

Fintech in Focus: Anti-Money Laundering Regulatory Developments for Virtual Currencies and Initial Coin Offerings

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Virtual currencies like Bitcoin and Ether are new entrants into the global financial services industry while initial coin offerings (hereinafter “ICOs”) are opening up new ways for businesses to access capital using blockchain technology. These new technologies pose real concerns regarding anti-money laundering (hereinafter “AML”), fraud and security risks. This article will explore AML regulatory developments and enforcement trends for virtual currencies and ICOs in the United States and offers insights for what fintech companies can do to minimize their AML, fraud and security risks.

VIRTUAL CURRENCIES AND BLOCKCHAIN TECHNOLOGY

Virtual or cryptocurrencies are digital assets created and managed using blockchain technology. These online currencies are not recognized by any jurisdiction, yet they can have real value for investors who have the appetite for their high volatility. For example, Bitcoin, the world’s first and most popular cryptocurrency created in 2009, has had huge swings in value in recent months. According to a February 3, 2018 CNBC report, the cryptocurrency market recently suffered a massive \$100 billion loss in value sending Bitcoin prices to below \$8,000 per coin, after reaching a record high of \$19,000 in December 2017. See Arjun Kharpal, *Cryptocurrency market stabilizes after violent sell-off*, CNBC (Feb. 3, 2018, 6:32 AM), <http://www.cnbc.com/2018/02/03/bitcoin-price-cryptocurrency-market-stabilizes-after-violent-sell-off.html> (last visited Mar. 15, 2018).

Blockchain technology is a digital ledger system used to verify, process and store records/transactions (called blocks) that are linked by a group of connected computers (called nodes) and secured using cryptography. A core feature of blockchain is that it has no central authority and is decentralized, allowing users to identify themselves only by their public key. All participants to a transaction have access to the blockchain, which is intended to serve as an immutable record of the transaction. Blockchains may be public (open-sourced) or private (accessible only to certain

authorized users). Given that blockchain users do not need to know one another in order to engage in transactions, some have called blockchain networks “trustless” systems whereas blockchain enthusiasts argue that such networks provide “more trust” because these transactions are fully transparent and accessible by all transaction participants in real time.

Virtual currencies are not only a form of blockchain technology, they are also a method of payment for parties to use a blockchain network. Investors have begun to buy and hold these cryptocurrencies betting that their value will increase as blockchain technology gains greater acceptance and adoption by consumers and businesses.

INITIAL COIN OFFERINGS (ICOS)

ICOs are the latest blockchain phenomenon to disrupt the financial services industry. An ICO is typically structured as an online capital-raising campaign that offers and sells cryptocurrency (called tokens or coins), which are used to finance new projects or to provide access to a company’s platform or services. Coin offerings often take the form of a “pre-sale” offering, using a derivative or other instrument that converts into the tokens at the initial generation event. Pre-sales, in particular, facilitate access to capital and enable business start-ups and online projects to raise funds in a short time period, generally without having to give away equity in the underlying entity. Most pre-sales and ICOs are limited to accredited investors in order to qualify for exemptions from federal and state securities laws in the United States. For example, in August 2017, Filecoin, a blockchain-based storage network startup, raised almost \$188 million in just 60 minutes and was limited to accredited investors. According to a December 18, 2017 New York Times article, ICOs raised over \$4 billion in 2017, a 3,000% increase over ICO funds raised in 2016. See John Patrick Mullin, *ICOs In 2017: From Two Geeks And A Whitepaper To Professional Fundraising Machines*, Forbes.com (Dec. 18, 2017, 11:29 PM), <http://www.forbes.com/sites/outofasia/2017/12/18/>



icos-in-2017-from-two-geeks-and-a-whitepaper-to-professional-fundraising-machines/#17ab8978139e(last visited Mar. 15, 2018).

