-more-than-25-percent-in-24-hours.html>.

³ Principal among these early adopters was the Silk Road. An online marketplace on which users exchanged narcotics and other illegal goods, The Silk Road was shut down in 2013. Bitcoin was the currency of choice on the marketplace. Prosecution emerging from the Silk Road's closure resulted in a life sentence for founder Ross Ulbricht. *United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017).

Part I provides background information on blockchain technology and initial coin offerings. Part II addresses actions that the IRS, CFTC, and FinCEN have taken to regulate this new technology. Part III focuses on the SEC's approach, as the agency has thus far served as the industry's primary regulator. The article concludes by identifying questions as to how this regulatory framework will function going forward.

I. BLOCKCHAIN TECHNOLOGY AND THE INITIAL COIN OFFERING

Blockchain technology is, at its simplest, a means of permanently recording transactions without relying on an intermediary.⁴ A blockchain is a ledger of information stored across multiple participating computers in such a way as to prevent retroactive alteration.⁵ The technology was pioneered by the Bitcoin network, which uses its blockchain to record exchanges of its eponymous cryptocurrency.⁶

Blockchain projects have proliferated in the wake of this early success. These projects provide uses as varied as the internet itself and often deploy their own associated digital tokens.⁷ These tokens vary dramatically in their utility, value, and technological infrastructure. While some tokens are limited to their utility within the network,⁸ others are exchanged amongst users and actively traded on secondary markets.⁹

When launching, projects will often hold an "initial coin offering" (ICO) whereby they offer the token native to their platform for sale.¹⁰ These offerings allow users to purchase the project's tokens, and provide a means for the projects to raise funds.¹¹

⁴ PRIMAVERA DE FILIPPI & AARON WRIGHT, *BLOCKCHAIN AND THE LAW: THE RULE OF CODE 22* (2018).

⁵ Michael Mendelson, *From Initial Coin Offerings to Security Tokens: A U.S. Federal Securities Law Analysis*, 22 *STAN. TECH. L. REV.* 52, 56–57 (2019).

⁶ *Id.* at 58.

⁷ For example, internet browser Brave operates a blockchain to reward its users for viewing online advertisements and denominates those rewards in its native cryptocurrency, the Basic Attention Token (BAT). BRAVE SOFTWARE, *BASIC ATTENTION TOKEN: BLOCKCHAIN BASED DIGITAL ADVERTISING 1* (2018), <https://basicattentiontoken.org/BasicAttentionTokenWhitePaper-4.pdf>. Protocol labs deploys blockchain technology to allow users to rent electronic file storage on another's computers and uses its token, Filecoin, as a medium of exchange for storage space. PROTOCOL LABS, *FILECOIN: A DECENTRALIZED STORAGE NETWORK 1* (2017), <https://filecoin.io/filecoin.pdf>. Online prediction market Augur uses a blockchain to facilitate gambling on the outcomes of real-world events, and uses its cryptocurrency, Reputation ("REP"), to denominate and reward those bets. JACK PETERSON, ET AL., *AUGUR: A DECENTRALIZED ORACLE AND PREDICTION MARKET PLATFORM (V2.0) 1* (2019), <https://www.augur.net/whitepaper.pdf>.

⁸ De Filippi & Wright, *supra* note 4, at 100.

⁹ For example, secondary exchange Coinbase allows users to trade more than 15 different cryptocurrencies. *Prices*, COINBASE, <https://www.coinbase.com/price> (last visited December 11, 2019).

¹⁰ De Filippi & Wright, *supra* note 4, at 100.

¹¹ *Id.*

This new technology, and in particular the cryptocurrencies that make use of it, have attracted the attention of criminals and regulators alike. Seeking to prevent criminal activity associated with and facilitated by cryptocurrency, federal agencies have stepped in to regulate the emerging space with a similarly wide array of criminal implications.

II. ACTIONS TAKEN BY THE IRS, CFTC, AND FINCEN

Cryptocurrency is big business. The largest ICOs have generated billions of dollars for their issuers.¹² Coinbase, the largest cryptocurrency exchange, has more 30 million users, and has hosted the exchange of more than \$150 billion in cryptocurrency.¹³ Accordingly, the United States agencies responsible for financial regulation have taken interest in the industry. The IRS, CFTC, FinCEN, and SEC have all claimed partial jurisdiction over the regulation of cryptocurrency. All have done so by declaring that cryptocurrencies meet the definition of a class of assets within their purview, effectively defining their way to regulatory authority.

