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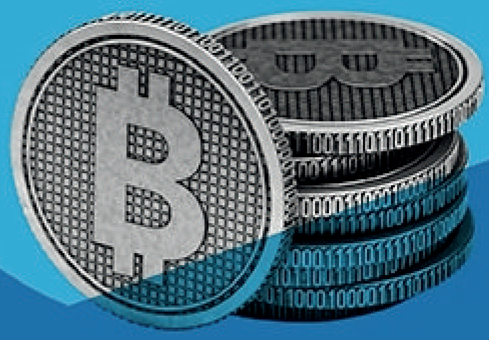

January 2024

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CryptoLink is a compilation of news stories published by outside organizations. Akin aggregates the stories, but the information contained in them does not necessarily represent the beliefs or opinions of the firm. Akin's January CryptoLink update includes developments and events that occurred between December 2023 and January 2024.

Congress continues to plug along on crypto policy. The Senate's attention – on a bipartisan basis – has been focused on extending Anti-Money Laundering (AML) regulatory authority to the digital assets space. This continues to draw fire from the crypto industry, particularly given concerns about AML application to decentralized finance. That said, it does seem that even the most aggressive crypto proponents in the House understand that some work in AML might be the price of entry on broader crypto legislation on stablecoins and market structure. House Financial Services Chairman Patrick McHenry (R-NC) and Rep. French Hill (R-AR) continue to work closely with Ranking Member Maxine Waters (D-CA) and the Administration on a stablecoin resolution, and they say that they are "close" to a deal. Given the AML concerns of the Administration, as well as continued concerns from Treasury about the systemic risk that digital assets might eventually pose to the larger financial system, there seems to be a shared interest in getting a regulatory framework to the President for signature sometime this year.

With the start of 2024, regulatory enforcement actions in the digital asset space continue to be a priority for several government agencies. First, the Commodity Futures Trading Commission (CFTC) has continued to expand its focus on the decentralized finance ("DeFi") space through providing industry and market participants with guidance on the opportunities and risks presented by decentralization through the agency's Decentralized Finance Report. The CFTC will likely continue to focus on "DeFi" in its enforcement actions this year. Further, the Securities and Exchange Commission (SEC) has continued to litigate cases against digital asset platforms. This month, many in the industry paid close attention to the oral arguments in connection with the *SEC v. Coinbase* case, in which Coinbase has filed a Motion to Dismiss the SEC's charges against the exchange. The Court's ruling on Coinbase's Motion to Dismiss will provide further guidance on how courts are interpreting the *Howey* test's application to various digital asset classes. Another headline case from last year, the criminal case against Sam Bankman-Fried, will continue to be a guidepost for criminal prosecutions of individuals involved in cryptocurrency fraud.

In this issue

Key Developments

CFTC Releases Decentralized Finance Report

On January 8, 2024, the **CFTC's** Digital Assets and Blockchain Technology Subcommittee of the Technology Advisory Committee released a detailed report on the opportunities and risks associated with the DeFi market. Commissioner Christy Goldsmith Romero noted that this foundational report serves "as a first step to facilitate a dialogue between policymakers and industry." The CFTC report provides detailed recommendations to mitigate risks to investors, consumers, market integrity, financial stability and to combat illicit finance. In particular, the report recommends (i) a resource assessment, data gathering and mapping exercise, (ii) surveying the existing regulatory perimeter, (iii) risk identification, assessment and prioritization, (iv) identifying and evaluating the range of potential policy responses to address risks, and (v) fostering greater engagement and collaboration with domestic and international standard setters, regulatory efforts and DeFi builders.

The CFTC's report can be found here and Commissioner Romero's comments can be found here.

SEC Approves 11 ETFs Holding Bitcoin to be Publicly Listed and Traded

On January 10, 2024, the SEC approved the listing and trading of spot bitcoin exchange traded fund (ETF) shares. This decision followed an earlier Court of Appeals ruling which struck down the SEC's previous decision to deny the trading of bitcoin ETF shares by Grayscale Investments, LLC. Following approval for Grayscale, 10 other companies also gained approval to have their bitcoin ETF shares publicly traded.