July 2018 Update: The market for virtual currencies and ICOs continues to skyrocket in 2018. As reported by Thomas Reuters, virtual currencies grew \$590 billion in 2017 as compared to an \$11 billion increase in 2016, with 30% of crypto holders located in the United States. See Chavez-Dreyfuss, Gertrude, *U.S. tax liabilities for crypto currencies in 2017 seen at \$25 billion, to pressure bitcoin: Fundstrat*, Thomson Reuters (April 5, 2018, 01:08 PM), <https://www.reuters.com/article/us-crypto-currencies-taxes/u-s-tax-liabilities-for-crypto-currencies-in-2017-seen-at-25-billion-to-pressure-bitcoin-fundstrat-idUSKCN1HC29Y> (last visited July 10, 2018). According to CoinDesk, ICOs raised \$6.3 billion in the first quarter of 2018, which exceeds the total amount raised by ICOs in 2017. See Peter Ryan, *\$6.3 Billion: 2018 ICO Funding Has Passed 2017's Total*, (Apr. 19, 2018, 01:00 PM), <https://www.coindesk.com/6-3-billion-2018-ico-funding-already-outpaced-2017/> (last visited July 10, 2018). With such large sums of investor money involved, the risk of fraud and loss remains high as does the need for further regulation.

AML RISKS FOR VIRTUAL CURRENCIES AND ICOS

A chief concern for virtual currencies and ICOs is AML risk. Given that ICOs involve the online offer and sale of tokens (i.e., virtual currencies) conducted with limited (if any) central oversight, these potentially global investment platforms represent unique challenges for U.S. regulators.

The AML and fraud risks associated with virtual currencies and ICOs are multi-fold.

First, fraud and token theft remain looming concerns for any ICO offering or virtual currency owner. For example, Veritaseum, the issuer of a cryptocurrency called VERI, fell victim to a July 2017 hack in which \$8 million worth of VERI were stolen. Coindash, an Israeli startup, planned to raise capital by selling its tokens in exchange for ether (another digital currency). However, just 13 minutes into the ICO, hackers stole \$7 million worth of ether by hacking Coindash's website and changing the address for investments to a fake one.

Second, customer identification and transaction verification present unique challenges, particularly given that token holders can be pseudonymous (identified by something other than their real name) making AML compliance difficult. The speed of such transactions, including the advent of smart contracts (computer code driven set of rules for self-executing and self-enforcing contracts), creates added challenges for regulators. Without the ability to accurately

identify and track users and authenticate and authorize blockchain transactions, there is a heightened risk that virtual currencies and ICOs could be used to finance criminal activities or sponsor terrorism. Think of Bitcoin's sorted past with Silk Road, a notorious online drug marketplace, before it was shut down in 2013. In addition to the national and global security interests in ensuring virtual currencies and ICOs are AML compliant, these transactions also pose additional legal issues relating to taxation, cybersecurity, data privacy and data transfer.

Third, the international scope of virtual currencies and ICOs, particularly those organized offshore, represents a further regulatory challenge. The difficulty in tracing, freezing or securing cryptocurrency assets makes it hard for regulators to take action to hold those who violate the law accountable. Add to this the lack of a central authority in blockchain transactions, a lack of investor protection, and extreme volatility in cryptocurrency value, and the AML challenges multiply. It is no surprise that many regulators around the world have issued cautionary guidance for ICO investments and certain jurisdictions like China have banned them outright.

Current Regulatory Landscape

A. Federal Regulations

Currently, there is no comprehensive U.S. federal regulation specifically governing virtual currencies and ICOs. However, several federal agencies have provided guidance and some have brought enforcement actions based on existing regulations. For example, the Internal Revenue Service (IRS) has stated that virtual currencies should be treated as property and the Commodity Futures Trading Commission (CFTC) has found that some virtual currencies fall within the definition of a commodity and, thus, are subject to CFTC enforcement actions. In January 2017, the Financial Industry Regulatory Authority (FINRA) issued a report on the potential implications of blockchain technology for the securities industry. In July 2017, the SEC issued an investigation report in the DAO case determining that the DAO tokens offered in an ICO qualified as securities and laying out a roadmap for future offerings to follow consistent with existing securities laws. See U.S. Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (Release No. 81207) (July 25, 2017) <https://www.sec.gov/litigation/investreport/34-81207.pdf> (last visited Mar. 15, 2018). In recent months, the SEC has taken enforcement action against several ICO related companies, and SEC Chairman Jay Clayton publicly commented that, "I have yet to see an ICO that doesn't have a sufficient number of hallmarks of a security,"