A. IRS

In 2014, the IRS reported that it would treat cryptocurrencies as “property” for the purposes of federal taxation.¹⁴ This declaration subjects the purchase, sale, and exchange of cryptocurrencies to the collection authority of the IRS.¹⁵ The sale of a cryptocurrency for a profit will typically constitute a capital gain.¹⁶ Likewise, purchasing goods or services in exchange for cryptocurrency typically constitutes the sale of the asset, also taxable as a capital gain.¹⁷ This designation subjects cryptocurrency users to liability for tax evasion, among other tax crimes, should they fail to disclose information related to their holdings.¹⁸

The IRS has signaled that it intends to pursue those who neglect disclosure of their cryptocurrency gains. In November 2017, the agency secured a judicial order demanding that Coinbase disclose the names and transaction records of all account holders who engaged in at least one cryptocurrency transaction worth \$20,000 or more in 2013 through 2015.¹⁹ The IRS analysis found that in each year during that period, fewer

¹² Olga Kharif, *How's that ICO Working Out? Breaking Down the Biggest ICOs from the Past Few Years*, BLOOMBERG BUSINESSWEEK, December 14, 2018.

¹³ *About Coinbase*, COINBASE, <https://www.coinbase.com/about> (last visited Dec. 11, 2019).

¹⁴ I.R.S. Notice 2014-21, 2014-16 I.R.B., https://www.irs.gov/irb/2014-16_IRB#NOT-2014-21.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 26 U.S.C. § 7201 (2018).

¹⁹ *United States v. Coinbase, Inc.*, No. 17-CV-01431-JSC, 2017 WL 5890052, at *8 (N.D. Cal. 2017).

than 800 United States citizens included cryptocurrency gains in electronic tax filings,²⁰ even though at the end of 2013, Coinbase had around 650,000 users, and now boasts more than 30 million.²¹ In July 2019, the IRS sent more than 10,000 letters informing individuals that they may owe taxes on digital holdings.²²

While the IRS has not yet referred any cryptocurrency-related tax evasion to the DOJ for prosecution, its demands of Coinbase and notice to taxpayers indicate that it may be preparing to do so.

B. CFTC

The CFTC has determined that cryptocurrencies can be “commodities” within its regulatory authority under the Commodities Exchange Act.²³ The CFTC first exercised this authority against Coinflip, a business that was offering put and call options on Bitcoin.²⁴ The CFTC determined that these contracts fell within its jurisdiction and required Coinflip to comply with its rules and regulations going forward.²⁵ Coinflip and its CEO cooperated with the CFTC and its investigation, and the matter did not include any criminal charges.²⁶

Federal district courts in New York and Massachusetts have confirmed the determination that cryptocurrencies may be commodities in the context of CFTC civil enforcement actions.²⁷ In *CFTC v. McDonnell*, the Eastern District of New York found virtual currencies to be commodities subject to the CFTC’s regulatory protections, enabling a civil enforcement action to proceed against defendant Patrick K. McDonnell.²⁸ Cryptocurrencies, the court reasoned, “fall well within the common definition of ‘commodity’ as well as the [Commodities Exchange Act’s] definition of ‘commodities’ as ‘all other goods and articles . . . in which contracts for future delivery are presently or in the future dealt in.’”²⁹

The District of Massachusetts has further affirmed this definition.³⁰ In *CFTC v. My Big Coin Pay, Inc.*, Judge Rya Zobel reasoned that, because “My Big Coin is a virtual currency, and it is undisputed that there is futures trading in virtual currency,” the CFTC had sufficiently established

²⁰ *Id.* at *1.

²¹ Laura Saunders, *IRS to Cryptocurrency Owners: Come Clean, or Else!*, WALL ST. J., Aug. 16, 2019, at 3, <https://www.wsj.com/articles/irs-to-cryptocurrency-owners-come-clean-or-else-11565956801>.

²² *Id.*

²³ *In re* Coinflip, Inc., CFTC No. 15-29, 2015 WL 5535736, at *2 (Sep. 17, 2015).

²⁴ *Id.* at *1.

²⁵ *Id.* at *2–4.

