LITIGATION MINUTE: SURVIVING THE EVER-CHANGING CRYPTOCURRENCY REGULATORY LANDSCAPE

CRYPTOCURRENCY LITIGATION SERIES: PART ONE OF FOUR

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

One of the hottest areas in the law right now is cryptocurrencies and digital assets. One seemingly cannot open a news website without seeing stories about cryptocurrency risks, pending legislation, enforcement actions, and litigation. One reason for this explosion in activity is the constantly changing nature of the cryptocurrency regulatory landscape.

Originally considered a plaything of technologists and libertarians, cryptocurrencies are now the subject of mainstream investor interest: accepted by merchants, used for cross-border payments, and utilized as a hedge against inflation. This means that regulators at all levels—local, state, and federal—are taking notice, as should any entity operating in the investments, payments, and FinTech space.

This four-part series will cover the ever-shifting cryptocurrency regulatory landscape, enforcement trends, best practices for surviving a government investigation, and cryptocurrency litigation on the horizon.

The Persistent Myth That Cryptocurrencies and Digital Assets Are “Unregulated”

One of the most persistent myths about cryptocurrencies is that they are unregulated. To be clear, cryptocurrency is highly regulated. Indeed, the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) has regulated cryptocurrencies since 2013 with respect to anti-money laundering compliance.

Over 20 states require certain cryptocurrency exchanges to have state money transmitter licenses, a number that increases to over 45 states if the exchange also holds and moves fiat currencies. When consumers and businesses entrust their assets to the care of an exchange, strict regulatory obligations follow.

Regulation by Enforcement and Pending Legislation

In addition to the plain language of federal and state laws explicitly governing cryptocurrencies, there has been significant “regulation by enforcement,” with actions and proceedings initiated by the Securities and Exchange Commission, Commodity Futures Trading Commission, Department of Justice, Federal Trade Commission, Office of Foreign Assets Control, and various state regulatory agencies. Why? Primarily because many traditional financial institutions and their regulators view cryptocurrencies as a threat to stability and to consumers, with concerns increasing as the “crypto winter” drags on.

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Secondarily, there are currently no definitive federal regulations identifying which agencies regulate which cryptocurrencies, and how such products are to be categorized under the law. Ensuing editions of “Litigation Minute” will discuss these enforcement actions in more detail.

Adding to this uncertainty is the wave of pending federal legislation. According to the National Conference of State Legislatures—in addition to the multiple bills pending before Congress addressing cryptocurrencies (such as the Lummis-Gillibrand Financial Innovation Act and the Stabenow-Boozman Digital Commodities Consumer Protection Act)—there were more than 100 different state bills introduced in 2021 addressing various aspects of cryptocurrency regulation.

Operating a Cryptocurrency Business During Times of Uncertainty

Those in the cryptocurrency space want to get on the right side of regulations before inadvertently becoming targets of investigation, enforcement action, or litigation. Under current conditions, that certainty can be elusive. However, cryptocurrency business entities can reduce risks by following three key principles:

- Keeping abreast of changing laws, regulations, and guidance by monitoring federal and state agencies and legislative activity;
- Establishing an infrastructure and system that is nimble enough to implement changes quickly; and
- Perhaps most importantly, striving to institute a culture of fairness and compliance with transparent disclosures and fair pricing and terms, as well as prompt resolution of complaints.

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