AMERICAN BANKRUPTCY INSTITUTE

2023 Rocky Mountain Bankruptcy Conference

Cryptocurrency

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CONCURRENT SESSION

2023

Background: Web 3

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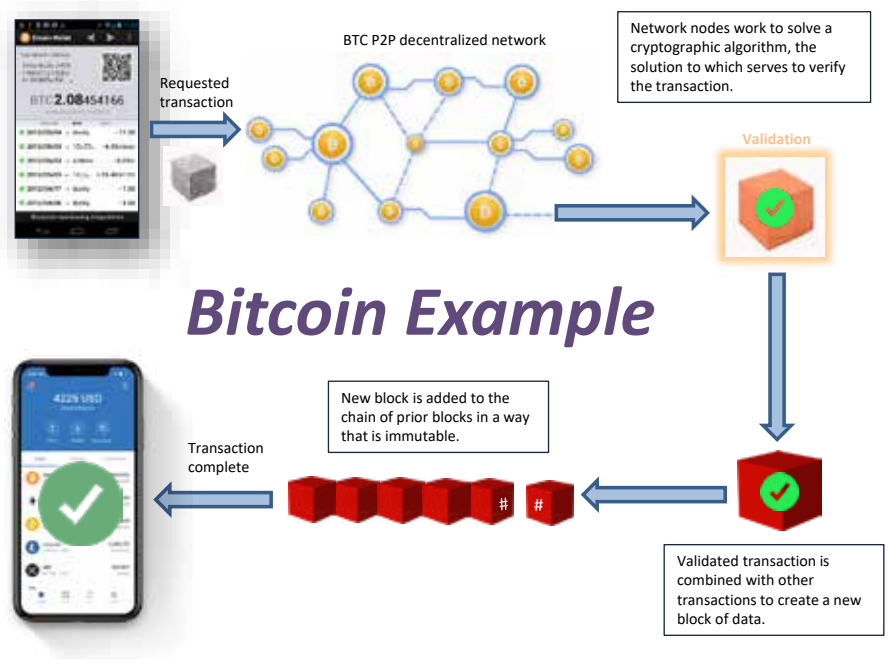
Alphabet Soup

- **AML** **Anti Money Laundering**
- **BSA** **Bank Secrecy Act**
- **BTC** **bitcoin (the cryptocurrency, not the concept)**
- **FinCEN** **U.S. Dept. Tr. Financial Crimes Enforcement Network**
- **KYC** **Know Your Customer**
- **MSB** **Money Services Business**
- **MTL** **Money Transmitter License**



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The Rise of Crypto Bankruptcies

MT.GOX

FTX

Celsius

Three Arrows Capital

VOYAGER

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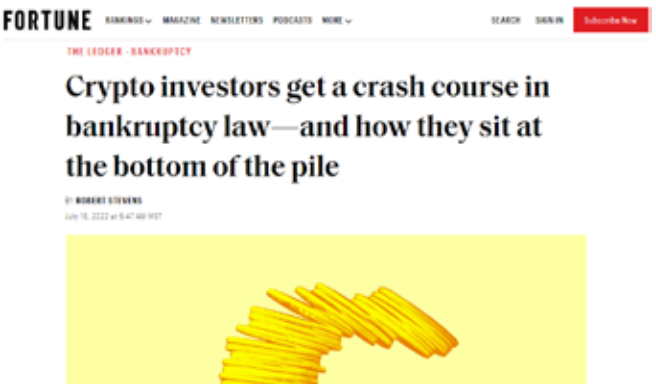
Crypto Assets: Property of the Estate?


FORTUNE

THE LEDGER - BANKRUPTCY

Crypto investors get a crash course in bankruptcy law—and how they sit at the bottom of the pile

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- "Any sufficiently advanced technology is indistinguishable from magic."

  Arthur C. Clark, *Profiles of the Future: An Inquiry into the Limits of the Possible* (1962)

- "[E]xisting regulatory efforts—while substantial—nonetheless fall short of answering a critical question: What is a crypto asset?"

  Megan McDermott, *The Crypto Quandary: Is Bankruptcy Ready?*, 115 Northwestern Univ. L. Rev 24, 27 (2020)

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Crypto Assets: Property of the Estate?

Celsius

"The Court concludes, based on Celsius's unambiguous Terms of Use, and subject to any reserved defenses, that when the cryptocurrency assets . . . were deposited in Earn Accounts, the cryptocurrency assets became Celsius's property; and the cryptocurrency assets remaining in the Earn Accounts on the Petition Date became property of the Debtors' bankruptcy estates."

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Crypto Assets: Property of the Estate?

NB: "Earn" program assets were not segregated or held in custody by Celsius, but were used to generate investment returns.

The Celsius Court did not address the assets held under Celsius' "custody" or other programs, each of which is the subject of separate disputes and litigation.

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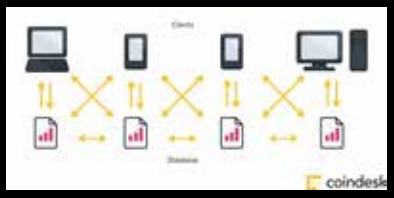
A Legislative Fix?