²⁶ *Id.*

²⁷ *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018); *CFTC v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, 496–97 (D. Mass. 2018).

²⁸ *McDonnell*, 287 F. Supp. 3d at 228.

²⁹ *Id.* at 217 (citing 7 U.S.C. § 1(a)(9) (2018)).

³⁰ *My Big Coin Pay, Inc.*, 334 F. Supp. 3d at 498.

that the token could constitute a commodity within its regulatory purview.³¹

In March 2018, Patrick K. McDonnell pled guilty to criminal charges emerging from the same scheme that prompted the CFTC’s enforcement action in *CFTC v. McDonnell*.³² While he was indicted under general mail and wire fraud statutes, rather than under the Commodities Exchange Act, the prosecution indicates that the CFTC is willing to refer its enforcement investigations to the DOJ.³³

The CFTC’s jurisdiction over cryptocurrencies is thus confirmed by caselaw in two districts, and the agency has proven willing to refer violators of the laws within its purview for criminal prosecution.

C. *FinCEN*

The Financial Crimes Enforcement Network (“FinCEN”) has determined that cryptocurrencies constitute “funds” for the purposes of its regulatory authority.³⁴ The Bank Secrecy Act, which FinCEN is responsible for enforcing, imposes substantial reporting requirements on institutions that it deems “money services businesses” (MSBs).³⁵ Organizations that transfer “funds” within the meaning of the Bank Secrecy Act are considered MSBs.³⁶ Failure to register an entity as a MSB is a criminal offense³⁷ and can lead to substantial civil penalties.³⁸

This designation of cryptocurrency as “funds” within the meaning of the Bank Secrecy Act potentially subjects businesses dealing in cryptocurrency to reporting requirements for MSBs. In 2013, FinCEN issued guidance applying its MSB designation to the exchange of cryptocurrency.³⁹ It stated that people who merely exchange goods or services for cryptocurrency are not subject to FinCEN regulation.⁴⁰ However, entities engaged in the business of exchanging cryptocurrency for fiat currency or for other cryptocurrencies may be considered MSBs

³¹ *Id.*

³² Press Release, U.S. Dep’t of Justice, U.S. Atty’s Office for the Eastern Dist. of N.Y., Staten Island Man Pleads Guilty to Defrauding Investors in Virtual Currency (June 21, 2019), <https://www.justice.gov/usao-edny/pr/staten-island-man-pleads-guilty-defrauding-investors-virtual-currency>.

³³ Indictment, United States v. McDonnell, 19-cr-148-NGG (E.D.N.Y. 2019), <https://www.justice.gov/usao-edny/press-release/file/1147991/download>.

³⁴ FinCEN Guidance FIN-2019-G001 (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> [hereinafter “FinCEN Guidance 2013”].

³⁵ 31 U.S.C. § 5330 (2018)

³⁶ *Id.*

³⁷ 18 U.S.C. § 1960 (2018).

³⁸ 31 U.S.C. § 5330

³⁹ FinCEN Guidance 2013, *supra* note 34.

⁴⁰ *Id.*

and may thus be subject to FinCEN regulation.⁴¹ Likewise, entities that issue cryptocurrency and have authority to redeem that currency from circulation may also be MSBs, and may also be subject to FinCEN regulation.⁴²

FinCEN updated its guidance in 2019, clarifying that common cryptocurrency applications, including cryptocurrency wallets, decentralized applications, and kiosks at which people may purchase cryptocurrency using cash or debit cards may all qualify as MSBs.⁴³

The agency has proven willing to enforce criminal sanctions against blockchain entities that fail to comply with its regulations. In 2015, Ripple Labs settled a criminal investigation conducted by FinCEN, the U.S. Attorney's Office for the Northern District of California, and the IRS.⁴⁴ Ripple built a blockchain and native cryptocurrency expressly for the purpose of facilitating cross-border payments.⁴⁵ The company settled its investigation by agreeing, among other measures, to pay a penalty of \$700,000 and register with FinCEN as a MSB.⁴⁶ The DOJ ultimately declined to pursue criminal prosecution.⁴⁷ However, in 2016, Anthony Murgio was convicted of operating an unlicensed MSB in connection with Bitcoin exchange Coin.mx.⁴⁸ In reaching this conclusion, Judge Alison Nathan of the Southern District of New York found Bitcoin to constitute "funds" within the meaning of FinCEN's prohibition on the operation of unlicensed MSBs.⁴⁹

Caselaw thus confirms FinCEN's jurisdiction over cryptocurrency, and the agency, like the CFTC, has proven willing to pass its enforcement actions on to the DOJ for criminal prosecution.

