

Davis Polk Blockchain Bulletin: A Cryptocurrency and DLT Newsletter - April 2018

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A Cryptocurrency and DLT Newsletter – April 5, 2018 Authored by Jai R. Massari, Christophe Perchet, Byron B. Rooney, Daniel Arroche, Trevor I. Kiviat, Daniela Dekhtyar-McCarthy and Andrew Ruben

Market Developments

Web Platforms Continue to Ban ICO-Related Advertisements The SEC increasingly is focusing its enforcement authority not only on companies and individuals raising capital through Initial Coin Offerings (“**ICOs**”), but also on the “market participants – promoters, sellers, lawyers, officers and directors and accountants” who participate in the ICO ecosystem. On March 1, 2018, it was [reported](#) that the SEC had sent out “dozens of subpoenas and information requests” in recent months to individuals and companies who facilitated ICOs. And on March 7, 2018, as the previous edition of the [Blockchain Bulletin](#) noted, the SEC issued a [statement](#) suggesting that at least some online platforms for digital asset trading are operating unlawful securities exchanges. Web platforms, perhaps taking into account the regulatory environment, have continued to ban ICO ads. On January 30, 2018, Facebook [updated its ads policy](#) to prohibit “ads that promote financial products and services that are frequently associated with misleading or deceptive promotional practices, such as binary options, initial coin offerings and cryptocurrency.” Noting that many companies selling these products and services are acting “in bad faith,” Facebook designed this policy to be “intentionally broad” while the company works to better detect misleading advertising practices. Other web platforms are implementing policies similar to Facebook’s. [Google](#), citing the “unregulated” and “speculative” nature of these products, also has banned ICO and other types of ads relating to digital assets. Google’s policy, which goes into effect this June, is broad: it encompasses ads serving “cryptocurrency and related content (including but not limited to initial coin offerings, cryptocurrency exchanges, cryptocurrency wallets, and cryptocurrency trading advice).” This language seems to cover ads relating to conventional cryptocurrencies, such as bitcoin, as well as security tokens and other digital assets. [Twitter](#), [Snapchat](#) and email service [MailChimp](#) have likewise banned the advertising of ICOs on their platforms. As private firms implement policies like these, it will be interesting to observe how their efforts intersect with those of federal and state lawmakers, regulators and the industry itself. Gemini’s calls for a [Virtual Commodity Association](#) may lead the industry to establish and enforce its own standards for consumer and investor protection, including with regard to the “detection and deterrence of manipulative and fraudulent acts and practices.” For the time being, however, major web platforms have de-risked and will not be participating in the ecosystem. **Key Takeaways**

- Facebook, Google, Twitter, Snapchat and other web platforms have banned ICO and, in some cases, other digital asset related ads, citing the need to protect users from deceptive advertising.
- These policies come at a formative time for the virtual currency sector: the SEC is ramping up enforcement, while the industry itself may begin to establish and enforce its own standards.

Regulatory Developments

France Soon to be at the Forefront of ICOs? Following France’s new motto “France is back!” and efforts made by the **AMF**, the French securities market regulator, the French Minister of the Economy, Mr. Bruno Le Maire, [recently](#) expressed a strong willingness to put France at the forefront of the blockchain revolution and to widely welcome ICOs through a dedicated friendly regulatory framework. **Optional ICO clearance.** Mr. Le Maire confirmed that in practice,

France is moving towards an *ad hoc* regulatory framework for ICOs, which could be adopted in the next few weeks, as part of an “action plan for growth and transformation of companies”.¹ This framework would allow each ICO issuer to decide whether to pursue an ICO that is pre-approved by the AMF or to proceed without approval but with the risk of requalification of the tokens as securities after the ICO has been launched. This follows the [recommendations](#) of the AMF in February 2018 based on feedback received following a public consultation on ICOs and crypto-assets:

- ICO issuers targeting the French public could obtain AMF approval if they meet certain conditions (*g.*, if the token does not qualify as a financial security) and provide certain guarantees to investors that still need to be specified.
- Non-approved, privately offered ICOs would not necessarily be illegal but they would have to include a disclaimer to potential investors stating they are not approved and therefore carry risks. Token offerings that do not include such a disclaimer could be sanctioned.