Following the SEC's order allowing the ETF trading, SEC chair Gary Gensler issued a statement in which he noted that the SEC had previously disapproved more than 20 exchange rule filings for spot bitcoin exchange-traded products (ETPs), one of which had been made by Grayscale and contemplated the conversion of the Grayscale Bitcoin Trust into an ETP. Gensler noted that "circumstances, however, have changed" and the "most sustainable path forward is to approve the listing and trading of these spot bitcoin ETP shares." Gensler emphasized that the approval of a bitcoin ETF should not signal a willingness to approve listing for other crypto asset securities nor does it shift the SEC's position that "the vast majority of crypto assets are investment contracts and thus subject to the federal securities laws." Gensler added that the SEC's action will include certain protections for investors, including by requiring sponsors of bitcoin ETPs to "provide full, fair, and truthful disclosure about the products." Furthermore, Gensler stressed that the SEC's approval should not be viewed as an endorsement of bitcoin. Instead, he noted that bitcoin is speculative, volatile, and used for "illicit activity including ransomware, money laundering, sanction evasion, and terrorist financing."

The SEC order can be found here and Gensler's comments can be found here.

Crypto Advocacy Group Refuses to Answer to Accusations From Senator Warren

On January 15, 2024, Coin Center, a crypto currency lobbying group, responded to a letter issued by Senator Warren (a member of the Senate Banking, Housing and Urban Affairs Committee) to the Blockchain Association, Coin Center and Coinbase in December 2023 in which Warren questioned the presence of former defense and national security officials in crypto firms and their role in undermining efforts to regulate cryptocurrency. In their letter, Coin Center maintained that it had no obligation to answer the statements in the letter and that the letter and proposed legislation violate the First Amendment and fail to effectively regulate virtual currency.

Senator Warren's letter can be found here and a news report on Coin Center's response can be found here.

European Banking Authority Extends Anti Money Laundering Guidelines to Crypto

On January 16, 2024, the European Banking Authority (EBA) extended its guidelines on money laundering and terrorist financing risk factors to crypto-asset service providers (CASPs) in the European Union (EU). The new guidelines, which will go into effect on December 30, 2024, highlight money laundering and terrorist financing risk factors and mitigating measures that CASPs need to consider. Under the new guidelines, CASPs will be required to manage their exposure to financial crime by identifying vulnerability factors and implementing mitigating measures. The guidelines acknowledge the heightened risk for CASPs due to the speed of crypto-asset transfers and the potential for anonymity. Through extending the scope of the guidelines, the EBA seeks to harmonize the approach that CASPs across the EU should adopt when implementing the risk-based approach to anti-money laundering/counter-terrorism finance as part of their business. The EBA's press release notes that, given the interdependence of the financial sector, the new guidelines include guidance addressed to other credit and financial institutions that have CASPs as their customers or which are exposed to crypto assets.

The EBA's press release can be found here.

Terraform files for Chapter 11 Bankruptcy

On January 22, 2024, Singapore-based Terraform Labs Pte. Ltd., a cryptocurrency software developer, filed for chapter 11 bankruptcy in Delaware. Terraform is currently engaged in litigation against the SEC associated with its Terra stablecoin. According to the court filing, Terraform claimed assets between $100 million and $500 million and liabilities of the same monetary range.

Terraform's bankruptcy petition can be found here.

India Tightens Restrictions on Cryptocurrency Exchange Platforms

On December 28, 2023, India's Financial Intelligence Unit (FIU) requested that the Ministry of Electronics and Information block the URLs of nine different global cryptocurrency exchange platforms, including Binance, KuCoin, Huobi and Kraken. The FIU alleged that these platforms had operated illegally within the country and violated various crypto regulations. Following the request, Apple India and Google independently blocked the nine platforms from their respective app stores.

FIU's press release can be found here.

Key Enforcement Actions

SEC v. Coinbase: Debate over Application of the *Howey* Test During the Oral Arguments on Coinbase's Motion to Dismiss

On January 17, 2024, U.S. District Judge Katherine Polk Failla questioned attorneys on both sides in a hearing relating to Coinbase's motion to dismiss. The SEC brought a complaint against Coinbase in June 2023, alleging that Coinbase operated as an unregistered national securities exchange, broker and clearing agency. Coinbase filed its motion to dismiss in August 2023 on the basis that, among other things, Coinbase did not deal in securities.

The hearing lasted over five hours and focused on the application of the so-called *Howey* test (a three-pronged test that is used by courts to evaluate whether something is an investment contract) applies to digital assets sold on the Coinbase platform. While both the SEC and Coinbase agree that the *Howey* test is applicable to the case, the primary disagreement concerns whether the sale of Coinbase's digital assets creates a securities transaction and whether investment contracts require a contract between the buyer and seller. In particular, Judge Failla emphasized the need to consider the wider implications of the SEC's position that Coinbase's digital assets met the *Howey* test and constituted a securities transaction. If the case is not fully dismissed, both parties will proceed to discovery, which could proceed throughout the rest of 2024.

