

QUICK REFERENCE GUIDE:

U.S. Regulation and Enforcement of Digital Assets

Investor enthusiasm continues to feed the explosive growth of digital assets, including virtual currency and tokens, rushing ahead of U.S. efforts to establish a cohesive regulatory and supervisory regime for them. Existing laws and regulatory agencies cover many of the activities of exchanges, traders, issuers, and investors, but the novel products and services at the heart of this wave often do not fit squarely within any one agency's orbit. Although the Commodities Futures Trading Commission and the Securities and Exchange Commission have moved to provide market participants with some sense of their jurisdiction and agendas, the future treatment of digital assets and related activities remains characterized more by uncertainty than clarity. Criminal prosecutors have made it clear that they have their own role in this evolving web, and are poised to step into any perceived regulatory gaps.

Attorneys from Buckley's fintech practice advise market participants on digital assets and offer this quick reference guide to help companies assess their regulatory and enforcement exposure.

Recent Regulatory and Enforcement Activity

U.S. DEPARTMENT OF JUSTICE

National prosecutors for criminal violations

- Reportedly focusing on how digital-asset trading may be susceptible to the same forms of criminal manipulation as traditional markets (including spoofing and wash trading).
- In April 2018, charged co-founders of a cryptocurrency startup with fraud, alleging that they made material misrepresentations and omissions to raise more than \$25 million in an initial coin offering.
- In February 2018, charged a cryptocurrency trader with fraud for misappropriating virtual currency assets to cover his own trading losses through the transfer of \$2 million of Bitcoin and Litecoin from his employer's trading account to personal accounts.

STATE ATTORNEYS GENERAL

Top civil and criminal prosecutors in 50 states, the District of Columbia, and Puerto Rico

- New York has taken the lead in digital assets and launched its Virtual Markets Integrity Initiative — a fact-finding inquiry into the policies, procedures, and practices of exchange platforms used by consumers to trade virtual currencies like Bitcoin and Ether.¹
- New Jersey recently issued an emergency order to stop a cryptocurrency-related investment entity from offering unregistered securities in New Jersey; the state is also said to be conducting a wide-ranging investigation of many companies sponsoring ICOs.

SEC

National securities regulator

- Has focused its enforcement efforts on unregistered ICOs and platforms that facilitate the exchange of ICO tokens, which it has warned are often structurally similar enough to securities to be regulated as such.
- In April 2018, charged two co-founders of a purported financial services start-up with orchestrating a fraudulent ICO that raised more than \$32 million from thousands of investors.

CFTC

National commodities regulator

- Has focused its enforcement efforts on identifying fraud and virtual-currency price manipulation.
- In April 2018, charged numerous individuals with operating a fraudulent scheme involving binary options trades and a virtual currency known as ATM Coin.
- In January 2018, filed a federal civil enforcement action against a company for fraud and misappropriation in connection with purchases and trading of Bitcoin and Litecoin.

1. In June 2015, New York released its BitLicense regulatory framework, designed to regulate virtual currency businesses. New York is currently the only state that requires a specific license for such companies.

Jurisdiction of Law Enforcement and Regulatory Agencies

| AGENCY | OVERSIGHT OR LAW ENFORCEMENT ROLE |
|---|---|
| U.S. Department of Justice (and the Federal Bureau of Investigation) | <ul style="list-style-type: none"> Investigates and prosecutes violations of U.S. criminal laws, including securities laws, wire and mail fraud, and some —bribery of foreign government officials, money laundering, and sanctions violations — that digital-asset firms may not realize apply to them. Works in close cooperation with international law enforcement agencies in the U.K. and elsewhere. Applies relevant U.S. laws extraterritorially, and can claim jurisdiction over entities that use a U.S. bank or clear dollars through the U.S. financial system. |
| U.S. Securities and Exchange Commission | <ul style="list-style-type: none"> Primary securities regulator for entities that are — or should be — registered under the securities laws. Says many ICOs are securities that “most likely” must be either registered with the SEC or qualify for a private placement exemption. Regulates platforms that trade digital assets that are securities and platforms that operate as an “exchange,” as defined by the U.S. securities laws, requiring registration as a national securities exchange or an exemption (such as the one for alternative trading systems). |
| U.S. Commodity Futures Trading Commission | <ul style="list-style-type: none"> Regulates futures, options, and derivatives contracts involving virtual currency, as well as fraud or manipulation involving virtual currency traded in the U.S. Generally does not regulate spot exchanges or transactions involving virtual currencies that do not utilize margin, leverage, or financing. |
| State Attorneys General <i>50 different ones, plus D.C. and Puerto Rico</i> | <ul style="list-style-type: none"> Each is responsible for enforcing individual state’s laws (e.g., money transmission, general consumer protection, and state investor protection laws), which can result in multiple independent state-level investigations, joint investigations with other states, and parallel investigations with federal agencies. |
| State Regulators | <ul style="list-style-type: none"> State regulators oversee state-chartered banking organizations and money transmitters engaged in virtual currency businesses, including activities that implicate consumer protection and anti-money-laundering laws. State securities regulators oversee ICOs (which may require registration with the state), and investigate fraud, market manipulation, and investor protections related to virtual currency businesses. |
| Other Federal Agencies | <ul style="list-style-type: none"> The Financial Crimes Enforcement Network enforces U.S. anti-money-laundering laws to combat the use of virtual currency for illicit purposes, including terrorist financing, human trafficking, and other financial crimes. The U.S. Secret Service has broad authority to detect and arrest persons who violate certain federal laws related to banking, coins, securities, and electronic fund transfer frauds. The prudential bank regulators (Federal Deposit Insurance Corp., Office of the Comptroller of the Currency, Federal Reserve) are interested in the risk profile of companies banked by U.S. institutions and the services these institutions provide to virtual currency providers, exchanges, and lenders. |

How We Can Help

Buckley attorneys have helped companies across the digital asset landscape — including exchanges, issuers, and investors — evaluate risks and manage investigations, regulatory obligations, and enforcement agencies. U.S. laws reach more digital asset companies than ever, in sometimes unexpected ways, creating exposure for the unprepared. We:

- Help cryptocurrency exchanges with state licensing (including New York BitLicenses) and as money transmitters.
- Assist with development and implementation of compliance management controls, policies and procedures, marketing materials, and consumer-facing disclosures.
- Provide transactional support, negotiating with various counterparties (including bank partners and other vendors and service providers) to help clients achieve business objectives.
- Evaluate risks regarding anti-money-laundering laws and “know your customer” rules, money transmission, and commodities, securities law, and bank regulatory issues.
- Guide responses to subpoenas and law enforcement information requests for company, customer, or transaction data.
- Assist financial technology companies with the development of buy-and-hold wallet products, and platforms to offer consumer and commercial loans collateralized by cryptocurrency.
- Advise credit card companies on the regulatory treatment of cryptocurrency purchases and modifications to cardholder agreements.

If you have any questions about these topics or related issues, please contact attorneys in our Fintech practice or your regular Buckley contact.

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ABOUT BUCKLEY

With more than 150 lawyers in Washington, D.C., Los Angeles, San Francisco, New York, Chicago, and London, Buckley LLP offers premier enforcement, litigation, compliance, regulatory, and transactional services to financial services institutions and early stage and leading fintech and technology companies, as well as venture capital and private equity funds, investment companies, and corporate and individual clients throughout the world. “The best at what they do in the country.” (Chambers USA)

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