III. THE SEC'S APPROACH

Despite the agency turf war, the SEC has emerged as the primary regulator of the space by indicating that it considers many blockchain tokens to be "securities."⁵⁰ The Commission has issued extensive legal

⁴¹ *Id.*

⁴² *Id.*

⁴³ FinCEN Guidance FIN-2010-G001 (2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

⁴⁴ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Ripple Labs, Inc. Resolves Criminal Investigation (May 5, 2015), <https://www.justice.gov/opa/pr/ripple-labs-inc-resolves-criminal-investigation> [hereinafter Ripple Press Release].

⁴⁵ De Filiippi & Wright, *supra* note 4, at 64.

⁴⁶ Ripple Press Release, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ United States v. Murgio, 209 F. Supp. 3d 698, 707 (S.D.N.Y. 2016).

⁴⁹ *Id.* ("[I]t is clear that bitcoins are funds within the plain meaning of that term.")

⁵⁰ See Public Statement, Jay Clayton, Chairman, Sec. and Exch. Comm'n, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017), <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> ("By and

guidance establishing when and how this definition applies, and its analytical method has been affirmed by caselaw.⁵¹ By defining some cryptocurrencies as securities, the Commission brings these blockchain tokens within the Securities Act of 1933 (“The 1933 Act”) and the Securities Exchange Act 1934 (“The 1934 Act”).⁵² These Acts provide the basis for crimes including the unlawful sale of unregistered securities,⁵³ securities fraud,⁵⁴ and insider trading.⁵⁵ Through extensive guidelines and numerous enforcement actions pursuant to its authority under the securities laws, the SEC has thus far served as the federal government’s principal regulator of cryptocurrency.

A. Jurisdiction

The SEC first staked its claim to regulatory authority over cryptocurrency in its investigation of the Decentralized Autonomous Organization (The DAO).⁵⁶ The DAO intended to raise capital through an ICO, and then allow holders of issued tokens to channel those funds into selected entrepreneurial projects.⁵⁷ The DAO tokens were soon tradeable on cryptocurrency exchanges, and holders were not restricted from reselling the tokens.⁵⁸ In its report on the investigation (“The DAO Report”), the agency applied the reasoning of *SEC v. W.J. Howey Co.* (“The *Howey Test*”) to conclude that the DAO’s tokens constituted investment contracts, and thus securities, within the meaning of the 1933 Securities Act (“The 1933 Act”).⁵⁹ Through this investigation, the SEC articulated that the determination of whether a blockchain token constituted a security would be conducted through application of the *Howey Test*, and that, accordingly, some cryptocurrencies are securities.⁶⁰

large, the structures of initial coin offerings that I have seen promoted involve the offer and sale of securities”).

⁵¹ *E.g.*, United States v. Zaslavskiy, 17-cr-647-RJD, 2018 WL 4346339, at *7 (E.D.N.Y. 2018) (finding that The *Howey Test* could result in a finding that a blockchain token is a security).

⁵² See Thomas Lee Hazen, *Tulips, Oranges, Worms, and Coins – Virtual, Digital, or Crypto Currency and the Securities Laws*, 20 N.C. J. L. & Tech. 493, 527 (2019) (“[M]any, if not most crypto currencies are likely to implicate the securities laws at least at some point during their life cycle.”).

⁵³ 15 U.S.C. § 77e (2018).

⁵⁴ 15 U.S.C. § 77q (2018).

⁵⁵ 15 U.S.C. § 78j (2018).

⁵⁶ Report of Investigation: The DAO, Exchange Act Release No. 34,81207, 117 S.E.C. Docket 745 (July 25, 2017) [hereinafter The DAO Report].

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 6.

⁵⁹ *Id.* at 11; See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946) (defining an investment contract as “a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”).

⁶⁰ The DAO Report, *supra* note 56.

