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DECRYPTING CRYPTO: ISSUES PLAGUING TODAY'S HOTTEST REGULATORY NIGHTMARE

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> "When bitcoin currency is converted from currency into cash, that interface has to remain under some regulatory safeguards. I think the fact that within the bitcoin universe an algorithm replaces the functions of the government . . . [that] is actually pretty cool."
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> —Al Gore, former Vice President of the United States[1]

Introduction

Regardless of how vehemently critics may try to disparage it, cryptocurrency technology (often referred to by the shorthand "crypto" or the alternative "virtual currency") has established itself as an inescapable part of the modern financial world. Since their introduction in 2008, the assets themselves and blockchain, the underlying technology, have fundamentally altered the way in which innovators approach age-old issues at the heart of the financial system and beyond. Academics, entrepreneurs, and everyone in between have proposed uses of cryptocurrency and blockchain technologies to solve problems ranging from corporate governance[2] to land ownership registration and health records.[3] While these uses may still face a significant amount of skepticism in the legal, technological, and financial worlds, there is little reason to believe the technology will cease disrupting established systems anytime soon.

This disruptiveness is particularly relevant and troubling for the banking and financial services industry. One of blockchain and cryptocurrency's biggest selling points is their potential to eliminate classic financial intermediaries from various processes, thus eliminating costs.[4] These intermediary costs, while plaguing consumers, have built entire industries,

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1. Richard Caetano, Learning Bitcoin 1 (2015).

2. *See* Fiammetta S. Piazza, *Bitcoin and the Blockchain as Possible Corporate Governance Tools: Strengths and Weaknesses*, 5 Penn. St. J.L. & Int'l Aff. 262, 288 (2017).

3. *See* Jesse Marks, *Distributed Ledger Technologies and Corruption: The Killer App?*, 20 Colum. Sci. & Tech. L. Rev. 42, 44 (2018).

4. *See* Immaculate Dadiso Motsi-Omoijiade, *Financial Intermediation in Cryptocurrency Markets – Regulation, Gaps and Bridges, in* Handbook of Blockchain, Digital Finance, and Inclusion: Cryptocurrency, FinTech, InsurTech, and Regulation 207 (David Lee, Kuo Chuen & Robert H. Deng eds., 2017).

from commercial and investment banks to accounting firms. And while there has been significant pushback on the intermediaries being viable in the long-run should the shift of cryptocurrency continue,[5] it is no doubt recognized as a problem by current financial juggernauts who are scrambling to hedge this risk by investing in the technology.[6] This sort of institutional investment is evidence that cryptocurrency refuses to be ignored, despite efforts by numerous financial leaders and governments to deny the viability of the technology as a legitimate financial tool.[7]

Governments around the world have taken a variety of positions on the regulation of cryptocurrencies, ranging from embracing the technology to attempting to shoehorn it into existing, antiquated regulatory schemes, to even outright bans. This paper will survey the various approaches US regulators have taken to regulating and defining cryptocurrency while pointing out the extensive holes in these enforcement mechanisms. Additionally, I will provide a brief overview of the various approaches that some other nations and regions have taken to these same issues, as well as conclusions US regulators may be able to draw from them. Finally, I will provide brief recommendations for the US government as it continues its struggle with the developing technologies and how to approach them from a legal standpoint.

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5. *See, e.g.*, Cameron Harwick, *Cryptocurrency and the Problem of Intermediation*, 20 INDEP. REV. 569, 580 (2016) (recognizing that current legal boundaries limit the degree to which cryptocurrencies can be scaled under anonymity due to intermediation and liability issues).

6. *See, e.g.*, Michael del Castillo, *Nasdaq Leads $20 Million Investment in Enterprise Blockchain Startup Symbiont*, FORBES (Jan. 23, 2019), https://www.forbes.com/sites/michaeldelcastillo/2019/01/23/exclusive-nasdaq-leads-20-million-investment-in-enterprise-blockchain-startup-symbiont/; Hugh Son, *JP Morgan is Rolling Out the First US Bank-Backed Cryptocurrency to Transform Payments Business*, CNBC (Feb. 14, 2019), https://www.cnbc.com/2019/02/13/jp-morgan-is-rolling-out-the-first-us-bank-backed-cryptocurrency-to-transform-payments--.html; Josiah Wilmoth, *Goldman Sachs Headlines $59 Million Funding Round in Cryptocurrency Custodian BitGo*, CCN (Oct. 18, 2018), https://www.ccn.com/goldman-sachs-headlines-59-million-funding-round-in-cryptocurrency-custodian-bitgo.

7. *See, e.g.*, Kate Rooney, *Warren Buffett Says Bitcoin is a 'Delusion' and 'Attracts Charlatans,'* CNBC (Feb. 25, 2019), https://www.cnbc.com/2019/02/25/warren-buffett-says-bitcoin-is-a-delusion.html.

I.
What is Cryptocurrency and Blockchain?

Introduced in a 2008 white paper by an individual writing under the pseudonym Satoshi Nakamoto,[8] blockchain technology is "a sequential database of information that is secured by methods of cryptographic proof, and it offers an alternative to classical financial ledgers."[9] As a peer-to-peer system, these ledgers are validated by each "node," or computer, connected to the network, meaning there is no centralized authority and no individual can change the ledger without the validation of all other nodes.[10] This form of authentication allows for the elimination of the traditional, profit-driven third-party financial institutions that validate the identity and creditworthiness of both parties in a traditional digital transaction.[11] These traditional intermediaries exert enormous control over the digital marketplace as they choose whom to exclude upon the basis of profits, how hefty the transaction costs will be, and what factors will determine the level of trust vested in an individual party.[12] As such, former Fed Chairwoman Janet Yellen has described crypto as a "payment innovation that is taking place entirely outside of the banking industry."[13]

As the original cryptocurrency, Bitcoin was the world's first decentralized currency.[14] It was introduced as a tool for e-commerce with a finite but slow-growing supply that could be easily converted into traditional currencies.[15] Given its place as the original and most talked-about cryptocurrency, the term "Bitcoin" is often used synonymously with "cryptocurrency" by laypeople. But while the originator is still the most valuable, it is far from being the only player in the market these days; as of

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8. *See* Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System (2008) (introducing the concept of blockchain technologies and cryptographic currencies to the world; the system itself did not begin running until January 3, 2009).

9. David Yermack, *Corporate Governance and Blockchains*, 21 Rev. Fin. 7, 7 (2017).

10. *See* Marks, *supra* note 3, at 44.

11. *See id.* at 45.

12. *See id.*

13. Ryan Tracy, *Yellen: Bitcoin 'Doesn't Touch' Banks the Fed Oversees*, Wall Street J. (Feb. 27, 2014) https://www.wsj.com/articles/no-headline-available-1393521584.

14. *See* Marks, *supra* note 3, at 46.

15. *Id.*

April 2019, there are over 2,500 cryptocurrencies in existence that are being actively traded.[16] These currencies range in US dollar value from the thousands to mere pennies, and many are far from legitimate.