thus making it clear that enforcement of non-compliant ICO related activity will be a key SEC enforcement priority for 2018. However, on June 14, 2018 at the Yahoo Finance summit, the director of the division of corporation finance at the SEC, William Hinman declared that “the Ethereum network and its decentralized structure, current offers and sales of ether are not securities transactions.” See Shannon Liao, *The SEC says Ethereum tokens are not securities*, (June 14, 2018, 3:37 PM), <https://www.theverge.com/2018/6/14/17464692/sec-ethereum-tokens-securities-ether-yahoo-finance-summit> (last visited July 3, 2018).

The Financial Crimes Enforcement Network (FinCEN) is the chief U.S. regulator for AML law enforcement. The Bank Secrecy Act (BSA) is the primary U.S. anti-money laundering law, which requires all money service businesses (MSBs) to register with the U.S. Treasury Department, implement AML compliance programs and adhere to certain record-keeping and reporting requirements such as the filing of suspicious activity reports (SARs) and currency transaction reports (CTRs) for transactions over certain dollar amounts. Banks and other financial institutions are also required to have customer identification programs in place and to undertake customer due diligence commonly known as KYC (Know Your Customer) obligations, as mandated by the U.S. PATRIOT Act.

In 2013, FinCEN issued guidance on virtual currencies finding that virtual currency administrators and exchangers (as opposed to simply users/owners of cryptocurrencies) are considered MSBs and thus subject to BSA registration and reporting requirements. FinCEN regulations also extend to all ICOs and any transaction where a virtual currency is being exchanged for another cryptocurrency or fiat currency.

In 2015, FinCEN brought its first civil enforcement action against a virtual currency exchanger, Ripple Labs Inc. Despite no allegation of any actual fraud or theft, Ripple Labs was fined \$700 million for selling its virtual currency, known as XRP, without registering with FinCEN and without implementing an effective AML program. Ripple Labs also forfeited \$450 million to resolve possible criminal violations.

July 2018 Update: Although no new federal laws or regulations specifically aimed at ICOs or crypto currencies have been enacted in 2018 thus far, to bring greater awareness of the potential risk to ICO investors, the Securities and Exchange Commission (SEC) in May 2018, unveiled a mock ICO website with fake cryptocurrency called HoweyCoins (named after the Howey test used to determine what constitutes a security). The site claimed to offer a legitimate investment opportunity, but once investors clicked on the “BuyCoinsNow” button at the bottom of the site, they

were taken to the SEC’s site warning them they could have been scammed. See Dunstan Prial, *SEC Handling Each ICO Based on ‘Facts and Circumstances’*, (May 16, 2018, 4:48 PM), <https://www.law360.com/articles/1044353> (last visited May 20, 2018).

The Financial Crimes Enforcement Network (FinCEN) has also stepped up its efforts to police the ICO/virtual currency space. On February 13, 2018, FinCEN’s assistant secretary for legislative affairs, Drew Maloney, wrote a letter to U.S. Senator Rob Wyden (D-OR), clarifying FinCEN’s position that virtual currency developers and cryptocurrency exchanges are subject to its AML regulations. See <https://coincenter.org/files/2018-03/fincen-ico-letter-march-2018-coin-center.pdf> (last visited June 8, 2018). FinCEN asserted that developers that sell a convertible virtual currency and cryptocurrency exchanges that sell tokens or exchange them for fiat or virtual currencies will generally be considered money services businesses (MSBs) subject to FinCEN regulation. This letter raises concerns that ICOs involving U.S. residents that fail to register with FinCEN and adhere to its AML/Know Your Customer regulations could be criminally investigated and prosecuted.