Further information can be found here and Coinbase's motion for judgment on the pleadings can be found here.

SEC Charges Individual with Fraudulent Securities Offering Involving Cryptocurrency

On December 21, 2023, the SEC charged Diana Mae Fernandez with conducting a $360,000 fraudulent securities offering. Fernandez is currently under arrest in Serbia and awaiting extradition to the United States pursuant to an indictment filed by the United States Attorney's Office for the Northern District of West Virginia. The SEC's complaint (filed in federal district court in the Northern District of West Virginia) alleges that, between 2018 and 2020, Fernandez induced investors to participate in the fraudulent securities offering by claiming that she would use their money to invest in, among other things, private and publicly traded companies, crypto assets and luxury real estate properties, and guaranteeing returns as high as 63%. Instead of investing investor funds as promised, Fernandez allegedly used them to pay for her day-to-day living expenses and lavish hotel stays, fund numerous cash withdrawals and make Ponzi-like payments to earlier investors.

The SEC's press release can be found here and the complaint can be found here.

Prosecutors Seek to Avoid Second Trial Against Bankman-Fried

On December 29, 2023, prosecutors from the U.S. Attorney for the Southern District of New York issued a letter to U.S. District Judge Lewis A. Kaplan providing notice to the Court that the government does not plan to proceed with a second trial in the ongoing litigation against FTX founder Samuel Bankman-Fried. On March 28, 2023, the grand jury returned a superseding indictment which included five additional courts (charging the defendant with conspiracy to bribe foreign officials, conspiracy to commit bank fraud, conspiracy to operate an unlicensed money transmitting business and substantive securities fraud and commodities fraud). At the trial, the government had introduced evidence of the defendant's conduct underlying the additional counts and noted that a trial on the additional courts would feature much of the same evidence that was presented at the initial trial. In its letter, the government explained that much of the evidence offered in a second trial was already offered in the first trial and can be considered by the court at the defendant's March 2024 sentencing. The letter further emphasized the "strong public interest in a prompt resolution" of Bankman-Fried's fraud case, where he was convicted on all seven charges in November 2023. In particular, the letter noted that "a second trial would not affect the United States Sentencing Guidelines range for the defendant, because the Court can already consider all of this conduct as relevant conduct when sentencing him for the counts that he was found guilty of at the initial trial."

The U.S. Attorney's letter can be found here.

Judge Rules that NFT Cannot be Collateral in Hermes Trademark Litigation

On January 2, 2024, U.S. District Court Judge Jed Rakoff ruled that a defendant's non-fungible tokens (NFTs) could not be used as collateral for a $133,000 jury verdict. The jury verdict arose out of a dispute between Hermes International and Hermes of Paris Inc., and Mason Rothschild (Sonny Estival). Hermes successfully won a judgment for Estival's unlawful dilution of Hermes' brand through the production of replica NFTs. However, the Court declined to allow the tokens to be used as collateral, noting the "irony that the MetaBirkins products are the very items that Rothschild used to infringe and dilute Hermes's trademark" and there is "no conceivable basis for concluding that valueless items" are an acceptable alternative means of securing a $133,000 judgment.

The court order can be found here.

Investment Manager Sentenced to 4 Years Imprisonment for Crypto Fraud Scheme

On January 11, 2024, the U.S. Attorney's Office for the Northern District of California announced that William Koo Ichioka was sentenced to serve four years in prison and ordered to pay a $5 million fine for committing multiple felonies in connection with an investment fraud scheme involving cryptocurrencies and other investment vehicles. Ichioka pleaded guilty to five charges—wire fraud, two counts of aiding and assisting in the preparation of a false or fraudulent tax return, committing fraud in connection with the purchase and sale of securities and engaging in commodities fraud—on July 12, 2023. According to the plea agreement, Ichioka operated a scheme in which he fraudulently raised tens of millions of dollars from over 100 persons and entities. Assistant U.S. Attorney Patrick Robbins noted that the sentence "illustrates that lengthy prison terms await all those who seek to swindle investors in this district."

The U.S. Attorney's Office press release can be found here.