Existing cryptocurrencies are issued and new ones are brought to market through an initial coin offering, or ICO. Much like IPOs for securities, ICOs are essentially a formal type of "crowdfunding mechanism by which projects can raise money."[17] The tokens that investors purchase through ICOs typically come in two varieties: usage (or utility) tokens and securities tokens.[18] Usage tokens merely serve as a form of currency within the company's application; securities tokens provide a return based upon the valuation of an underlying entity, like the startup issuing the ICO.[19] Startups quickly began using ICOs to raise capital without the help of traditional middlemen like venture capitalists due to the low costs associated with them.[20] Following the burst of the Bitcoin bubble, however, investors and businesses alike became increasingly aware that cryptocurrencies are not, in fact, the infallible investments they were made out to be.[21] As such, ICOs have yet to regain their shortly-held position as the go-to fundraising means for startups.[22]

16. *All Cryptocurrencies*, INVESTING.COM, https://www.investing.com/crypto/currencies (last visited Apr. 15, 2019).

17. 5Miles, *Are Initial Coin Offerings the New and Improved Way for Startups to Raise Capital?*, INC. (Oct. 12, 2017), https://www.inc.com/fivemiles/are-initial-coin-offerings-the-new-and-improved-way-for-startups-to-raise-capital.html.

18. *Id.*

19. *Id.*

20. *See* Jia Wertz, *Are ICOs the New Startup Lifeblood?*, FORBES (Dec. 2, 2017), https://www.forbes.com/sites/jiawertz/2017/12/02/icos-new-startup-lifeblood/ (estimating that ICOs rose nearly 500% between 2016 and 2017).

21. *See infra* Part II.

22. *See* Paul Vigna, *Raising Money in the Crypto World Has Gotten a Lot Harder*, WALL STREET J. (Mar. 31, 2019), https://www.wsj.com/articles/raising-money-in-the-crypto-world-has-gotten-a-lot-harder-11554037201.

II.
Systemic Risks of Cryptocurrencies

A. *Fraudulent Issuers*

The question of crypto legitimacy has long plagued the marketplace, investors, and regulators alike. The lack of jurisdictional and regulatory clarity[23] set the marketplace up so that virtually anyone—especially in the early days of crypto—could issue coins. Given the novelty and the technical aspects of cryptocurrencies, investors have often fallen victim to inexperienced developers using ICOs to raise funds with little-to-no plan on what to do with it; one study found that in 2017 as many as 80% of ICOs by dollar volume were scams, and 4% of ICOs failed.[24] Unfortunately, what began as a means to attract support for new ideas from small investors became a breeding ground for con artists.[25]

B. *Bubbles & Market Volatility*

The overwhelming success of these fraudulent schemes was undoubtedly propelled by the first "Bitcoin bubble" of late 2017 to early 2018. Just short of a decade after its introduction, the original cryptocurrency's price was sent skyrocketing by speculators and technology leaders selling it as a foolproof investment, even going so far as to declare that "[b]ubbles are mathematically impossible in this new paradigm."[26] But while the lay investor rushed to the nearest computer to cash in on the hottest investment opportunity, academics began issuing dire warnings that this gold rush was sure to come crashing down.[27] As with all bubbles, however, warnings from skeptics were drowned out by the sales pitches of paid spokespeople

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23. *See infra* Part III.

24. Satis Grp., Cryptoasset Market Coverage Initiation: Network Creation (2018), https://research.bloomberg.com/pub/res/d28giW28tf6G7T_Wr77aU0gDgFQ.

25. Dirk A. Zetzsche et al., *The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators* 2 (European Banking Inst., Working Paper No. 18, 2018).

26. *See* Noah Smith, *Yep, Bitcoin Was a Bubble. And It Popped.*, Bloomberg (Dec. 11, 2018), https://www.bloomberg.com/opinion/articles/2018-12-11/yep-bitcoin-was-a-bubble-and-it-popped (noting John McAffee's role in selling Bitcoin as an infallible investment immediately before the currency's price peaked in late 2017).

27. *See* Zetzsche et al., *supra* note 25.

hyping the product. Bitcoin peaked in December of 2017 at an astounding $19,511 per token and began a precipitous fall that sent investors running. More than a year later, the market is still struggling to recover from crypto's reputation as a poor fad investment. Reports suggest that the first quarter of 2019 saw ICOs raise $118 million, a mere 1.7% of the $6.9 billion that was raised in Q1 of 2018.[28]

C. *Personal & Network Security Risks*

Beyond the schemes and hype, even the most legitimate of digital assets pose a wide array of additional security risks to owners due to inherent problems with digital and network security. On the individual level, a person's means of storing his or her password may make assets vulnerable to either thieves (for those passwords physically written down) or hackers (for those passwords stored digitally).[29] There are further risks of human error in losing or forgetting the password to digital assets, making them inaccessible and functionally worthless.[30] At the exchange level stakes are even higher, as recent events have shown, since flaws in network security can open digital asset "wallets" up to hackers who can run off with millions of dollars worth of assets.[31] These sorts of systemic risks pose enormous problems to regulators who are currently bound by existing—and arguably antiquated—financial services and banking laws in their attempts to regulate cryptocurrencies.[32]

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28. *See* Vigna, *supra* note 22.

29. *See* Andrew W. Balthazor, *The Challenges of Cryptocurrency Asset Recovery*, 13 FIU L. Rev. 1207, at 1209 (2019).

30. *See, e.g.*, Daniel Shane, *A Crypto Exchange May Have Lost $145 Million After Its CEO Suddenly Died*, CNN Bus. (Feb. 5, 2019), https://www.cnn.com/2019/02/05/tech/quadriga-gerald-cotten-cryptocurrency/index.html (reporting that a major cryptocurrency exchange has been locked out of its clients' assets after the CEO died without having ever shared the password with anyone).

31. *See, e.g.*, Eric Larcheveque, *2018: A Record-Breaking Year for Crypto Exchange Hacks*, Coindesk (Dec. 29, 2018), https://www.coindesk.com/2018-a-record-breaking-year-for-crypto-exchange-hacks (noting that crypto exchange hacks increased dramatically in 2018 with a total of $865 million in assets stolen, including the largest in history of $534 million).

32. PricewaterhouseCoopers, Carving Up Crypto: Regulators Begin to Find Their Footing (2018), https://www.pwc.com/us/en/financial-services/regulatory-services/publications/assets/cryptocurrency.pdf [hereinafter "PwC Brief"].

These sorts of massive network failures pose an even larger danger beyond those individuals who have their assets stolen. As noted above, the cryptocurrency market has proven to be incredibly volatile—a characteristic to which many attribute the technology's failure to overthrow existing financial systems as many early adopters had promised.[33] This volatility has set the market up to respond quickly and violently to major hacks of crypto assets. In 2018 when South Korean exchange Conrail announced it had suffered a major hack that wiped out 30% of its assets, the bitcoin market plummeted 7%, wiping out billions of dollars in wealth across the globe.[34] This sort of structural vulnerability is undeniably one of the most significant reasons behind the institutional hesitancy to move towards public cryptocurrencies as legitimate investments or practical currencies; backers are simply not going to be able to convince a major financial institution or corporation to risk any significant amount of money on a currency that can plummet due to uncontrollable network security risks on the other side of the world.