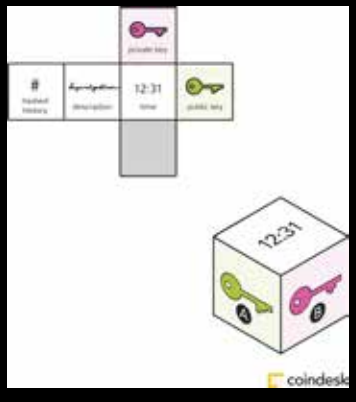
Pending draft amendments to the UCC would further implement the rule that custodially-held crypto assets should not be property of the bankruptcy estate in a bankruptcy of a custodian-cryptocurrency exchange.

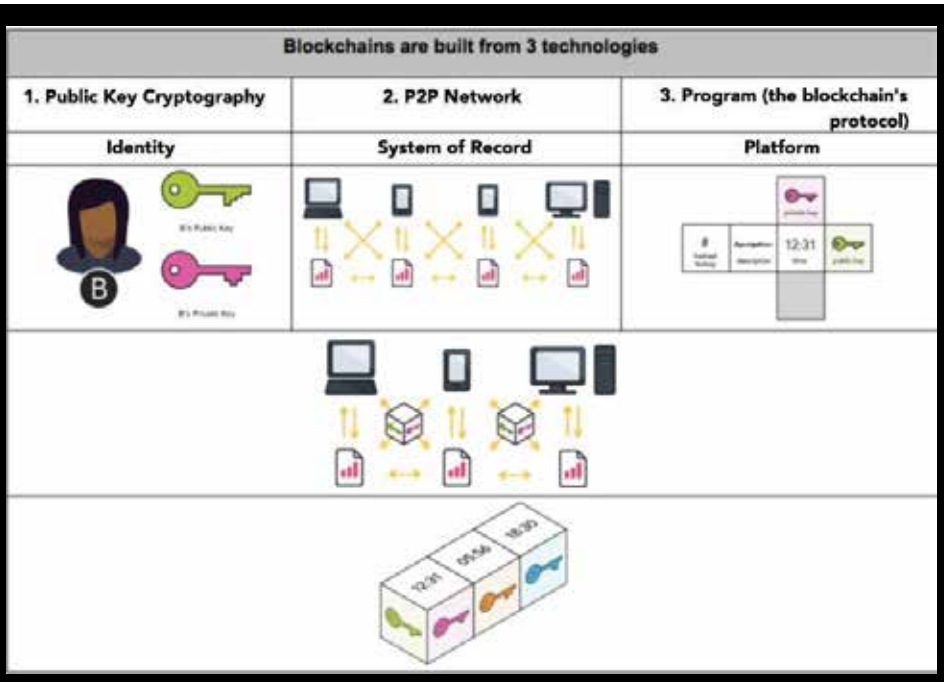
Cryptocurrencies would fit into a new category of collateral under the UCC, referred to as "controllable electronic records" (a form of general intangible), which generally would include information stored in a nontangible medium that can be subjected to a secured creditor's control.

Working Definitions

- Blockchain – A distributed ledger that allows transactions to be solved by network participants, thereby adding to the chain of previously solved transactions.





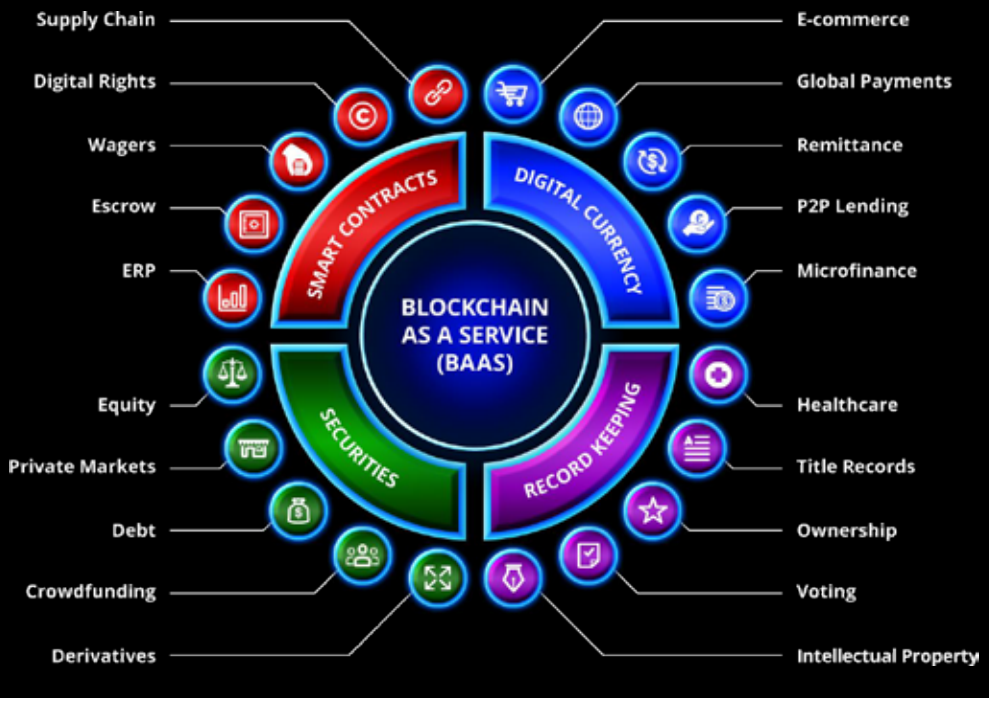


Applications of blockchain technology

- Identity Functions (tracking identity)
- Notary Functions (verification)
- **Digital Assets (i.e. cryptocurrencies, ICO's, tokens)**
- Smart Contracts
- Digital Voting
- Distributed Storage

Now, what is a token?