New York Department of Financial Services Fines Genesis $8 Million

On January 12, 2024, New York State Department of Financial Services (DFS) Superintendent Adrienne A. Harris announced that Genesis Global Trading, Inc. will pay an $8 million penalty to New York State for compliance failures that violated DFS's virtual currency and cybersecurity regulations and left the company vulnerable to illicit activity and cybersecurity threats. Superintendent Harris stated that "Genesis Global Trading's failure to maintain a functional compliance program demonstrated a disregard for the Department's regulatory requirements and exposed the company and its customers to potential threats." In connection with the settlement, Genesis Global Trading will surrender its BitLicense and is in the process of ceasing operations. The DFS's press release noted that under Superintendent Harris, the DFS has imposed its first penalties against virtual currency companies, to date levying more than $140 million to hold companies accountable.

The DFS' press release can be found here and the consent order can be found here.

Cryptojacker Arrested in Ukraine over EUR 1.8 Million Mining Scheme

On January 12, 2024, the National Police of Ukraine, with the support of Europol, announced the arrest of a 29-year-old individual in Mykolaiv, Ukraine, who was suspected of orchestrating a sophisticated $2 million crypto-jacking scheme. The arrest followed an investigation into a crypto-jacking operation, where perpetrators exploit compromised cloud user accounts to mine cryptocurrencies. The suspect is believed to have mined over $2 million (EUR 1.8 million) in cryptocurrencies. Europol, in collaboration with Ukrainian police and a cloud services provider, identified and tracked down the suspect. The investigation revealed that the scheme aimed to avoid server and energy costs associated with crypto mining, leaving account holders with substantial cloud service bills.

Europol's press release can be found here.

DEBT Box Calls for Sanctions Against SEC in Lawsuit over Cryptocurrency Fraud

On January 12, 2024, defendants Digital Licensing Inc. (doing business as DEBT Box), Jason Anderson, Jacob Anderson, Schad Brannon and Roydon B. Nelson submitted a reply to the SEC's response to the November 30, 2023 order to show cause issued by the U.S. District Court for the District of Utah in which the defendants requested sanctions under the Federal Rules of Civil Procedure and under the court's inherent authority for the SEC's failure to correct misstatements made when obtaining a temporary restraining order at the start of its investigation into DEBT Box. According to the defendant's submission, the SEC's statements led to "enormous damage to the defendants" and "incalculable damage to third-party businesses, token holders, and others around the world."

The reply to the SEC's response can be found here.

SEC Orders Crowd Machine to Disgorge More Than $19.6 Million Raised in Unregistered and Fraudulent Crypto Asset Securities Offering

On January 17, 2024, the United States District Court for the Northern District of California issued an amended final judgment ordering defendants Crowd Machine Inc. and Metavine Inc. to disgorge $19,676,401.27 raised from investors in an unregistered and fraudulent offering of crypto asset securities, plus $3,358,147.75 in prejudgment interest. The Court held relief defendant and affiliate Metavine Pty. Ltd. liable, jointly and severally with the defendants, for disgorgement of $5 million. The Court also ordered defendants to pay civil penalties of $600,000, each. The SEC's complaint charged defendants Crowd Machine and Metavine and founder Craig Sproule for making materially false and misleading statements in connection with the unregistered offer and sale of crypto asset securities they referred to as "Crowd Machine Compute Tokens" or "CMCTs." The Court's final judgment followed an order, issued December 5, 2023, granting in part the SEC's motion for monetary relief.

The press release can be found here and the amended final judgment can be found here.

CFTC Charges Digital Asset Platform with Fraud and Misappropriation in an Online Romance Scam

On January 19, 2024, the CFTC announced it filed a civil enforcement action in the U.S. District Court for the District of Arizona against Debiex. The complaint alleges Debiex used popular romance scam tactics to fraudulently misappropriate $2.3 million in customer funds intended for digital asset commodity trading. The CFTC's complaint alleges Debiex's unidentified officers and/or managers cultivated friendly or romantic relationships with potential customers by communicating falsehoods to gain trust, and then solicited them to open and fund trading accounts with Debiex. The CFTC's complaint also names Zhāng Chéng Yáng as a relief defendant because Debiex used his digital asset wallet to misappropriate at least one customer's funds, which, as alleged, suggests he may have acted as a money mule for Debiex. In its continuing litigation against Debiex, the CFTC seeks restitution to defrauded customers, disgorgement of ill-gotten gains, civil monetary penalties, trading bans, and a permanent injunction against further violations of the Commodity Exchange Act (CEA) and CFTC regulations. CFTC Commissioner Kristin N. Johnson issued a statement following the announcement, emphasizing the role regulators play in protecting customers and strongly encouraging "all members of the public to stay informed about the potential fraud and abuses in digital assets markets."