D. *Cryptocurrency in the Criminal World*

These concerns are compounded by the security and criminal concerns raised by crypto's anonymity. What was initially sold as one of the technology's biggest selling points quickly became a point of vulnerability for its legitimacy as some of the earliest adopters of cryptocurrency were criminals looking to replace cash as the go-to means for transferring massive amounts of dirty money.[35] One study from January of 2018 estimated that approximately one-quarter of bitcoin users and 46% of bitcoin transactions are involved in illegal

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33. *See* Darryn Pollock, *Cryptocurrency Volatility: Enemy or Friend? How Can Digital Assets Be Price-Secure*, FORBES (Apr. 16, 2019), https://www.forbes.com/sites/darrynpollock/2019/04/16/cryptocurrency-volatility-enemy-or-friend-how-can-digital-assets-be-price-secure/.

34. *See* Daniel Shane, *Billions in Cryptocurrency Wealth Wiped Out After Hack*, CNN BUS. (June 11, 2018), https://money.cnn.com/2018/06/11/investing/coinrail-hack-bitcoin-exchange/index.html (noting that the hack resulted in a drop of bitcoin prices that amounted to approximately $30 billion worldwide).

35. *See generally* Tyler Elliot Bettilyon, *Cryptocurrency's Criminal Revolution*, MEDIUM (July 12, 2018), https://medium.com/s/story/cryptocurrencys-criminal-revolution-6dae3cdf630f.

activity; these estimates equate to around $76 billion in illegal activity per year, a figure that has likely grown in the year since.[36] When two parties to a crypto transaction exchange funds, the only thing identified is a "hot" wallet number that is not tied to personal information like a bank account.[37] While individual bitcoin addresses may be able to link back to the wallet, without external information it is impossible to tie it to an individual, making it both a dream for criminals and a nightmare for law enforcement.[38] Combined with the darknet,[39] cryptocurrencies opened up a world for global criminal networks to remain completely anonymous.

The early dangers of this system hit headlines in 2013 after the arrest of Ross Ulbricht, the creator of the "Silk Road." In under three years, Ulbricht had established the marketplace as the world's largest and most notorious black market for drugs, having hosted more than $1.2 billion in transactions;[40] what was established as a means of selling psychedelic mushrooms in exchange for Bitcoin turned into a criminal enterprise large enough to earn both commissions over ten thousand dollars per day and the attention of U.S. senators.[41] Silk Road eventually led to Ulbricht receiving a sentence of life in prison without parole and dealt a major blow to crypto backers hoping to establish it as a legitimate currency.

While some hypothesize that the growing popularity of cryptocurrencies will lead to the development of technologies that can de-anonymize it,[42] it still remains a challenge for law enforcement and regulators. Had Ulbricht not slipped up by

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36. Sean Foley et al., *Sex, Drugs, and Bitcoin: How Much Illegal Activity Is Financed Through Cryptocurrencies?*, 32 REV. FIN. STUD. 1798, 1798 (2019).

37. *See id.* at 1804.

38. *See id.*

39. The "darknet" is a network like the internet, but can only be accessed through protocols with greater anonymity. It contains marketplaces that allow for the trading of illegal goods and services, including drugs, weapons, and social security numbers. *See id.*

40. David Segal, *Eagle Scout. Idealist. Drug Trafficker?*, N.Y. TIMES (Jan. 18, 2014), https://www.nytimes.com/2014/01/19/business/eagle-scout-idealist-drug-trafficker.html.

41. *See* David Adler, *Silk Road: The Dark Side of Cryptocurrency*, FORDHAM J. CORP. & FIN. L. BLOG (Feb. 21, 2018), https://news.law.fordham.edu/jcfl/2018/02/21/silk-road-the-dark-side-of-cryptocurrency (referencing Senator Chuck Schumer's public call to law enforcement to shut down Silk Road).

42. *See* Yermack, *supra* note 9, at 18.

using a personal email, it is questionable whether the IRS would have been able to ever shut the market down. While countries like France and China have implemented total bans on the practice of purchasing crypto anonymously,[43] the US has failed to do so—though whether this is a choice of principal or a consequence of regulatory inadequacy is yet to be seen.

III.
Existing Regulatory Framework in the US

Working under an existing regulatory structure that was not designed to account for products like cryptocurrencies, United States financial regulators have trodden lightly in an attempt to balance out what could easily become a jurisdictional war over the industry.[44] What has resulted is a piecemeal system of regulation in which participants are left guessing how and to whom they report when transacting in crypto currencies. What's more, the regulators themselves have been left guessing as to how far their authority may extend; in February 2018 both SEC Chairman Jay Clayton and CFTC Chairman Christopher Giancarlo testified to the Senate Banking Committee that neither of them could definitively state they have adequate authority to regulate cryptocurrencies.[45] This leaves fundamental questions about the technology's legal future without any definitive answers in sight.

The primary issue facing regulators today is that there is no single classification or definition of cryptocurrency under US federal laws. Multiple regulators have repeatedly refused to recognize cryptocurrency as "currency" for the purposes of

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43. *See infra* Part IV.

44. *See* PwC Brief, *supra* note 32, at 2.

45. *See Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. (2018) (statement of Jay Clayton, Chairman, Securities and Exchange Commission) [hereinafter "Clayton Testimony"]; *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. (2018) (statement of Christopher Giancarlo, Chairman, Commodities Futures Trading Commission) [hereinafter "Giancarlo Testimony"].

regulation.[46] Instead, these agencies have cast their net over a portion of the crypto market by defining it as something within their purview: crypto is a security per the SEC, a commodity per the CFTC, currency per FinCEN, or property per the IRS. In addition to these federal agencies claiming jurisdiction, a handful of state regulators and legislatures have begun efforts to institute their own regulation on the crypto markets. This has crafted a market begging for clarity on how to define crypto assets.[47]

A. *Securities and Exchange Commission (SEC)*

The SEC began investigating cryptocurrencies beginning in 2013 in relation to their use as a means of financing Ponzi schemes[48] and illegal online gambling.[49] In these first enforcement actions relating to crypto, the SEC charged individuals for failing to register offerings that were selling investment shares in return for Bitcoin.[50] As the agency began to realize the growing problem, it released warnings to investors that Bitcoin and similar technologies have "the potential to give rise both to frauds and high-risk investment opportunities."[51] Thus began the SEC's years-long battle to warn investors of the technology's volatility and developers of the legal jeopardy they face in creating investment opportunities using cryptocurrencies. SEC Chairman Clayton continues to raise concerns that the material facts and risks involved in cryptocurrencies

46. Susan Alkadri, *Defining and Regulating Cryptocurrency: Fake Internet Money or Legitimate Medium of Exchange?*, 17 DUKE L. & TECH. REV. 71, 76 (2018).

47. *See, e.g.*, Marie Huillet, *Circle CEO Says More Regulatory Clarity from US SEC Will Help Unlock Crypto Markets*, COINTELEGRAPH (Jan. 11, 2019), https://cointelegraph.com/news/circle-ceo-says-more-regulatory-clarity-from-us-sec-will-help-unlock-crypto-markets (reporting the CEO of a Goldman Sachs-backed cryptocurrency believes the lack of regulatory clarity has stunted the growth of crypto technology).

48. *See, e.g.,* SEC v. Shavers, No. 4:13-CV-416, 2014 U.S. Dist. LEXIS 130781 (E.D. Tex. Sept. 18, 2014) (finding for the SEC against an individual charged with operating a Ponzi scheme using Bitcoin as consideration).

49. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Bitcoin Entrepreneur with Offering Unregistered Securities (June 3, 2014).

50. *See id.*

51. Press Release, U.S. Sec. & Exch. Comm'n, Bitcoin and Other Virtual Currency-Related Investments (May 7, 2014).

are beyond the understanding of the "Main Street investors".[52] Recognizing this vulnerability, Chairman Clayton has been categorical in his efforts to protect consumers from predatory crypto transactions, declaring:

> There should be no misunderstanding about the law. When investors are offered and sold securities—which to date ICOs have largely been—they are entitled to the benefits of state and federal securities laws and sellers and other market participants must follow these laws.[53]

The SEC currently holds jurisdiction over initial coin offerings in which the coin or token being offered is a security. While obvious on the face, there has been dispute over what exactly makes an offered coin a security. In a December 2017 statement, Chairman Clayton declared that nearly all ICOs would fall under this definition as most are marketed with the expectation that they will increase in value, are traded on secondary markets, and are generally not used for the token's purported utility.[54] While many issuers have argued that their tokens do not fall within this category, the Commission has shown little interest in narrowing their definition or jurisdiction. Additionally, the SEC has warned that it is watching for entities that structure ICOs in a similar fashion to an IPO without complying with securities regulations.[55]

In September 2017, the SEC announced the creation of a Cyber Unit dedicated to, among other things, targeting misconduct involving "distributed ledger technology and initial coin offerings."[56] Following the Unit's creation, it issued a

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52. *See* Clayton Testimony, *supra* note 45, at 2–3 (warning investors that "these markets span national borders" and that "risks can be amplified, including the risk that U.S. market regulators, such as the SEC and state securities regulators, may not be able to effectively pursue bad actors or recover funds.").

53. *Id.* at 3.

54. Press Release, U.S. Sec. & Exch. Comm'n, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017) (noting that while the determination depends on the facts, "[b]y and large, the structures of initial coin offerings that I have seen promoted involve the offer and sale of securities").

55. *See* PwC BRIEF, *supra* note 32 at 5.

56. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Initiatives to Combat Cyber-Based Threats and Protect Retail Investors (Sept. 25, 2017).

number of enforcement actions and cease-and-desist letters in relation to ICOs and cryptocurrency transactions it interpreted as amounting to unregistered securities; as of April 2019, the Commission has taken such action against thirty different individuals and entities.[57] These actions include both settlements requiring fines and retroactive registration as well as halting upcoming ICOs.[58] This enforcement authority has faced plenty of challenges but has thus far been upheld by the courts, including, most notably, by the District Court in Southern California earlier this year.[59]

Moving forward, the Commission has indicated it intends to move into regulating crypto exchanges as securities exchanges needing to meet proper security and disclosure requirements,[60] a move that may eventually lead to jurisdictional tension with the CFTC.[61] Despite all of these efforts to create hardline enforcement in the market, the vast majority[62] of ICOs registered with the SEC in 2018 took advantage of a registration loophole known as Form D that allows them to forego many of the registration requirements typical of an IPO.[63] As such, the SEC has successfully undermined its own efforts to create predictable and forceful regulation by indicating that it is willing to accept the bare minimum.

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57. *Cyber Enforcement Actions*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/spotlight/cybersecurity-enforcement-actions (last visited Apr. 17, 2019).

58. Daniel Roberts, *The SEC Brings Its ICO Crackdown Out into the Open*, YAHOO! FIN. (Nov. 20, 2018), https://finance.yahoo.com/news/sec-brings-ico-crackdown-open-132238303.html.

59. *See* SEC v. Blockvest, LLC, No. 18CV2287-GPB(BLM), 2019 U.S. Dist. LEXIS 24446 (S.D. Cal. 2019) (granting the SEC a preliminary injunction against a firm attempting an ICO of its own cryptocurrency).

60. Press Release, U.S. Sec. & Exch. Comm'n, Statement on Potentially Unlawful Online Platforms for Trading Digital Assets (Mar. 7, 2018).

61. *See infra* Section III.B.

62. *See* Francine McKenna & Katie Marriner, *ICOs Continue to Raise Money Via SEC Back Door*, MARKETWATCH (Jan. 11, 2019), https://www.marketwatch.com/story/icos-continue-to-raise-money-via-sec-back-door-2019-01-11.

63. Form Ds are notices filed by a company for an offering declaring that only "accredited investors" will be allowed to take part in the ICO. The SEC defines "accredited investors" as those with a net worth over $1 million, those that have consistently made over $200,000 per year in income, or business with over $5 million in assets. *See id.*

B. *Commodity Futures Trading Commission (CFTC)*

The CFTC began publicly considering asserting jurisdiction over cryptocurrency derivatives as early as 2014.[64] In 2015, the CFTC officially determined that virtual currencies sufficiently met the definition of a "commodity" under the Commodity Exchange Act.[65] The Commission interprets cryptocurrencies (which they refer to as virtual currency) broadly to encompass any "digital representation of value that functions as a medium of exchange and any other digital unit of account used as a form of currency.[66] Beginning soon after this determination, the Commission took a number of steps to establish such authority, including: prohibiting wash trading and prearranged trades on virtual currency derivatives platforms;[67] bringing action against a Bitcoin futures exchange that failed to register with the CFTC;[68] and issuing proposed guidance on definitions for derivative markets and spot markets in the context of cryptocurrencies.[69] Since then, the Commission has continued to have a public discourse over the crypto marketplace, even releasing a Request for Information on the crypto markets in December of 2018.[70]

Having acted early to establish authority over the derivative marketplaces, the CFTC has—similar to the SEC—acted primarily to prevent fraud and other abuses of the derivative marketplace.[71] Where the two independent agencies have noticeably differed, however, are their attitudes towards the

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64. *See Effective Enforcement and the Future of Derivatives Regulation: Hearing Before the S. Comm. on Agric., Nutrition, & Forestry*, 113th Cong. 20 (statement of Timothy Massad, Chairman, Commodity Futures Trading Comm'n).

65. *See* Giancarlo Testimony, *supra* note 45, at 4.

66. *See* U.S. COMMODITY FUTURES TRADING COMM'N, CFTC STAFF ADV. NO. 18-14, ADVISORY WITH RESPECT TO VIRTUAL CURRENCY DERIVATIVE PRODUCT LISTING (2018) (Citing Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335, at 60,338 (proposed Dec. 20, 2017) (explaining the CFTC "'does not intend to create a bright line definition at this time given the evolving nature of the commodity'")) [hereinafter "CFTC GUIDANCE"].

67. *See* TeraExchange LLC, C.F.T.C. No. 15-33 (Sept. 24, 2015).

68. *See* BFXNA Inc., C.F.T.C. No. 16-19 (June 2, 2016).

69. *See* Retail Commodity Transactions Involving Virtual Currency, 82 Fed. Reg. 60,335 (Dec. 20, 2017) (to be codified at 17 C.F.R. pt. 1).

70. *See* Request for Input on Crypto-Asset Mechanics and Markets, 83 Fed. Reg. 64,563 (Dec. 17, 2018).