- Tokens can come in various forms and functions and, therefore, are hard to define.
- Some represent a user's reputation within a system; some represent a deposit in US dollars; some represent the quantity of files saved; some represent the right to use a product or service; while others represent the balance in some internal currency system….potential uses are growing.
- Types of tokens are talked about.
  - Asset Tokens (Security Tokens)
  - Utility Tokens/Consumptive Tokens
  - NFT's/Non Fungible Tokens
  - Governance Tokens



Market Sample

Data Sources: Gold.org; Goldman Sachs, McKinsey, Autonomous Research, Statista, Business Insider, Technavio, Galaxy Digital, The Money Project; S&P Global, The World Bank, Bain & Company; Blockchain Transparency Institute; Messari; Market Capitalizations as of 06/09/20, with data pulled from CoinMarketCap

INFRASTRUCTURE: NETWORKS, PAYMENTS, STORE OF VALUE & EXCHANGES

Bitcoin (BTC)

Bitcoin is a decentralized digital currency without a central bank or administrator that can be sent from user to user on the peer-to-peer bitcoin network without the need for intermediaries. Given its fixed-rules monetary policy, hard cap on supply, and decentralized nature, many view the currency as a digital analog to gold.

Chainlink (LINK)

Chainlink is a software platform that aims to bridge the gap between blockchains and external data/software. The network uses "oracles," which find and verify real-world data and bring it onto blockchains for use in smart contracts. This allows for blockchain-based applications to securely connect with external data feeds, APIs, and legacy payment systems.

Ethereum (ETH)

Ethereum is a decentralized software platform for enabling smart contracts and distributed applications to be built and run without any downtime, fraud, censorship, or interference from a third party. The network's native asset, Ether, is used as "gas" to access the security and vast computing power of the global network.

Binance Coin (BNB)

Binance Coin is a digital asset issued by the Binance exchange, which is the largest and most popular platform for trading digital assets in the world. BNB was initially established as a discount vehicle for trading fees, but it has since evolved into a true utility asset with more than 120 use cases and liquidity across a growing number of platforms, products, and services.

Dash (DASH)

DASH is a cryptocurrency with optional speed and privacy features that aims to achieve global adoption as a medium for day-to-day transactions. Launched in 2014, DASH uses a network of masternodes (of which the Fund owns four) to run a set of unique features that are designed to enhance network speeds, improve user privacy, and reduce transaction fees.

So What business in Wyoming getting into?

- 2018 Wyoming Legislation that got the world talking:
  - HB 19- Money transmitter Act change - to Allow for Crypto operators/Virtual Currency
  - HB 70 – Open Blockchain Token Exemption
  - HB 101 – Authorizes companies to use digital networks to maintain corporate records/stock ledgers etc./accept votes by electronic means
  - HB 126 – Series LLC
  - SF 111 - Creation of exemption of crypto assets from property taxation
  - *** HB144 – Securities Statute Update – fix to Crowdfunding/WIN program

So what business is Wyoming getting into?

- 2019 Wyoming Legislation – adding to the momentum
  - HB 57 – Financial Technology Sandbox
  - HB 62 – Updates to Utility Token Act – Removes it from Securities and Changes to Property
  - HB 74 – Special Purpose Depositories
  - HB 185 – Corporate Stock Certificate Tokens – enables Wyoming companies to issue stock via token
  - SF 125 – clarifies Wyoming commercial code to apply same money rules to digital currencies and tokens. Allows banks to become qualified custodians.
  - SF 28 – Banking technology and stock revisions – clarifies bank statutes to allow electronic records to accommodate blockchain based systems

Key Drivers

- Wyoming Legislation:
  - Special purpose depository institution (new bank charter)
  - Digital asset custody standards (based on SEC & CFTC principles)
  - Financial Tech Sandbox
  - Utility token exemption (consumptive token)
  - Corporate records/actions on DLT
  - Corporate security issuance on DLT
  - Commercial law amendments (legal status, security interests, negotiability)
  - *** Often considered in combination with existing LLC/Corp laws as well as tax exemption

Banking, Custody and Commercial Law

- Major Industry Problems for Blockchain/Crypto Industry, lacking access to traditional payment system, federal banking system.
- Wyoming's digital asset statutes/rules address this:
  - Custody Rules
    - Permissible banking, securities and commodities transactions
    - Customer Protection Standards
  - Commercial Law Amendments
    - Digital assets as legal asset class, with legal ways to deal with control of assets, security interests, legal remedies.
  - SPDI – Creates access to privileges granted to U.S. Banks
    - Qualified Custodian
    - Depository for "actual delivery" under commodity rules
    - Eligibility for access to payment system
    - Likely exemption from money transmission laws, broker/dealer, investment adviser registration

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FinTech University – Digital Assets

Richard B. Levin
Craig Nazzaro
Kevin Tran

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Agenda

- Introduction
- What is Blockchain?
- Views of Blockchain are Divergent
- What are Digital Assets?
- SEC Regulation of Digital Assets
- CFTC Regulation of Digital Assets
- Conclusions

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Digital Assets

- For purposes of this presentation we use the term “digital asset” in the same manner as the SEC to refer to "an asset that is issued and transferred using distributed ledger or blockchain technology.”
- Statement on Digital Asset Securities Issuance and Trading, Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets, SEC (Nov. 16, 2018).
- As the SEC has noted, digital assets include, but are not limited to virtual currencies, coins, and tokens.
- A digital asset may in certain instances be deemed a security under the federal securities laws.
- While not defined in the securities laws, the SEC often refers to digital assets that are securities as a “digital asset securities.”

