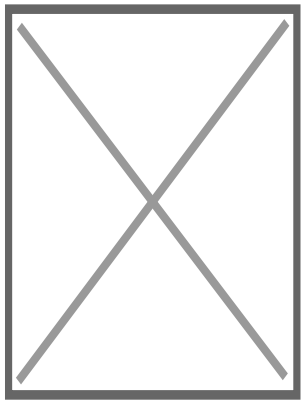
BERGER SINGERMAN
FLORIDA'S BUSINESS LAW FIRM

CFTC TREATMENT OF CRYPTOCURRENCIES AS COMMODITIES CONFIRMED BY A FEDERAL COURT

March 15, 2018

By: James Sattin



In its ruling of March 6, 2018 in Commodity Futures Trading Commission v. Patrick K. McDonnell, and Cabbagetech, Corp. d/b/a Coin Drop Markets, the U.S. District Court for the Eastern District of New York confirmed in a settlement order the position taken by the Commodity Futures Trading Commission (the "CFTC") that (1) "[v]irtual currencies can be regulated by the CFTC as a commodity" (including virtual currencies with respect to which no futures contract is offered); and, accordingly, (2) since the "CFTC's broad authority extends to fraud or manipulation in derivatives markets and underlying spot markets…CFTC may exercise its enforcement power over fraud related to virtual currencies sold in interstate commerce."

The suit brought by the CFTC alleged that the defendants had engaged in the operation of a deceptive and fraudulent cryptocurrency scheme whereby they solicited customers to pay for cryptocurrency trading advice and to use defendants' purported platform to provide cryptocurrency purchase and trading services. Acknowledging that no system to regulate cryptocurrency has been authorized by Congress, the Court explained that "until Congress clarifies the matter, the CFTC has concurrent authority, along with other state and federal administrative agencies, and civil and criminal courts, over dealing in virtual currency." It is important to note that the CFTC's concurrent authority remains incomplete. Indeed, the "jurisdictional authority of CFTC to regulate virtual currencies as commodities does not preclude other agencies from exercising their regulatory power when virtual currencies function differently than derivative commodities." Such other agencies include, but are not limited to, the SEC, the IRS, the Department of Justice (particularly through the Financial Crimes Enforcement Network "FinCEN"), the Treasury Department, and various state agencies.

While most of the current regulation entails pursuit of fraudulent and other criminal conduct only after such has occurred, rather than preventative oversight, the Coin Drop Markets ruling ratifies the CFTC's authority to regulate any commodity traded as a future or a derivative. Further, and as mentioned above, CFTC jurisdiction is implicated when there is fraud or manipulation involving a cryptocurrency traded in interstate commerce, including "a scheme to defraud investors through a contract for sale of a commodity in interstate commerce."

The Court determined that such regulatory authority does not extend to quick cash or spot transactions, absent fraud or manipulation.

As the first to recognize the CFTC's classification of cryptocurrency as a commodity, and, therefore, the first to affirm the CFTC's authority to regulate certain aspects of cryptocurrency, it remains to be seen how broadly other courts will apply this authority. Perhaps more intriguingly, it is also uncertain what effect this decision, and the judicial validation of the CFTC's proactive rulemaking, will have on the policies and regulations of other federal and state administrative and governing bodies that have increased their regulatory action in the field of virtual currencies, in particular the SEC, the IRS, and FinCEN. Finally, and as urged by the Court, we must wait to see whether (or more likely when) Congress will step in to authorize a complete and integrated regulatory system for cryptocurrency. Despite all of the questions, one thing seems certain: public investment and participation in cryptocurrency and cryptocurrency markets, and the government's regulation of the same and of its creators, miners, buyers, sellers, traders, brokers and facilitators, is only just beginning.

For more information, please contact the author, James Sattin on our Business, Finance and Tax Team.

Related Team Member(s)

James Sattin

Topics

Banking and Financial Services Litigation

Cryptocurrency