71. *See* PWC BRIEF, *supra* note 32, at 2.

evolving technologies. Whereas the SEC has struggled to keep up with issuers and been generally hostile to the crypto industry, the CFTC has gone out of its way to encourage and even facilitate its development. In May of 2017, the Commission established LabCFTC, an initiative to research emerging financial technology like cryptocurrency and blockchain.[72] Since its launch, LabCFTC has released a Primer on Smart Contracts to educate innovators,[73] provided a forum for over 200 organizations to discuss their ideas and concerns with the CFTC,[74] and launched a website dedicated to educating investors on Bitcoin commodities.[75]

As it stands today, the CFTC has perhaps the strongest legal authority over cryptocurrency assets. In 2018 the federal court for the Eastern District of New York recognized the broad definition of a commodity under the Commodity Exchange Act; as such, the court left no doubt that the agency has the power to bring enforcement actions against those defrauding the public through cryptocurrency schemes not involving ICOs.[76] Less than two months later, a Massachusetts federal court reached a virtually identical conclusion, finding that "it is undisputed that there is futures trading in virtual currencies (specifically involving Bitcoin)."[77] Having been bolstered by these judicial pronouncements, three of the Commission's top divisions notably placed "cryptocurrency surveil-

72. *See* Press Release, Commodity Futures Trading Comm'n, CFTC Launches LabCFTC as Major FinTech Initiative (May 17, 2017).

73. *See* LabCFTC, A Primer on Smart Contracts (2018), https://www.cftc.gov/sites/default/files/2018-11/LabCFTC_PrimerSmartContracts112718_0.pdf.

74. Aaron Stanley, *LabCFTC Director Daniel Gorfine Talks Inaugural Year, U.S. Fintech Regulation*, Forbes (Aug. 22, 2018), https://www.forbes.com/sites/astanley/2018/08/22/labcftc-director-daniel-gorfine-talks-inaugural-year-u-s-fintech-regulation/.

75. *Bitcoin,* Commodity Futures Trading Commission, https://www.cftc.gov/Bitcoin/index.htm (last accessed Apr. 17, 2019).

76. *See* CFTC v. McDonnell, 332 F. Supp. 3d 641, 651 (E.D.N.Y. 2018) (finding a company that had tricked consumers into paying them in cryptocurrency purportedly in exchange for investment advice that was never provided).

77. CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 498 (D. Mass 2018).

lance practices" at the very top of their examination priorities for 2019.[78]

Given this authority and priority, the Commission has issued guidance to clearing houses and exchanges on listing a derivative contract based on virtual currencies.[79] This guidance included specific technical and process recommendations related to enhancing market surveillance, coordination with CFTC staff, large trader reporting, outreach to stockholders, and DCO risk management.[80] Given this extensive guidance and all of the outreach and development efforts the Commission has put forth, the CFTC's expectations for cryptocurrency markets and definition of fraud are arguably the clearest available to those dealing in the technology.

C. *Financial Crimes Enforcement Network (FinCEN)*

As a division of the Department of Treasury, FinCEN's mission is to "safeguard the financial system from illicit use, combat money laundering, and promote national security."[81] Consequently, it is no surprise that the agency has asserted its own jurisdiction over the use of cryptocurrencies. In 2013, FinCEN issued guidance that defined currency (which it referred to as "real" currency) and made it clear that it did not formally consider crypto as "real currency."[82] Additionally, the agency declared that crypto "does not have legal tender status in any jurisdiction," but made clear that they have jurisdiction over "convertible virtual currency" that either has an

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78. Press Release, Commodity Futures Trading Comm'n, CFTC Divisions Announce Examination Priorities (Feb. 12, 2019) (announcing that crypto is a primary interest for the Division of Market Oversight, Division of Swap Dealer & Intermediary Oversight (DSIO), and Division of Clearing & Risk (DCR)).

79. CFTC GUIDANCE, *supra* note 66, at 1.

80. *Id.* at 3.

81. *Mission Statement*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/about/mission (last visited Apr. 19, 2019).

82. *See* U.S. DEPT. OF TREASURY, FIN. CRIMES ENF'T NETWORK, GUIDANCE FOR APPLICATION OF FINCEN'S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES (2013) (citing 31 C.F.R. § 1010.100(m)) (defining currency as "the coin and paper money of the United States or of any other country that [i] is designated as legal tender and that [ii] circulates and [iii] is customarily used and accepted as a medium of exchange in the country of issuance") [hereinafter "FINCEN GUIDANCE"].

equivalent value in real currency, or acts a substitute for real currency.[83]

FinCEN considers anyone that transmits virtual currency that is not a party to the transaction (i.e. an exchange) as a "money transmitter" for the purposes of regulation.[84] Additionally, "money transmitters" include anyone that accepts real currency or its equivalent from a purchaser and transmits the value of the real currency in cryptocurrency.[85] As such, FinCEN has made the broad declaration that anyone selling cryptocurrency is considered a money transmitter and, thus, subject to the requirements that come with the designation.[86] These requirements largely relate to anti-money laundering (AML) , know-your-customer (KYC), and combating the financing of terrorism (CFT) programs that have long been applied to financial entities. But while these are relatively commonplace in the banking industry, they pose enormous difficulties to crypto exchanges who have to overcome the issues of inherent anonymity. This has drawn the ire of the industry[87] as they struggle to meet the requirements despite their best efforts.[88]

Despite these sweeping pronouncements of its jurisdiction, however, FinCEN has maintained a fairly reasonable position in practice. In a letter to Senator Ron Wyden of the Senate Finance Committee, FinCEN deferred to the SEC and CFTC and clarified that it does not consider any ICO registered as a securities or derivatives offering to be a transmission of money under their jurisdiction.[89] These issuers would be

83. *See id.*

84. *See id.* at 3.

85. *See id.* at 4.

86. The guidance additionally made clear that the *user,* or purchaser, of the cryptocurrency is *not* considered a money transmitter. *See id.* at 1.

87. *See, e.g.*, Edan Yago, *There's a Bigger Scam Than Anything in Crypto, It's Called KYC/AML*, COINDESK (July 27, 2018), https://www.coindesk.com/theres-a-bigger-scam-than-anything-in-crypto-its-called-kyc-aml.

88. *See, e.g.*, Rachel Wolfson, *Crypto Exchange Binance Enhances Global KYC/AML Measures with Tools from IdentityMind*, FORBES (Mar. 26, 2019), https://www.forbes.com/sites/rachelwolfson/2019/03/26/crypto-exchange-binance-enhances-global-kycaml-measures-with-tools-from-identitymind/.

89. *See* Letter from Drew Maloney, Assistant Sec'y for Legis. Affairs, U.S. Fin. Crimes Enf't Network, to Sen. Ron Wyden, Ranking Member, Senate Comm. on Fin. (Feb. 13, 2018). This position was later formalized in FinCEN guidance issued in May of 2019. *See* FIN. CRIMES ENF'T NETWORK,

expected to conform to the AML, CFT, and KYC requirements of the corresponding agency rather than conforming to those of FinCEN.[90] As such, FinCEN only exerts jurisdiction over exchanges and issuers that have not registered with the SEC or CFTC. These transmitters are considered traditional Money Services Businesses that must comply with FinCEN disclosure and monitoring practices, including registration with FinCEN, keeping and submitting records including Suspicious Activity Reports and Currency Transaction Reports for transactions over $10,000, and implementing AML programs.[91]

Since issuing this guidance, FinCEN has taken a number of actions against exchanges that were used to underwrite crimes. In 2017 an exchange was fined $110 million for failing to implement effective AML programs which facilitated ransomware schemes and darknet drug sales; the exchange had failed to obtain anything from customers beyond a username, password, and e-mail address.[92] In April of 2019, FinCEN targeted the first individual peer-to-peer currency exchanger, assessing a $35,000 fine and barring the currency exchange from any future activities as a money service business.[93] In sum, the agency has made it clear that it intends to play a role in the regulation of crypto, with the likely consequence being that it pushes more exchanges and offerings towards SEC or CFTC registration.