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Praise for Blockchain

- Bitcoin has been described by Bill Gates as a “techno tour de force.”
- Peter Thiel, the co-founder of PayPal and an early investor in Facebook, believes Bitcoin has “world changing” promise for online transactions without fees.
- Fred Wilson of Union Square Ventures believes “Bitcoin represents something fundamental and powerful. . . .”
- Leading Silicon Valley investors, including Andreessen Horowitz, Lightspeed Ventures, and Hong Kong Billionaire Li Ka-shing’s Horizon Ventures, are supporters of the digital currency.
- Bitcoin and Ether are digital, private crypto currencies that are exchanged by means of the Internet.

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Praise for Blockchain

- Supporters believe blockchain technology has the potential to support more efficient global commerce and to help combat poverty.
- Marc Andreessen of Andreessen Horowitz has invested nearly $50 million in blockchain-related startups and believes the technology solves what he calls the "Byzantine Generals Problem" or how to establish trust between otherwise unrelated parties over an untrusted network like the Internet.
- Andreesen notes the "practical consequence of solving this problem is that Bitcoin gives us, for the first time, a way for one Internet user to transfer a unique piece of digital property to another Internet user, such that the transfer is guaranteed to be safe and secure, everyone knows that the transfer has taken place, and nobody can challenge the legitimacy of the transfer."
- Goldman Sachs believes Blockchain could "change everything."

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Criticisms of Blockchain

- Critics of digital assets have been equally as vocal in their skepticism of the digital currency and concern about its long-term viability as a unit of exchange as well as its potential impact on financial services and commerce.
- Digital assets has been derided as a "shady online currency" and as "a digital Wild West for narco traffickers and other criminals."
- Senator Charles Schumer has described Bitcoin as a form of money laundering.
- Leading economist, Paul Krugman, has been critical of Bitcoin, suggesting that the structure of the currency incentivizes hoarding.
- Other analysts have raised concerns of a Bitcoin bubble.
- Former Secretary of the Treasury Larry Summers has been more circumspect in his evaluation of the digital currency and appears to be waiting to judge its potential.

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Blockchain

- From Silicon Valley to Wall Street, technologists and investors alike are buzzing about the potential for the Blockchain to revolutionize everything.
- The funding backdrop is healthy and the eco-system is growing.
- Once considered the technology behind Bitcoin, this technology has taken center stage from its crypto-currency parent.
- Blockchain technology promises a new set of tools to cut costs and challenge the profit pool of the middle-man with a promise to make centralized institutions obsolete.
- This solution promises to not just address consumer opportunities but also those for the far more lucrative enterprise.
- Blockchain is a means of recording and verifying transactions in a tamper and revision-proof way that is public to all.

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Blockchain

- The idea of a blockchain was introduced in 2008 as a basis for the virtual currency Bitcoin, which is an example of an unrestricted blockchain.
- Blockchain technology is a distributed list of all transactions across a peer-to-peer network.
- Blockchain is the technology underlying Bitcoin and other digital currencies, and it has the potential to disrupt a wide variety of business processes. (PricewaterhouseCoopers)
- The blockchain is “authoritative” because every user agrees on it.
- In some blockchain initiatives there are no central, regulated institutions playing any role in the process.
- Advocates of blockchain technology believe it could substantially improve the trading, clearance and settlement of securities.
- Former SEC Commissioner Kara Stein once noted “one could imagine a world in which securities lending, repo, and margin financing are all traceable though blockchain’s transparent and open approach to tracking transactions.”

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Blockchain

- The technologies used by the financial services industry have developed over time as a network of mutually trusting institutions, with legal agreements and regulations designed to minimize risks, such as operational and counterparty risk, that are not directly related to the business of a securities issuer.
- Each institution trades with accountable and authorized counterparties, under the supervision and oversight of regulators.
- The adoption of blockchain technology will mean that competing financial institutions will be able to share a common digital representation of asset holdings and keep track of the execution, clearing and settlement of trades outside their legacy proprietary databases, and without the need for a central database management system.
- Blockchain technology will enable users to become peers in a shared database, which they can rely on to record transfers of assets and to perform additional related activities involving multiple parties, such as trading, clearance, and settlement.
- Blockchain users can propose new transactions and, depending on the blockchain chosen, they can either contribute to validation collectively or have a subset of users responsible for this task.
- A transaction is validated when a specified proportion of the network's validators have reached a consensus as to its legitimacy.