In 2018, this method of analysis was confirmed in *United States v. Zaslavskiy*, in which the Eastern District of New York found that, by application of the *Howey* Test, a jury could reasonably determine that tokens issued by the defendant were securities.⁶¹ In April 2019, the Commission published a framework clarifying its approach to determining which tokens meet this definition, and indicating that such an analysis would depend on the characteristics of each token.⁶² That same month, the SEC issued a No Action letter, confirming that tokens issued by TurnKey Jet, Inc. did not constitute securities.⁶³ In its letter, the SEC emphasized that its determination relied in part on the fact that TurnKey Jet's tokens were not tradeable on secondary markets, and would not change in value relative to the dollar.⁶⁴

With the DAO Report, the published framework, and the No Action letter to TurnKey Jet, the SEC has established boundaries for its jurisdiction over blockchain tokens. Accordingly, the Commission has undertaken numerous enforcement actions against blockchain organizations that violate the laws over which it has authority.

B. *Sale of Unregistered Securities*

Section 5 of the 1933 Act prohibits the sale of unregistered securities.⁶⁵ Registration requires extensive disclosure, including a description of the company's business, a description of the security offered for sale, information about the management of the company, and financial statements certified by independent accountants.⁶⁶

Of fifteen enforcement actions against blockchain organizations in 2019, the SEC cited the sale of an unregistered security in eight.⁶⁷ The SEC has proven willing to exercise its civil enforcement authority against ICOs issuing unregistered securities. However, none of the SEC's enforcement actions for unregistered sales of securities have resulted in parallel criminal prosecution at the time of this writing.⁶⁸

⁶¹ *United States v. Zaslavskiy*, 17-cr-647-RJD, 2018 WL 4346339, at *5–7 (E.D.N.Y. 2018).

⁶² SEC, FRAMEWORK FOR “INVESTMENT CONTRACT” ANALYSIS OF DIGITAL ASSETS, (April 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [hereinafter SEC Framework].

⁶³ TurnKey Jet, Inc., SEC No-Action Letter, 2019 WL 1471132 (Apr. 3, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm>.

⁶⁴ *Id.*

⁶⁵ 15 U.S.C. § 77e (2018).

⁶⁶ *Id.*

⁶⁷ Cyber Enforcement Actions, U.S. SECURITIES AND EXCHANGE COMMISSION (Oct. 15, 2019), <https://www.sec.gov/spotlight/cybersecurity-enforcement-actions>.

⁶⁸ *Id.*

C. Securities Fraud

Section 17(a) of 1933 Act forbids material misrepresentations and omissions in the offer or sale of securities.⁶⁹ Effectively, this portion of the law declares that issuers and sellers may not lie about their securities. A finding that a blockchain is a security imports this responsibility of candor to issuers and dealers of that token.

In *United States v. Zaslavskiy*, a token issuer was indicted for securities fraud in connection with an ICO.⁷⁰ The issuer offered two tokens for sale, RECoin, and Diamond, which he claimed were backed by physical real estate and diamonds respectively.⁷¹ The tokens did not in fact represent the value of any real-world assets, nor was there any actual underlying application of blockchain technology.⁷² Zaslavskiy filed a motion to dismiss the indictment on the grounds that his tokens did not in fact constitute securities.⁷³ The trial court denied the motion, holding that the question of whether the tokens were securities was for a jury to decide.⁷⁴ While it did not definitively reach the question of whether Zaslavskiy's tokens constituted securities, the decision noted that "simply labeling an investment opportunity as a 'virtual currency' or 'cryptocurrency' does not transform an investment contract—a security—into a currency," and does not therefore bring the offering outside of existing securities law.⁷⁵ Following this ruling, Zaslavskiy pleaded guilty to conspiracy to commit securities fraud.⁷⁶

D. Insider Trading

Section 10(b) of the 1934 Act forbids insider trading.⁷⁷ Although the law is quite broad, SEC Rule 10b-5-1 clarifies its application to insider trading by forbidding corporate insiders from engaging in the "purchase or sale of a security on the basis of material nonpublic information"⁷⁸

Application of this element of the securities laws to cryptocurrencies is scant. In 2018 cryptocurrency trader Jeffery Berk brought a civil suit against Coinbase, alleging that its employees engaged in insider trading

⁶⁹ 15 U.S.C. § 77q (2018).

⁷⁰ *United States v. Zaslavskiy*, 17-cr-647-RJD, 2018 WL 4346339 (E.D.N.Y. 2018).