D. *Other Federal Agencies*

Beyond these primary enforcement agencies, cryptocurrency issuers, exchanges, consumers, and users have faced additional scrutiny from the IRS and the FTC. The IRS was one of the first active regulators in the cryptocurrency world, with

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FIN-2019-G001, APPLICATION OF FINCEN'S REGULATIONS TO CERTAIN BUSINESS MODELS INVOLVING CONVERTIBLE VIRTUAL CURRENCIES (2019).

90. *See* Letter from Drew Maloney, *supra* note 89.

91. *See Which States Require Crypto Businesses to Get a Money Transmitter License?*, LANCE SURETY BOND ASSOCIATES (Feb. 13, 2019), https://www.suretybonds.org/blog/which-states-require-cryptocurrency-businesses-to-get-a-money-transmitter-license.

92. Press Release, Fin. Crimes Enf't Network, FinCEN Fines BTC-e Virtual Currency Exchange $110 Million for Facilitating Ransomware, Dark Net Drug Sales (July 27, 2017).

93. Press Release, Fin. Crimes Enf't Network, FinCEN Penalizes Peer-to-Peer Virtual Currency Exchanger for Violations of Anti-Money Laundering Laws (Apr. 18, 2019).

its involvement in the dissolution of the Silk Road.[94] In 2014, the IRS issued guidance on the tax treatment of transactions using virtual currencies defining them as "property" that is subject to normal tax treatment; it is not considered currency and thus must be declared as income when obtained, either as a payment for goods/services or when the individual "mines" crypto for a living.[95] As such, individuals are expected to declare capital gains or losses that result from crypto.[96] The IRS has repeatedly issued public warnings that failure to properly declare crypto income or assets may lead to charges of tax evasion or filing false returns, resulting in fines up to $250,000 and five years in jail.[97] As a show of force, in 2017 the agency issued a "John Doe" summons to Coinbase (one of the largest crypto exchanges), requesting transaction records from 2013 to 2015; the summons was upheld by a California federal court.[98] Despite these efforts, the IRS continues to express concern over massive underreporting of crypto transaction and has yet to require exchanges to report cryptocurrency transactions.[99]

The FTC has also intervened under certain circumstances in an effort to fight the many schemes stemming from the initial bitcoin gold rush. Both the FTC and the SEC have targeted promoters who have engaged in paid endorsements for unregistered or fraudulent cryptocurrency endeavors.[100] The FTC has also taken a number of steps to educate consumers about the dangers of cryptocurrency schemes, including hosting events and publishing blogs. Nevertheless, as it stands now, however, the Commission treats cryptocurrency promotions similarly to any other investment promotions, subject to the same standards for fraud and material misstatement of facts.

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94. *See* Adler, *supra* note 41 (detailing the IRS investigation that ultimately led to Ulbricht's arrest in 2013).

95. I.R.S., NOTICE 2014-21 at 2, 4.

96. *See id.* at 3.

97. *See, e.g.*, I.R.S., NEWS RELEASE IR-2018-71 (Mar. 23, 2018).

98. *See* Mordecai Lerer, *The Taxation of Cryptocurrency: Virtual Transactions Bring Real-Life Tax Implications*, CPA J. (Jan. 24, 2019), https://www.cpajournal.com/2019/01/24/the-taxation-of-cryptocurrency/.

99. *See id.*

100. *See, e.g.*, Press Release, Federal Trade Comm'n, FTC Shuts Down Promoters of Deceptive Cryptocurrency Schemes (Mar. 16, 2018); Press Release, U.S. Sec. & Exch. Comm'n, Two Celebrities Charged with Unlawfully Touting Coin Offerings (Nov. 29, 2018).

E. *State Regulations*

In addition to federal regulators, those dealing in cryptocurrency face a swath of state regulators seeking jurisdiction over transactions and pursuing a wide range of treatment. States like New Hampshire, Montana, and Wyoming have introduced laws to effectively exclude crypto transactions from state money transmitter laws; by contrast, Alabama, Connecticut, Georgia, North Carolina, Vermont, and Washington have all implemented laws that explicitly place crypto under the purview of money transmitter regulators.[101] This has resulted in even more burdensome compliance requirements for exchanges and pushed developers toward the former list of states given their more lenient regulatory standards.[102]

Most notably, New York became the first state in 2014 to adopt a cryptocurrency licensing regime, the "BitLicense", that applies to any "Virtual Currency Business Activity."[103] This system, administered by the New York Department of Financial Services (NYDFS), requires a non-refundable application fee of $5,000; consent to state examination; posting of a surety bond in an amount determined on a case-by-case basis; providing various disclosures and financial information; and establishing AML practices, cybersecurity policies, and business continuity and disaster recovery programs.[104] The extensive application procedure and broad inclusion of businesses subject to this regulation[105] has, effectively, made it a regulatory failure; despite the vast number of firms and exchanges to which the

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101. Jennifer L. Moffitt, *The Fifty U.S. States and Cryptocurrency Regulations*, COIN ATM RADAR (July 27, 2018), https://coinatmradar.com/blog/the-fifty-u-s-states-and-cryptocurrency-regulations.

102. *See* Benjamin Bain, *Wyoming Aims to Be America's Cryptocurrency Capital*, BLOOMBERG BUS. WEEK (May 15, 2018), https://www.bloomberg.com/news/articles/2018-05-15/wyoming-aims-to-be-america-s-cryptocurrency-capital.

103. *See* N.Y. COMP. CODES R. & REGS. tit. 23. § 200.3(a) (2015).

104. Alkadri, *supra* note 46, at 84.

105. BitLicenses are required of anyone engaging in: virtual currency transmission; storing, holding, or maintaining custody or control of virtual currency on behalf of others; buying and selling virtual currency as a customer business; performing exchange services as a customer business; or controlling, administering, or issuing a virtual currency. N.Y. COMP. CODES R. & REGS. tit. 23. § 200.2(q) (2015).

law applies to, NYDFS has only approved 16 BitLicenses as of January 2019.[106]

Despite New York's failure, other states have proposed similar programs. In 2017 the Uniform Law Commission completed a uniform model state law titled, "the Uniform Regulation of Virtual-Currency-Businesses Act," (URVCBA) which endorses a licensing regime.[107] Having repeatedly considered implementing a license regime, California recently became the fifth state to introduce the URVCBA; however, no state has yet enacted the URVCBA.[108] In an ongoing case in Florida, state regulators have litigated with an individual who is charged with selling bitcoin for cash in transactions the state claims should be considered money transmissions.[109] These are but a few of the examples of the chaos currently pervading the state-level regulation of cryptocurrency. As of now, states have yet to succeed in enforcing their own rules upon crypto markets, despite their best efforts to do so. Beyond encouraging cryptocurrency players to domicile in states with more amenable regulations, there currently seems to be very little states can do besides cracking down on individual fraud schemes.