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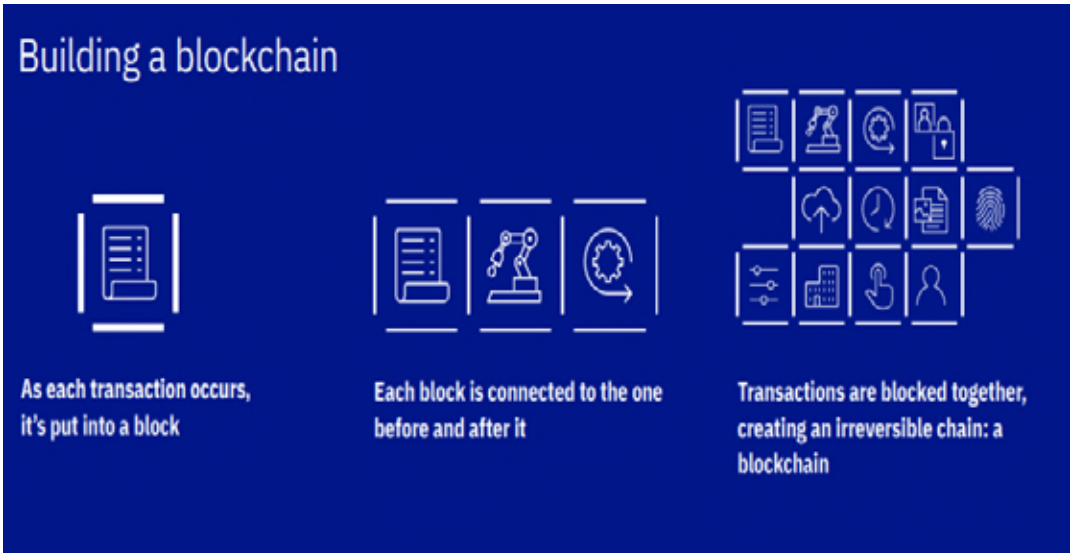
Blockchain



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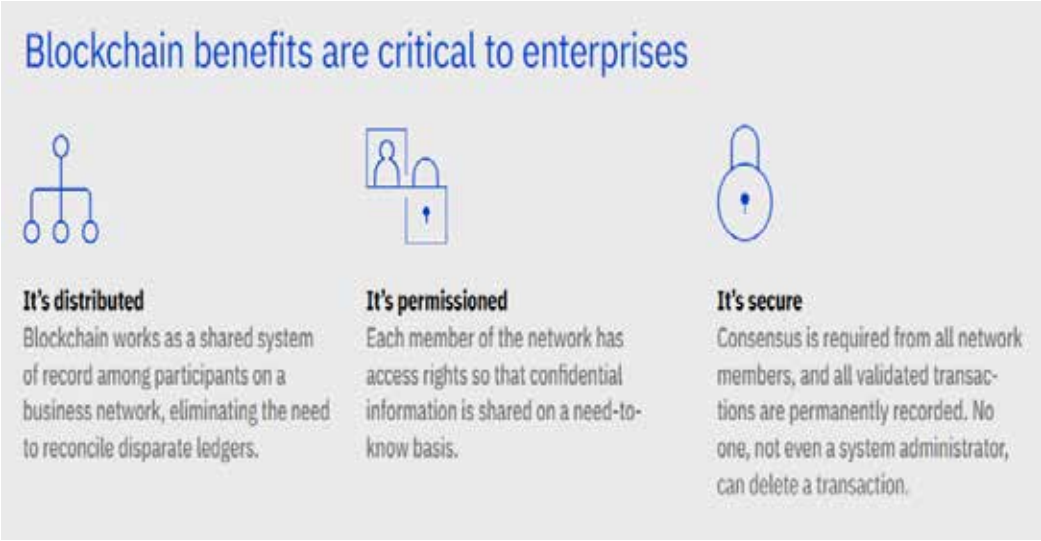
Blockchain



Source: IBM

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Blockchain

- Changes to the shared database are then reflected in its digitally signed versions, which users can store locally (either in their entirety or with only a subset of transactions/accounts visible).
- Users can then extract the updated information they need for conducting their respective businesses from these locally stored databases.
- Blockchains allow their users to store and access information relating to a given set of assets and their holders in a shared database of either transactions or account balances.
- This information is distributed among users, who could then use it to settle their transfers of, or for example, securities and cash, without needing to rely on a trusted central validation system.
- In financial markets, the substantial de-materialization of securities and cash has progressively shifted the settlement of a trade from the physical delivery and paper-based recording, to a system of book transfers in digital databases.
- What remains unchanged is the need for an authoritative "golden record" of holdings to be kept by specific financial market infrastructures, and for intermediaries involved in the settlement process to update their individual databases by communicating with the other institutions involved, at the different levels of post-trading, in order to be able to reflect the changes in each other's records.

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Blockchain

- The high cost of this type of reconciliation process has led many market players to consider distributed ledgers as an alternative to central validation systems – currently one per institution (internal records of outstanding positions) or per cluster of institutions (e.g., interoperable market infrastructure) – to keep their reciprocal records updated.
- Blockchains allow their users to reach consensus on a particular version of the distributed ledger, in particular on the sequential order of transactions.
- This means that there cannot be any doubt as to the users' respective holdings.
- Central validation is replaced in a blockchain by a set of cryptographic solutions and economic incentives that combine to prevent illicit updates and reconcile discrepancies.
- The ledger produced can thus be considered authoritative, although its management is shared among users with conflicting incentives.