⁷¹ *Id.* at *1.

⁷² *Id.* at *2.

⁷³ *Id.* *1.

⁷⁴ *Id.* at *4.

⁷⁵ *Id.* at *7.

⁷⁶ Press Release, U.S. Dep't of Justice, U.S. Atty's Office for the Eastern Dist. Of N.Y., Brooklyn Businessman Pleads Guilty to Defrauding Investors Through Two Initial Coin Offerings (Nov. 15, 2018), <https://www.justice.gov/usao-edny/pr/brooklyn-businessman-pleads-guilty-defrauding-investors-through-two-initial-coin>.

⁷⁷ 15 U.S.C. § 78j (2018).

⁷⁸ 17 C.F.R. § 240.10b-5-1 (2018).

in connection with company's listing of cryptocurrency Bitcoin Cash.⁷⁹ Berk alleged that Coinbase executives bought large sums of the cryptocurrency in advance of the listing, knowing that, because Coinbase is such a large exchange, the cryptocurrency's price would rise when they listed it on their platform.⁸⁰ The case was heard under diversity jurisdiction and applied California law rather than federal law.⁸¹ Likewise, the Northern District of California ultimately dismissed the suit for lack of standing and did not reach the issue of whether the conduct constituted insider trading.⁸² Nevertheless, *Berk v. Coinbase* illustrates the sort of situation that might implicate federal insider trading laws. Indeed, critics argue that such laws could reach cryptocurrency trading,⁸³ but this does not seem to be the SEC's current favored approach.

CONCLUSION

In its early stages, cryptocurrency captured the public's attention, seeming to promise untold digital wealth and unchecked criminality in equal measure. As blockchain technology has matured, platforms that utilize it have proliferated, and many have issued their own native cryptocurrencies. With this expansion comes a resultant increase in the need for regulation in the space.

The United States regulatory agencies have stepped in to impose order. Absent legislation on the subject, agencies have relied on existing law to bring cryptocurrencies within their regulatory authority. These efforts have led to the peculiar situation in which cryptocurrencies are defined variously as property, funds, commodities, and securities for the purposes of regulation. This environment leaves many questions unanswered.

The degree to which the agencies will pursue criminal prosecution of cryptocurrency users who violate their laws remains unclear. The CFTC, FinCEN, and the SEC have already referred several cases to the DOJ. The IRS has indicated that it is also preparing to do so, and adages about death, taxes, and Al Capone serve as useful reminders for those failing to report cryptocurrency gains. Likewise, the SEC has established an extensive analytical framework for its jurisdiction over cryptocurrency, and may yet leverage this framework more extensively in pursuit of criminal violators.

Further questions remain as to how legislation may impact cryptocurrency regulation going forward. Some states have already

⁷⁹ See *Berk v. Coinbase, Inc.*, No. 18-cv-01364-VC, 2018 WL 5292244, at *1 (N.D. Cal. Oct. 23, 2018).

⁸⁰ *Id.* at *2.

⁸¹ *Id.*

⁸² *Id.*

⁸³ E.g., Andrew Verstein, *Crypto Assets and Insider Trading Law's Domain*, 105 IOWA L. REV. 1 (2019) (arguing that existing insider trading laws apply to traders in cryptocurrency).

passed laws on the subject.⁸⁴ Wyoming, for example has already legislated to create an extensive legal framework for cryptocurrency.⁸⁵ Several federal laws have been proposed that would establish similar legal guidelines for cryptocurrency, though none have yet been enacted.⁸⁶

Answers to these questions will impact this fast-developing regulatory environment and the criminal implications for its users. While the cryptocurrency landscape appeared lawless at first, for the time being, the space has a few new bosses. And they're the same as the old bosses.

⁸⁴ *See e.g.*, Wyo. Stat. Ann. § 34-29-106 (West 2019) (differentiating among different forms of cryptocurrency for the purposes of Wyoming law).

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, Token Taxonomy Act, H.R. 2144, 116th Cong. (2019) (proposing to amend the securities laws to exclude cryptocurrencies from the definition of a security); Digital Taxonomy Act, H.R. 2154, 116th Cong. (2019) (proposing additional appropriations to the Federal Trade Commission to prevent unfair practices relating to digital currency).