IV.
International Approaches to Crypto Regulation

A. *Asia*

Asian countries are generally more advanced in the adoption and regulation of cryptocurrency. While originally having fairly lenient, Japan has strengthened crypto regulations after Mt. Gox, one of the biggest bitcoin exchanges, was hacked in 2014, resulting in the loss of 850,000 bitcoin and the ex-

106. Molly Jane Zuckerman, *New York Financial Regulator Grants BitLicense to Robinhood and LibertyX*, Cointelegraph (Jan. 24, 2019), https://cointelegraph.com/news/new-york-financial-regulator-grants-bitlicense-to-robinhood-and-libertyx.

107. Unif. Regulation of Virtual-Currency Businesses Act (Unif. Law Comm'n 2017).

108. Cal. Leg. Assemb. B. 1489, 2019-2020, Reg. Sess. (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB1489.

109. *See* State v. Espinoza, 264 So. 3d 1055 (Fla. Dist. Ct. App. 2019).

change's insolvency.[110] Since 2017, cryptocurrency exchange businesses operating in Japan have been regulated by the Financial Services Agency under the Payment Services Act. The Act requires businesses to be registered, keep records, adhere to security measures, and take steps to protect customers, among other things; it was later amended to include provisions for anti-money laundering practices.[111] Income from digital assets is consider miscellaneous income, rather than capital gains for tax purposes.[112] Notably, however, ICOs are not currently regulated—leaving a regulatory vacuum within the Japanese crypto space.

China represents perhaps the harshest regulatory scheme in the world on digital assets. In 2017, China's seven financial regulators jointly issued the Announcement on Preventing Financial Risks from Initial Coin Offerings, which effectively announced that ICOs are illegal in China.[113] This Announcement declared that cryptocurrencies do not have equal status as fiat currencies and "cannot and should not be circulated and used in the market as currencies."[114] As such, trading platforms are prohibited from converting cryptocurrencies into fiat currency and, as a result, have all but ceased operation in China. As of July 2018, Bitcoin traded with Chinese yuan had dropped from a high of 90% of global Bitcoin trading to under 1%.[115]

Outside of these two examples, most other Asian jurisdictions have largely remained hands-off in the crypto world. Regulators in Hong Kong have taken several actions against ICOs as violations of securities law, but have generally remained silent beyond defining virtual currencies as digital commodities.[116] Similarly, Singapore's regulators have largely refused to

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110. *See Regulation of Cryptocurrency: Japan*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/cryptocurrency/japan.php (last visited Apr. 19, 2019).

111. *See id.*

112. *Id.*

113. *See Regulation of Cryptocurrency: China*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/cryptocurrency/china.php (last visited Apr. 19, 2019) [hereinafter *Library Report*].

114. *See id.* (quoting PBOC, CAC, MIIT, SAIC, CBRC, CSRC, and CIRC, Announcement on Preventing Financial Risks from Initial Coin Offerings (Sept. 4, 2017)).

115. *See id.*

116. *See Library Report*, *supra* note 113, at 108–09.

interfere with the market beyond clarifying that cryptocurrencies are not legal tender,[117] as have Indian regulators.[118] The South Korean government has implemented requirements for dealers whereby they must contract with banks, thus tying transactions to individual bank accounts and undermining anonymity.[119]

B. *Europe & the United Kingdom*

The European Union currently lacks any uniform approach to cryptocurrency regulation. Despite consistent calls from both member states and the European Banking Authority (EBA) for standardized regulations within the bloc, the organization has yet to introduce such measures.[120] In a January 2019 report, the EBA called for the bloc to begin deliberations of region-level regulation while the technology and trading was still in its infancy.[121] The EU does not collect taxes on crypto transactions since a 2015 European Court of Justice case finding them to fall under a tax exemption.[122] Additionally, the European Commission still holds that "crypto-asset activities do not constitute regulated services within the scope of EU banking, payments and electronic money law, and risks exist for consumers that are not addressed at the EU level."[123] Beyond general AML and CTF obligations the Commission has imposed, it has left regulation up to the discretion of member states.

Crypto regulatory efforts in the region have largely been led by France, who adopted a new financial sector law in April of 2019 to encourage cryptocurrency issuers and traders to set up shop in the country.[124] The law establishes a regulatory framework that creates a mandatory licensing regime for "ser-

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117. *See id.* at 120.

118. *See id.* at 99.

119. *See id.* at 121.

120. *See* Osato Avan-Nomayo, '*EU-Level Action Needed' For Cryptocurrency, Says European Banking Authority*, BITCOINIST (Jan. 9, 2019), https://bitcoinist.com/eu-banking-authority-cryptocurrency.

121. *See Report with Advice for the European Commission on Crypto-Assets*, EUROPEAN BANKING AUTHORITY (2019).

122. *See Library Report*, *supra* note 113, at 28.

123. Press Release, European Banking Comm'n, EBA Reports on Crypto-Assets (Jan. 9, 2019).

124. *See* Inti Landauro, *France to Ask EU Partners to Adopt Its Cryptocurrency Regulation*, REUTERS (Apr. 15, 2019), https://www.reuters.com/article/us-

vice providers who wish to provide digital asset custody services to third parties or to purchase/sell digital assets in exchange for legal tender.[125] ICO issuers have the option to register with the AMF, but those who do not are not allowed to solicit the general public with crypto offerings, though advertising is allowed.[126] The AMF additionally indicated that it may choose to issue a blacklist of non-compliant entities or block access to fraudulent websites. Having been positively received by both crypto backers and skeptics alike, France has made it clear that it wants the EU to adopt their framework for the entire region, with the French Finance Minister indicating that he intends to formally propose it in the near future.[127]

Outside of France, there has been very little European effort to address cryptocurrencies. Most countries, including Finland, Belgium, and Denmark, have refused to issue any crypto-specific regulations, instead choosing only to provide advisory statements that warn consumers of their risks and make clear that no national laws protect the investments.[128] Switzerland classifies cryptocurrency as property, and has made efforts to relax regulatory burdens in order to attract fintech companies; the government has remained hands-off, with no regulations, case law, or legal doctrine for ICOs.[129] Falling in line with the rest of Europe, the UK has also failed to establish any crypto-specific regulations, but did issue guidance in January of 2019 announcing the launch of a consultation with the crypto market to determine the best means of regulating the technology.[130] In sum, cryptocurrency regulation has largely been indicative of the contrast between the US and European approaches to regulation: the US has been quick to impose less-than-optimal rules while Europe remains slow and deliberative.

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france-cryptocurrencies/france-to-ask-eu-partners-to-adopt-its-cryptocurrency-regulation-idUSKCN1RR1Y0.

125. Kevin Helms, *France Adopts New Crypto Regulation*, BITCOIN.COM (Apr. 16, 2019), https://news.bitcoin.com/france-cryptocurrency-regulation.

126. *See id.*

127. *See id.*

128. *See Library Report*, supra note 113, at 30–36.