The Office of the Comptroller of the Currency (OCC) issued a new risk report, “Semiannual Risk Perspective for Spring 2018,” where Comptroller of the Currency Joseph Otting stated that the OCC anticipates announcing its decision on whether it will issue special charters for fintech companies in July 2018.

Coordinating the multiple federal agencies with overlapping oversight over the financial industry is another challenge facing cryptocurrencies and ICOs. In January 2018, Treasury Secretary Steven Mnuchin announced the formation of a new working group of regulators under the Financial Stability Oversight Council to review the impact of cryptocurrencies on the U.S. financial system. As more regulators weigh in, there is a need to ensure any new laws or regulations are properly harmonized to minimize the regulatory burden for fintech transactions while maximizing investor protections.

B. State Regulations

In addition to these federal regulations, virtual currencies and ICOs must also comply with applicable state securities and MSB laws. Currently, each state regulates MSBs under their own laws. Some states like New York require companies that offer or sell virtual currencies to New York residents or wish to conduct an ICO to apply for a special BitLicense.

Other states (like California) are following New York’s lead and have proposed legislation along the same lines. Florida recently passed House Bill 1379 clarifying the definition of

virtual currency and Alabama and Washington recently updated their laws to include digital currency in the definition of money transmission. Illinois has issued digital currency guidance and Hawaii has shut down a virtual currency exchange, Coinbase, for failing to adhere to state law on cash reserves needed.

In 2015, the Conference of State Bank Supervisors (CSBS) drafted a model regulatory framework to address certain virtual currency activities, which includes among other things, a requirement that states require verification of an entity's service user, not only account holders as part of the customer identification process.

July 2018 Update: In contrast to the dearth of federal legislation specifically for ICOs and cryptocurrency, state lawmakers have been active in proposing new laws to address cryptocurrencies and ICOs in their respective jurisdictions. At least six U.S. states have proposed new cryptocurrency and ICO related legislation in 2018. Below are a few examples of recently enacted or proposed cryptocurrency and ICO related laws in various states.

Colorado

On May 8, 2018, Colorado state senate voted and approved HB 1426, which offered guidelines to distinguish between tokens and securities and would have exempted virtual currency from state money transmitter laws, but then state lawmakers took another vote on May 9, 2018, and rejected it. See <http://leg.colorado.gov/bills/hb18-1426> (last visited July 10, 2018).

Connecticut

In March 2018, Connecticut introduced HB 5496, a bill to regulate virtual currency businesses. The bill remains pending. See https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB05496&which_year=2018 (last visited July 10, 2018).

Hawaii

In January 2018, Hawaii introduced SB 2129, a bill to regulate virtual currency. The bill remains pending. See https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2129&year=2018 (last visited July 10, 2018).

Nebraska

In January 2018, Nebraska introduced LB 987, a bill to regulate virtual currency businesses, but on April 18, 2018, it voted to indefinitely postpone further action on this bill. See https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=34121 (last visited July 10, 2018).

New York

In November 2017, four legislative proposals to study the impact of cryptocurrencies on the New York financial market

and the use of blockchain technology in state record-keeping functions were introduced. All four bills remain pending, however, the fourth has made the most progress. See Nikhilesh De, *4 Blockchain Bills Introduced in New York Legislature*, (Dec 4, 2017, 6:17 PM), <https://www.coindesk.com/4-blockchain-bills-introduced-new-york-legislature/> (last visited July 10, 2018).

Vermont

In January 2018, Vermont introduced a blockchain bill (S.269, at § 4173(c)) that, among other things, exempts cryptocurrency companies from certain state taxes. This bill was signed into law on May 30, 2018, and went into effect on July 1, 2018. See <https://legislature.vermont.gov/bill/status/2018/S.269> (last visited July 10, 2018).