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Restricted v. Unrestricted

- Blockchains can be divided into those which are restricted and those which are unrestricted.
- Restricted blockchains are closed systems whose members are identified and accountable entities.
- Updates to the blockchain can only be proposed and validated by authorized participants.
- In unrestricted blockchains, by contrast, any entity can access the database and, depending on the specific validation method used, may be able to contribute to updating the ledger or to submit spam transactions to cause a denial of service.
- In a restricted blockchain the identity of participants is known, at least by its governance body.
- This implies that any wrongdoer can be identified and his misbehavior can be punished in the case of future activity in the ledger.
- Restricted blockchains also expose the conduct of any participants in the blockchain network to the set of rules and law-enforcement measures that typically apply to off-ledger activity.
- By definition, users of unrestricted blockchains cannot be held accountable outside the distributed ledger for their activity in the network.

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Regulation of Blockchain

- While blockchain technologies may be well suited to accomplishing the goals of the Securities Acts Amendments, the laws that regulate securities and commodities are not designed to regulate such innovative technologies.
- As noted by Commissioner Stein, "creative uses of blockchain are still in their infancy... [and] a lot of questions will need to be answered."
- Echoing Commissioner Stein's comments, a former SEC Chair noted: *"[b]lockchain technology has the potential to modernize, **simplify, or even potentially replace** current trading and clearing and settlement operations."*
- However, as White noted in the same speech:

  ***One key regulatory issue is whether blockchain applications require registration under existing [SEC] regulatory regimes, such as those for transfer agents or clearing agencies**. We are actively exploring these issues and their implications. [The SEC's] Advanced Notice of Proposed Rulemaking and Concept Release on transfer agent regulations... asked for public comment on the use of blockchain technology by transfer agents and how such systems fit within federal securities regulations.*

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Regulation of Blockchain

- While there is tremendous potential for blockchain technology in the financial services industry, it is less clear how regulators in the United States will treat platforms that use blockchain technology in the financial or securities sectors.
- It is unclear if those platforms must register with the SEC as an exchange, an ATS, a broker-dealer, a clearing agency, or a transfer agent.
- Before regulators can address this issue, they must better understand in what instances blockchain technology involves transactions in securities.

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Digital Asset Securities

- The definitions of "security" under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 are nearly identical and each is broad enough to include the various types of instruments that are used in commercial marketplaces that one might suspect to fall within the ordinary concepts of a security.
- This would include common instruments like stocks, bonds, and notes, as well as the various collective investment pools and common enterprises devised by persons seeking to generate profits from the efforts and investments of others (i.e. investment contracts and instruments commonly known as securities).
- Section 2(a)(1) of the Securities Act defines a "security" as:

> [A]any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, . . . transferable share, ***investment contract***, . . . any put, call, straddle, option, or privilege on any security, certificate of deposit, . . . or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

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Digital Asset Securities

- Although the term "note" is specifically enumerated in the Securities Acts' definitions of "security," courts have not found all notes to be securities because notes are used in a variety of contexts.
- A note may function as both a commercial vehicle, which is not a security,3 as well as an investment vehicle, which courts have deemed to be a security.
- In Marine Bank v. Weaver, 455 U.S. 551 (1982), the U.S. Supreme Court addressed whether the sale of a $50,000 certificate of deposit, with a 6-year maturity that featured a 7.5% interest rate was a security.
- The note also provided that, if the bank permitted early withdrawal, the depositor would earn interest at the bank's current savings passbook rate on the amount withdrawn, except that no interest would be paid for the three months prior to withdrawal.
- The Court noted that while the definition of "security" in the Securities Exchange Act of 1934 (the "1934 Act") is quite broad, Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.

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Digital Asset Securities

- The Court cautioned, however, "[t]he definition of 'security' in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires."
- The Court also noted that a certificate of deposit is not the functional equivalent of the withdrawable capital shares of a savings and loan association held to be securities, nor is it similar to any other long-term debt obligation commonly found to be a security.
- The purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long-term debt obligation assumes the risk of the borrower's insolvency.
- The Court held neither the certificate of deposit nor the agreement in question was a security within the meaning of § 10(b) of the Securities Act.

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Exchanges

- Section 3(a)(1) of the Exchange Act defines an "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange."
- Exchange Act Rule 3b-16(a) interprets the definition to mean any organization, association, or group of persons that: (1) ***brings together the orders of multiple buyers and sellers*** and (2) uses established, nondiscretionary methods (***whether by providing a trading facility*** or by setting rules) ***under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade***.
- Absent an exemption, an exchange must register as a national securities exchange pursuant to section 6 and section 19(a) of the Exchange Act.
- If a blockchain technology platform brings together multiple buyers and sellers of digital assets that are deemed securities, the platform could be required to register as a securities exchange unless it falls within an exclusion from registration.

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Alternative Trading Systems

- In 1998, the SEC adopted Regulation ATS, which allows an ATS to choose whether to register as a national securities exchange or to register as a broker-dealer and comply with additional requirements of Regulation ATS.
- An "alternative trading system" means any organization, association, person, group of persons, or system: (1) that constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of Rule 3b-16 under the Exchange Act, and (2) that does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or discipline subscribers other than by exclusion from trading.
- A blockchain technology platform may be required by the SEC to register as an ATS if it maintains a marketplace or facilities for bringing together purchasers and sellers of digital assets that are deemed securities, and it does not set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such platform.
- If the platform is not required to register as an ATS, the operator of the platform may be required to register as a broker-dealer.