129. *See id.* at 77.

130. FIN. CONDUCT AUTH., CONSULTATION PAPER CP 19/3: GUIDANCE ON CRYPTOASSETS (2019), https://www.fca.org.uk/publication/consultation/cp19-03.pdf.

C. *The Americas*

Canada allows citizens to deal in cryptocurrency, but maintains that it is not legal tender.[131] Crypto is taxed by the Canada Revenue Agency (CRA) as a commodity and transactions using it to pay for goods and services are treated as barter.[132] In 2014 the Canadian government enacted Bill C-31 which includes amendments to the country's Proceeds of Crime (money laundering) and Terrorist Financing Act. This treats virtual currencies as money service businesses for the purposes of anti-money laundering laws. The Act was the world's first national law on digital currencies as well as the first treatment of digital currency financial transactions under national anti-money laundering laws.[133]

Latin America has been particularly interested in the world of cryptocurrency as a means of filling the void left by traditional banks. A 2017 World Bank report found that only 49% of adults in the region have access to a bank account.[134] Thus, consumers are excited at the opportunity to access online markets through the new technology. Additionally, consumers have turned to crypto as a means of avoiding the hyperinflation in certain nations. For example, Argentina, a country plagued by hyperinflation following their financial crisis, has become one of the most active crypto communities in the world.[135]

In March of 2018, the Venezuela government launched the "Petro", the first-ever cryptocurrency created and backed by a national government.[136] The currency is supposedly backed by Venezuelan oil production and is meant to equate to the value of one barrel of crude oil, which the government

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131. *Library Report*, *supra* note 113, at 10.

132. *See id.* at 10–11.

133. *See id.*

134. Julia Yansura et al., *Why Does Cash Remain King in Latin America and the Caribbean?*, DIALOGUE (Sept. 24, 2019) (citing WORLD BANK GRP., THE GLOBAL FINDEX DATABASE 2017 (2017)), https://www.thedialogue.org/analysis/why-does-cash-remain-king-in-latin-america-and-the-caribbean/.

135. *See Bitcoin is Being Embraced in All Latin America as the Face of Money is Evolving in South America*, BITCOINEXCHANGEGUIDE (Jan. 14, 2019), https://bitcoinexchangeguide.com/bitcoin-is-being-embraced-in-all-latin-america-as-the-face-of-money-is-evolving-in-south-america.

136. Nathan Lustig, *An Overview of Latin America's Blockchain Adoption*, NASDAQ (June 20, 2018), https://www.nasdaq.com/article/an-overview-of-latin-americas-blockchain-adoption-cm980712.

hoped would lead to price stability.[137] In an effort to push adoption, the Petro was made an official alternate currency and pension payments were converted to the currency without the recipients' permission.[138] Unsurprisingly, however, much of this seems to have been a cash grab by the authoritarian government. A 2018 Reuters report found that the oil that supposedly the backed the currency simply did not exist.[139] Despite the government's best efforts, the Petro is not traded on any major crypto exchange, no businesses in the country accept it, and the Ministry in charge of it refuses to acknowledge it.[140] The desperate efforts have dealt another major blow to the legitimacy of crypto as an acceptable currency, and it is unlikely any other government will attempt such an undertaking anytime soon.

Beyond Venezuela, crypto regulation in Latin America largely falls in line with Europe. Countries including Argentina, Guatemala, Chile, and Honduras have all made clear that they do not legally recognize crypto as currency and, as such, have no authority to regulate it under their central banking systems.[141] Bolivia has instituted an outright ban on cryptocurrency and made clear that it provides no protection for consumers who deal in it.[142] Mexico was one of the earliest countries to regulate financial technology and has charged the Mexican Central Bank in charge of monitoring cryptocurrency businesses in the country.[143] Additionally, many Latin American governments have begun experimenting with using blockchain to improve governance and various other systems.[144]

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137. *Id.*

138. *See* Brian Ellsworth, *Special Report: In Venezuela, New Cryptocurrency is Nowhere to be Found*, REUTERS (Aug. 30, 2018), https://in.reuters.com/article/cryptocurrency-venezuela/special-report-in-venezuela-new-cryptocurrency-is-nowhere-to-be-found-idINKCN1LF18G.

139. *See id.*

140. *See id.*

141. *See Library Report, supra* note 113, at 7–17.

142. *Id.* at 9.

143. *See* Lustig, *supra* note 136.

144. *See id.*

Conclusions & Policy Recommendations

In short, a massive regulatory overhaul is needed in the United States if there is any aim to adequately regulate cryptocurrencies. The current patchwork system has produced a number of high-profile cases that have garnered the ire of the blockchain industry and front-page wins for regulators, but it does little to provide guidance to entrepreneurs looking to enter the field. Individuals looking to deal in crypto run the constant risk of tip-toeing over the ever-shifting regulatory line into illicit work that could earn them fines into the millions or even jail time. Additionally, the system is currently at the mercy of the relationships between regulators themselves; should any of them decide to broaden their interpretation of their own authority to overlap with another's, a court battle that could easily span years would likely ensue—leaving crypto in a legal purgatory.

The ideal means of overhauling this system would be through a congressional act that could officially define blockchain, cryptocurrency, and the jurisdiction of a single agency charged with its regulation. Though perhaps politically unlikely, establishing a new federal agency specializing in these technologies would provide an enormous amount of clarity to the space and allow for thorough, deliberate regulation that balances the interests of consumers and businesses alike. Federal regulators are currently working under an imaginary congressional mandate through the use of clever statutory interpretation and legal gymnastics. This sort of ad hoc governance is not conducive to effective policy-making and has, instead, just led to developers skirting the law by exploiting the massive holes existing between the patchwork jurisdiction. By introducing a new, specialized agency, these gaps can be filled, clarity increases, and the government can begin developing adequate enforcing efforts.

While perhaps opposed in the short term by developers and the industry as a whole, an overhaul in the regulation and enforcement of cryptocurrency in the United States would benefit all parties. Market volatility due to uncertainty around these products is one of crypto's greatest weaknesses and has prevented it from broad adoption.[145] Comprehensive govern-

145. *See supra* Section II.B.

ment intervention in the marketplace would likely shore up a significant amount of this volatility, thus granting more legitimacy to cryptocurrencies. Consumers could rest assured knowing that, at least to some extent, there are consumer protection mechanisms in place. Businesses and developers would be able to rely upon established federal policies and regulations, eliminating the uncertainty that currently surrounds working in crypto.

The substance of the new regulations should be created in conjunction with the industry itself, soliciting public comment from consumer groups, exchanges, traditional financial intermediaries, and developers in an effort to balance the interests of all parties involved. Establishing a formal registration regime, similar to that of France, for all those doing business in and actively using crypto would allow regulators to ensure products being offered conform to some sort of minimum standard and prevent issuers from raising capital and then disappearing with the money. While this would likely create some resistance, given one of crypto's selling points being anonymity, it is essential if there are to be any protections for consumers. This would have the additional benefit of creating asset tracking for tax purposes—likely funding at least a portion of the appropriations necessary for the new office. Without this sort of overhaul, the United States is likely to continue to face a regulatory crisis as the development of crypto currencies persists and the industry is left without concrete parameters.