Wyoming

In March 2018, Wyoming Governor Matt Mead signed four blockchain-friendly bills into law. One exempts certain types of blockchain tokens from the state securities laws and two others exempt cryptocurrencies from state property taxes and facilitate cryptocurrency trading. The fourth bill allows businesses incorporated in Wyoming to use blockchain for record-keeping, making Wyoming a blockchain-friendly jurisdiction. See The Associated Press, *Wyoming courts tech behind cryptocurrency to entice business*, (May 23, 2018, 2:06 PM), <http://accesswdun.com/article/2018/5/673878> (last visited July 10, 2018).

2018 Enforcement Trends

A. Federal Enforcement Trends

July 2018 Update: SEC enforcement co-directors Stephanie Avakian and Steven Peikin have stated that fraudulent ICOs are among the greatest risks currently facing investors. See Stephanie Avakian and Steven Peikin, *Oversight of the SEC's Division of Enforcement*, (May 16, 2018), <https://www.sec.gov/news/testimony/testimony-oversight-secs-division-enforcement> (last visited June 8, 2018). In response, the SEC created a special cyber unit in September 2017 within its Division of Enforcement. The SEC's cyber unit's first enforcement action came in December 2017 when it obtained an emergency asset freeze to shut down a \$15 million fraudulent ICO. In January 2018, the SEC's cyber unit again successfully obtained an emergency asset freeze against AriseBank, a Texas-based ICO that claimed to have raised \$600 million. In April 2018, it froze \$27 million in trading proceeds of Longfin, a Nasdaq-listed blockchain company, in a case alleging Longfin trades violated existing securities laws.

Whether digital tokens and coins are securities or commodities subject to regulation by the SEC and CFTC remains an unresolved issue and continues to be litigated

through the courts. A New York federal district court recently dismissed SEC fraud charges against a businessman for alleged misstatements he made to attract ICO investors. The court found the digital tokens at issue were not securities. See Dunstan Prial, *Ruling on What Isn't A Security Needed For ICO Clarity*, (May 9, 2018, 7:31 PM), <https://www.law360.com/articles/1042159?scroll=1> (last visited May 19, 2018).

The CFTC has also been active in its enforcement efforts. In March 2018, the United States District Court in the Eastern District of New York held that virtual currencies can be regulated by CFTC as a commodity. The court noted, however, that the CFTC's jurisdictional authority did not preclude other agencies from exercising their regulatory power when virtual currencies function differently than derivative commodities. See No. 1:18-cv-00361-JBW-RLM, Dkt. No. 29 (E.D.N.Y. Mar. 6, 2018). In May 2018, the CFTC and the U.S. Department of Justice launched a criminal investigation into potential cryptocurrency market manipulation.

In addition to policing U.S.-based ICOs and cryptocurrency related activity, the U.S. has also taken recent action regarding foreign cryptocurrencies. For example, on March 19, 2018, President Trump issued an Executive Order prohibiting transactions with any digital currency, coin or token issued by, for or on behalf of the Venezuelan government, including the *petro*. See Stinebower, *New Executive Order Adds New Sanctions Against Venezuela's Petro Cryptocurrency*, (March 27, 2018), <https://www.cmtradelaw.com/2018/03/new-executive-order-adds-new-sanctions-against-venezuelas-petro-cryptocurrency/> (last visited May 21, 2018).

The IRS has also entered the enforcement arena. New tax implications are arising for token users and purchasers. After January 1, 2018, exchanging or trading one cryptocurrency for another became a taxable event. In March 2018, the IRS issued a bulletin mentioning that the failure to report the income tax of virtual currency transactions could result in penalties or, in more extreme situations, a prison term and a fine. In 2017, the IRS brought an enforcement action against a cryptocurrency exchange that led to a federal court ordering the turnover of certain customer information to the government, signaling that the IRS may be looking to identify potential tax evaders through their cryptocurrency profits.