The CFTC's complaint can be found here, the press release can be found here, and the statement from Commissioner Johnson can be found here.

CEO Sentenced for Transnational "Cherry-Picking" Scheme Involving Foreign Exchange and Cryptocurrency Futures Contracts

On January 19, 2024, the U.S. Department of Justice (DOJ) announced that Peter Kambolin, the chief executive officer of an investment firm, was sentenced to two years in prison followed by one year and six months of home confinement and ordered to forfeit approximately $1.6 million for a "cherry-picking" scheme in which he fraudulently misappropriated profitable trades to himself and saddled his investors with losses. According to court documents, as the owner and chief executive officer of Systematic Alpha Management LLC (SAM), Kambolin (i) engaged in a cherry-picking scheme in which he fraudulently allocated profits and losses from futures trades in a manner designed to benefit his own accounts unfairly at the expense of his clients, and (ii) misrepresented to his clients that SAM employed trading strategies focused on cryptocurrency futures contracts and foreign exchange futures contracts, when in reality, approximately half of Kambolin's trading in each pool involved equity index futures contracts. Kambolin pleaded guilty on October 11, 2023, to one count of conspiracy to commit commodities fraud.

The DOJ's press release can be found here.

CEO Of Cryptocurrency Ponzi Scheme "IcomTech" Sentenced To Five-Year Prison Term

On January 19, 2024, the U.S. Attorney's Office for the Southern District of New York announced that Marco Ruiz Ochoa was sentenced principally to five years in prison for his role in promoting a large-scale cryptocurrency Ponzi scheme known as IcomTech. Previously, on September 27, 2023, Ochoa pled guilty to one count of conspiracy to commit wire fraud. U.S. Attorney Damian Williams stated that the "significant sentence sends a message to anyone considering following in his footsteps: that path leads to serious prison time." According to the press release, victims invested in IcomTech by purchasing investment products from promoters using cash, checks, wire transfers and actual cryptocurrency. However, while victims saw "profits" accumulate on an online portal, most victims were unable to withdraw any of these so-called profits and ultimately lost their entire investments. In reality, IcomTech's promoters, including Ochoa, siphoned off hundreds of thousands of dollars in funds, which they withdrew as cash, spent on IcomTech promotional expenses, and used for personal expenditures such as luxury goods and real estate.

The U.S. Attorney's Office press release can be found here.

CEO of Crypto Investment Platform Charged in Multi-Million Dollar

International Fraud Scheme

On January 19, 2024, the U.S. Attorney's Office for the Eastern District of New York announced that Horst Jicha would be arraigned at the federal courthouse in Brooklyn on an indictment charging him with securities fraud and conspiracies to commit securities fraud, wire fraud and money laundering for his role in a cryptocurrency scheme called USI Tech. Jicha (one of USI Tech's founders and its Chief Executive Officer was arrested, and the charges against him were unsealed when he entered the United States on December 23, 2023. According to the indictment, USI Tech was an online platform that began in Europe and purported to make cryptocurrency investments easy and accessible to the average retail investor. In reality, however, it was a multilevel marketing scheme that relied on investors recruiting other investors below them to buy various purported cryptocurrency investments. In 2017, Jicha brought USI Tech to the United States and aggressively marketed it to U.S. and, in early 2018, USI Tech ceased all U.S. operations overnight, leaving investors with no ability to access their money.

The U.S. Attorney's Office press release can be found here and the indictment can be found here.

Nexo Files $3 Million Arbitration Claim Against Bulgaria

On January 24, 2024, Nexo, a Swiss crypto currency lender, submitted a $3 billion arbitration claim against the Republic of Bulgaria at the International Centre for Settlement of Investment Disputes (ICSID). The ICSID claim follows a raid and investigation at Nexo's Sofia offices that resulted in no criminal charges to against the company or its executives. Nexo stated that the attacks caused Nexo to lose business opportunities, and they seek reparation for those damages through the arbitration.

Nexo's press release can be found here.

Akin Thought Leadership

Are Crypto Tokens Securities? *Terraform* Court Says 'Yes' in Extensive Decision (January 12, 2024)

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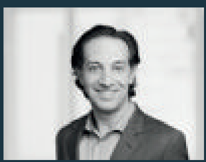

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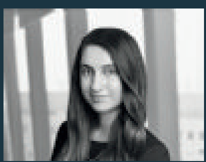

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