Qualification of tokens under French securities law. The AMF also confirmed in its aforementioned recommendations that tokens would not normally qualify as equity securities or debt securities under French law given the rights usually attached to them. Such an ICO regime would be among the first in Continental Europe (other than Switzerland and Gibraltar) and would likely attract ICO issuers, provided that France rectifies other flaws that restrict efficient ICOs in practice, including their tax treatment. **Improving the tax treatment of ICOs.** Most importantly, France would need to clarify the tax treatment of ICO proceeds if it wishes to attract ICO issuers. Currently, it is uncertain whether the proceeds of ICOs should be accounted for as turnover and therefore be subject to French corporate tax (currently 33%, which will be progressively reduced to 25% by 2022). This tax rate would compare unfavorably with, for instance, Switzerland or Gibraltar (18% and 10%, respectively). In addition, a number of practical aspects of the tax treatment of ICOs remain unclear, including whether reserves may be accounted for (*e.g.*, to anticipate the risk of adverse price movements in the value of the cryptocurrencies received through the ICO). **Key Takeaways**

- France may be on the verge of attracting ICO issuers targeting Europe through the adoption of an innovating ICO-friendly regime.
- In order for this effort to be effective, France must however clarify other flaws to become the jurisdictional choice of ICO issuers, principally with respect to the tax treatment of ICO proceeds.

The G20 on Cryptoassets At the 2018 G20 summit in Buenos Aires last week, member states [committed](#) to implementing the Financial Action Task Force (“**FATF**”) standards as they apply to cryptoassets and called on international standards-setting bodies, including the Financial Stability Board (“**FSB**”), the Committee on Payments and Market Infrastructures (“**CPMI**”) and the International Organization of Securities Commissions (“**IOSCO**”), to monitor and assess multilateral responses to cryptoassets and related risks. The G20 set a soft deadline of July 2018 for the FSB, CPMI, IOSCO, and FATF to “report ... on their work on cryptoassets.” As Argentina’s Central Bank Chair Frederico Sturzenegger put it when speaking on behalf of the G20, members committed to getting specific recommendations on the “data [they] need” by July 2018—not necessarily to propose regulation by then. What some may consider to be a slow-moving pace to the regulation of cryptoassets is likely due to two factors. First, the G20 members have not necessarily agreed about whether cryptoassets should be regulated in the first instance, and, if they should be, what appropriate regulation would look like. Second, there seems to be a consensus among members of the G20 that while cryptoassets raise concerns regarding market integrity, consumer and investor protection, tax evasion, money laundering and terrorist financing, they do not yet have implications for the stability of the financial system. As the FSB stated in its [letter](#) to the G20 finance ministers and central bank governors, “[cryptoassets] small size, and the fact that they are not substitutes for currency and with very limited use for real economy and financial transactions, has meant the linkages to the rest of the financial system are limited.” The focus of the G20 on cryptoasset regulation could increase, depending on how quickly the markets develop. Some prominent market participants and commentators have noted that cryptoasset markets are becoming increasingly connected to the traditional financial markets. For example, bitcoin derivatives are cleared in the same clearing organizations as other products, which has caused some market participants to [voice concern](#) that large price movements in bitcoin futures could destabilize clearing organizations and their ability to satisfy fundamental obligations with respect to other products in the same clearing pool. Such a scenario, they argue, could have knock-on effects throughout the broader economy. Further, the increased interconnectedness of these markets, together with the high volatility and illiquidity of many cryptoassets, has led some prominent commentators to [state](#) publicly that such assets and the markets where they trade may now, or may in the future, be systemically important, to the point where the volatility and illiquidity of such assets pose a systemic risk to the broader financial system, beyond the market for cryptoassets. **Key Takeaways**

- The G20 member states committed to apply FATF standards to cryptoassets.
- The G20 called on international standard-setting bodies to monitor and assess responses to cryptoassets and to report on that monitoring and assessment by July 2018.
- While the G20 recognizes many risks associated with cryptoassets, this initiative is likely to take some time, given that members seem not to view these markets as currently having an appreciable effect on global financial stability.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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¹ This bill, which is called "Loi Pacte" for "*Plan d'action pour la croissance et la transformation des entreprises*", will be presented to the Ministers Council (as a first step towards adoption by Parliament) on April 18, 2018. [View as PDF](#)