B. State Enforcement Trends

July 2018 Update: On May 21, 2018, the North American Securities Administrators Association (NASAA) launched "Operation Cryptosweep," the largest coordinated series of securities enforcement actions by U.S. and Canadian state regulators ever brought. To date, it has resulted in at least 70 inquiries and investigations and 35 pending or completed

enforcement actions related to ICOs or cryptocurrencies since the beginning of May. See *Regulators Crack Down on Crypto Scams Via 'Operation Crypto-Sweep'*, Forbes.com (May 21, 2018), <http://fortune.com/2018/05/21/regulators-cryptocurrency-ico-scams/> (last visited May 30, 2018). The probe targets unregistered securities offerings promising lucrative returns without adequately advising investors of the risks, including suspicious cryptocurrency transactions and ICOs. The NASAA has also agreed to share information with the CFTC, which could serve as a basis for the federal authorities to bring their own enforcement actions.

As cryptocurrency and ICO regulations lag behind the growing popularity of this emerging technology, state regulators are stepping up their enforcement efforts. For example, on March 27, 2018, Massachusetts stopped five unregistered ICOs, even though there was no allegation of fraud. Texas has emerged as an early leader in "Operation Cryptosweep" and has cracked down on bitcoin mining farms who are operating in violation of state securities laws. New York has also stepped up its efforts to protect NY residents investing in cryptocurrencies and ICOs. On February 7, 2018, the New York Department of Financial Services (NYS DFS) issued new guidance to virtual currency business entities to ensure they have comprehensive policies on preventing and reporting fraud. On April 17, 2018, the New York Attorney General launched the "Virtual Markets Integrity Initiative," which requested a wide range of information from thirteen major virtual currency exchanges. This heightened scrutiny is intended to inform enforcement agencies, investors, and consumers on virtual currency practices and is sending a strong message to unlicensed ICOs and cryptocurrency exchanges seeking to enter the New York market that they must comply with state licensing requirements.

FUTURE REGULATORY TRENDS

So what to expect in the future? It is safe to say, as more regulators continue to weigh in on the cryptocurrency space, more regulation is expected. In 2016, a bi-partisan group of U.S. Congress members established a blockchain caucus understanding the potential for blockchain and the need for new laws to support this new technology. The federal Office of the Comptroller of the Currency (OCC) has proposed a special purpose bank charter for crypto-exchanges and other fintech companies. This special purpose charter would pre-empt state-by-state licensing laws for fintech businesses but would not be subject to FDIC protections. Certain state regulators, including the California Department of Business Oversight and NYS DFS have resisted the OCC's fintech charter, claiming that it represents an impermissible overreach by the federal government that will serve to weaken state enforcement of consumer protection laws. On December 12, 2017, a New York federal court dismissed the NYS DFS claims, finding the court lacked jurisdiction as the OCC had not yet taken any final action.

At the state level, the Uniform Law Commission has proposed a Virtual Currency Businesses Act (VCBA) to promote uniform state laws for cryptocurrency related businesses. The VCBA drafting committee will consider licensing requirements, reciprocity, consumer protection, cybersecurity, AML/KYC, and supervision of licensees.

CONCLUSION

In this new era of ICOs, cryptocurrencies and blockchain transactions, managing AML, fraud and security risks will remain top-of-mind for fintech companies seeking to gain investor confidence and will remain an active area for government regulators for the foreseeable future.

Fintech companies would be wise to incorporate “security by design” features into their proposed projects, to consider security from inception through launch, and to voluntarily adopt AML/KYC processes that meet U.S. federal regulations while continuing to improve processes for verifying and storing user/customer identification and data. Government regulators and legislators, in turn, should enact smart regulations that are not overly burdensome or hamper innovation but are designed to keep consumers safe and create accountability for wrongdoers. This space will likely continue to generate a lot of interest and activity by regulators, consumers and fintech companies in the years to come.

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