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Broker-dealers

- Section 15 of the Exchange Act requires registration with the SEC of all broker-dealers using interstate commerce or the facilities of any national securities exchange to effect transactions in securities (other than exempted securities and certain short-term debt instruments).
- Section 3(a)(4)(A) of the Exchange Act defines a "broker" as "any person engaged in the business of effecting transactions in securities for the account of others."
- The Exchange Act and the rules thereunder do not define these terms.
- The courts and the SEC have taken an expansive view of the scope of these terms.
- The SEC and the courts apply a "facts and circumstances" analysis in evaluating whether a person has acted as a broker, with no single element being dispositive.
- Depending on the circumstances, the operator of a blockchain technology platform may be deemed a broker-dealer if the operator of the platform is deemed to be engaged in the business of effecting transactions in securities for the account of others.

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FinCEN

- Virtual currencies are not created or overseen by a central bank in the manner of traditional currencies.
- The fact that virtual currencies are not subject to traditional regulatory oversight has drawn the attention of federal regulators including the Treasury (through FinCEN), the SEC, and the CFTC.
- FinCEN is delegated authority under U.S. Department of Treasury Order 180-01 to administer the BSA and to thereby regulate money transmission to detect and prevent money laundering, fraud, and other illegal practices.
- FinCEN regulates money services businesses (MSBs) and money transmitters.
- The BSA and FinCEN regulations considers each of the following to be MSBs: currency exchangers; issuers, redeemers, or cashiers of travelers' checks, checks, money orders, or similar instruments; the United States Postal Service; a person who engages as a business in the transmission of funds; and any business or agency which engages in any activity determined by regulation to be an activity similar to, related to, or a substitute for these activities.

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Money Transmission

- The term "money transmitter" includes a person that engages in the acceptance of currency, funds, or other value that substitute for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.
- It is important to note that the definition of a money transmitter does not differentiate between real currencies and instruments deemed convertible virtual currencies (CVCs).
- A person accepting or transmitting anything of value that substitutes for currency (such as Bitcoin or other digital asset) will be viewed as a money transmitter.
- Any entity or person, including certain foreign-located persons that engage in money transmission in any amount is subject to the BSA rules.
- Persons operating money transmitting businesses must register as such with FinCEN. The failure to register a money transmitting business is a federal offense punishable by civil and criminal penalty.
- The jurisdiction of FinCEN is proscribed under the BSA.

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Money Transmission

- Since 2011, FinCEN has regulated money services business models involving money transmission denominated in virtual currencies through a series of administrative rulings and guidance.
- In 2019, FinCEN issued guidance that consolidated its regulations and related administrative rulings and guidance applicable to MSBs utilizing models that involve convertible virtual currencies.
- "Money transmission" includes the "acceptance…of…other value that substitutes for currency."
- The term "other value that substitutes for currency" encompasses transmission activities that do not involve currency, but instead involves something that the parties to the transaction recognize has value that is equivalent to or can substitute for currency, which may include virtual currencies.
- FinCEN defines "virtual currency" as a "medium of exchange that can operate like a currency but does not have all the attributes of 'real' currency, including legal tender status."
- The guidance further clarifies that convertible virtual currencies ("**CVCs**") are a type of currency that either has an equivalent value as currency, or acts as a substitute for currency, and is therefore a type of "value that substitutes for currency."
- Accordingly, the definition of money transmitter does not differentiate between real currencies and CVCs.

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Money Transmission

- Accepting anything of value that substitutes for currency, such as a digital asset like Bitcoin, therefore makes that person a money transmitter.
- Virtual currencies can be divided into two primary categories: (1) convertible virtual currencies and (2) nonconvertible virtual currencies.
- Nonconvertible virtual currencies are essentially credits that can only be redeemed for products or other services.
- Non-convertible virtual currencies, like Facebook credits, generally cannot be converted into state-issued or government backed currency.
- Convertible currencies, on the other hand, may act as a substitute for real currency and have an equivalent value in real currency.
- These virtual currencies are frequently converted into and exchanged for real currency. Bitcoin is a convertible virtual currency.

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Money Transmission

- FinCEN regulation is less about the type of currency involved in a transmission or transaction and more about the process by which the currency is transmitted, the purpose of the transmission and the participants involved in the transmission.
- FinCEN has stated that "[w]hat is material to the conclusion that a person is not an MSB is not the mechanism by which a person obtains the convertible virtual currency, *but what the person uses the convertible virtual currency for, and for whose benefit*".
- FinCEN has stated activities that do not constitute accepting and transmitting currency, funds or the value of funds do not fit within the definition of "money transmission services" and are not subject to FinCEN's registration, reporting, and recordkeeping regulations for MSBs (United States.
- However, a CVC user that wants to purchase goods or services with CVCs it has earned, that pays CVC to a third party at the direction of a seller or creditor, may be engaged in money transmission.

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Money Transmission

- FinCEN's guidance defines CVC wallets as "interfaces for storing and transferring CVCs."
- There are different wallet types that vary according to the technology employed, where and how the value is stored, and who controls the value.
- Wallets where user funds are controlled by third parties are called "hosted wallets," whereas wallets where users control the funds are called "unhosted wallets."
- FinCEN states that the regulatory obligations of persons that act as intermediaries between the owner of value and the value itself (i.e., a money transmitter) is technology agnostic.
- Determining the regulatory treatment of a digital wallet depends on four criteria: (i) who owns the value; (ii) where the value is stored; (iii) whether the owner interacts directly with the payment system where the CVC runs; and (iv) whether the person acting as intermediary has total independent control over the value.

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- FinCEN refers to the participants in generic virtual currency arrangements, using the terms “user, ” “exchanger,” and “administrator”.
- A user is a person that obtains virtual currency to purchase goods or services. How a person engages in “obtaining” a virtual currency may be described using any number of other terms, such as “earning,” “harvesting,” “mining,” “creating,” “auto-generating,” “manufacturing,” or “purchasing,” depending on the details of the specific virtual currency model involved. For purposes of the guidance,
- FinCEN has noted the label applied to a particular process of obtaining a virtual currency is not material to the legal characterization under the BSA of the process or of the person engaging in the process.
- An exchanger is a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency.
- An administrator is a person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency.

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Money Transmission

- The proliferation of decentralized applications (DApps) facilitating transactions in CVC, including its transmission, has raised concerns among regulators.
- FinCEN defines DApps as software programs that operate on a peer-to-peer network of computers running a blockchain platform and designed such that the DApp is not controlled by a single person or entity.
- Although FinCEN acknowledges that DApps typically lack an identifiable administrator, the DApp itself remains subject to the same regulatory interpretation as mechanical money transmitters (such as a CVC kiosk).
- To that end, when a DApp engages in money transmission activities, the definition of money transmitter as described above will apply to the DApp, the owner/operators (to the extent identifiable), or both.

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- Nelson Mullins' FinTech and Regulation practice helps clients meet the challenges posed by the development of these new technologies, including digital assets and ICOs.

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  - Government investigations and compliance
  - Intellectual property
  - Labor and employment
  - Litigation
  - Public policy
  - Regulation by the CFTC, the SEC and FinCEN
  - Securities and corporate finance
  - Tax

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Faculty

Matthew D. Kaufman is a partner with The Law Firm of Hathaway & Kunz, LLP in Cheyenne, Wyo., where his practice focuses on business, corporate, technology, capital-formation, intellectual property protection, and mergers and acquisitions. He represents entrepreneurs, start-ups and emerging companies, as well as established companies on complex transactions and strategies. Mr. Kaufman routinely represents and advises clients on such matters as entity formations, financing and operational issues, intellectual property, regulatory compliance and contract matters. He is one of only a few attorneys in Wyoming actively representing clients in private-placement securities matters, and recently co-lawyered Wyoming's first ever equity-based crowdfunding campaign. Additionally, he is one of the only attorneys in Wyoming advising companies on blockchain, cryptocurrency and token offerings. He also has experience representing clients in litigation matters, routinely appearing before various state and federal courts in Wyoming. Deeply involved in local and regional entrepreneurship, Mr. Kaufman co-founded the Wyoming Entrepreneurs group that meets in Cheyenne, has a published academic article on developing entrepreneurship in Wyoming, and has also published various articles on topics such as crowdfunding and the blockchain/cryptocurrency industry. He is counsel to dozens of start-ups, emerging technology companies and investment funds across Wyoming, is an active tech and real estate investor, and has been a guest speaker on topics such as capital-raising, securities, blockchain and legal issues surrounding start-ups in Wyoming. Mr. Kaufman was a co-founder and three-year chairman of the Array School of Technology and Design, Wyoming's first private coding school, before exiting through a sale of the company in 2018. His newest venture is becoming a partner with BXE Capital, a cryptocurrency investment fund based in Denver. Mr. Kaufman has been repeatedly selected as one of the *Mountain States Super Lawyers* "Rising Stars," has been selected multiple times by *National Trial Lawyers* as one of the Top 40 Under 40 for the State of Wyoming, has been selected by the American Society of Legal Advocates as a Top 40 under 40 in Wyoming, and is *a National Trial Lawyers* "Top 100." He also serves on the board of advisors for the University of Wyoming Law School, and is a graduate of Leadership Wyoming. Mr. Kaufman was appointed in 2017 by Gov. Matt Mead as the only attorney to serve on the statewide executive council of ENDOW (economically needed diversification options for Wyoming), which helped Wyoming develop a new economic diversification strategy. In 2018, he was appointed by Gov. Mead to additionally serve on the legislatively created Blockchain Taskforce, which he was reappointed to in 2019 by Gov. Gordon. This past year, he was further appointed by the Wyoming Supreme Court to serve on the Chancery Court Committee, purposed with standing up the newly created Chancery (business) court in Wyoming. Mr. Kaufman received his B.A. and J.D. from the University of Wyoming and his LL.M. in entrepreneurial law from the University of Colorado.

Richard B. Levin is chair of Nelson Mullins Riley & Scarborough LLP's FinTech and Regulation Practice in Denver and was one of the first lawyers to focus on the regulation of blockchain and digital assets. He is considered a thought leader in the fintech space. Mr. Levin brings his experience as a senior legal and compliance officer on Wall Street and in London to bear in advising clients on corporate, fintech, securities and regulatory issues. He has been advising fintech clients on legal and regulatory issues since the start of electronic trading in the late 1990s, and his practice focuses on helping financial services and technology clients identify and address regulatory issues as they build their businesses. Mr. Levin's practice focuses on the representation of early-stage and publicly traded

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