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Cryptocurrency and other digital assets for asset managers

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Introduction

In 2008, an unknown author publishing under the name Satoshi Nakamoto released a white paper describing Bitcoin, a peer-to-peer version of electronic cash, and the corresponding software that facilitates online payments directly between counterparties without the need for a financial intermediary. In the decade that has followed, Bitcoin and countless other open-source, decentralised protocols inspired by Bitcoin (for example, Ethereum and Monero) have come to represent a $300 billion-plus market of alternative assets, commonly referred to as "digital assets", which are typically traded over the internet using online exchange platforms.

Digital assets can serve several functions. Although the following categories are not independent legal categories under U.S. law, such distinctions are helpful for understanding and crafting various investment strategies involving these assets. Some digital assets, such as Bitcoin or Litecoin, are widely regarded as decentralised stores of value or mediums of exchange due to certain common economic features that support these functions; these are sometimes referred to as "pure cryptocurrencies". Other digital assets, such as Monero or Zcash, are a subset of pure cryptocurrencies that also possess certain features designed to enhance transaction privacy and confidentiality ("**privacy-focused coins**").

Beyond pure cryptocurrencies and privacy-focused coins, there exists a broad array of general purpose digital assets ("**platform coins**"), such as Ethereum, NEO and Ravencoin, which are designed to facilitate various peer-to-peer activity, from decentralised software applications to "smart" contracts to digital collectibles, such as CryptoKitties. Platform coins also enable the creation of new digital assets called "tokens", which are typically developed for a specific purpose or application – for example, (1) "utility tokens", which generally are designed to have some consumptive utility within a broader platform or service, or (2) "security tokens", which are designed to represent more traditional interests like equity, debt and real estate with the added benefit of certain features of the digital asset markets, such as 24/7 operations, fractional ownership and rapid settlement.

The digital asset market extends beyond the assets themselves. Other participants, including online exchanges, payment processors and mining companies, compose the broader digital asset industry. And as this industry continues to grow, it has captured the attention of retail and institutional investors alike, including asset managers seeking to develop investment strategies and products involving these emerging assets and companies. Some strategies resemble early-stage growth strategies, featuring long-term investments either directly in

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certain digital assets or in start-up ventures developing complementary goods and services for the industry. Other strategies include hedge fund strategies, such as long/short funds, which often use derivatives, or arbitrage strategies, which seek to capitalise on the price fragmentation across the hundreds of global online exchanges.

This chapter outlines the current U.S. regulatory framework applicable to cryptocurrency and other digital asset investment funds ("**digital asset funds**") offered to U.S. investors and how those regulatory considerations affect fund structuring decisions.

The U.S. regulatory framework generally

Digital asset funds operated in the United States or offered to U.S. investors must contend and comply with a complex array of statutes and regulations. These include the Securities Act of 1933 (the "**Securities Act**"), which regulates the offer and sale of securities; the Investment Company Act of 1940 (the "**1940 Act**"), which regulates pooled investment vehicles that invest in securities; the Commodity Exchange Act (the "**CEA**"), which regulates funds and advisers that trade in futures contracts, options on futures contracts, commodity options and swaps; and the Investment Advisers Act of 1940 (the "**Advisers Act**"), which governs investment advisers to such funds. Additionally, many fund-structuring decisions are driven by tax considerations. This section sets out the current U.S. regulatory framework applicable to digital asset funds managed in the United States or offered to U.S. investors and explores how those regulatory considerations affect fund structuring decisions.

Offering of fund interests

Interests in investment funds are securities. Under the Securities Act, an offering of securities must be registered with the SEC or made pursuant to an exemption. While there are a few possible exemptions, the most common exemption that private funds rely upon is Regulation D, which provides two alternative exemptions from registration: Rule 504 and Rule 506. Because most private investment funds intend to raise more than $5 million, Rule 506, which provides no limit on the amount of securities that may be sold or offered, is the exemption under Regulation D most commonly relied on by such funds, and consequently, this discussion of Regulation D is limited to offerings made under Rule 506.[1] In order to offer or sell securities in reliance on Rule 506 of Regulation D, an investment fund must:

- limit sales of its securities to no more than 35 non-accredited investors (unless the offering is made pursuant to Rule 506(c), in which case all purchasers must be accredited investors), although securities may be sold to an unlimited number of accredited investors;
- ensure that all non-accredited investors meet a sophistication requirement by having such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment;
- refrain from general solicitation or advertising in offering or selling securities (unless the offering is made pursuant to Rule 506(c));
- comply with the information disclosure requirements of Rule 502(b) with respect to any offering to non-accredited investors. There are no specific information requirements for offerings to accredited investors;
- implement offering restrictions to prevent resales of any securities sold in reliance on Regulation D; and
- file a Form D notice of the offering with the SEC within 15 calendar days of the first sale of securities pursuant to Regulation D.

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There are also some important limitations on the scope of the Regulation D exemption. For example, Regulation D only exempts the initial transaction itself (i.e., resales of securities acquired in an offering made pursuant to Regulation D must be either registered or resold pursuant to another exemption from registration). Furthermore, Regulation D is not available for any transaction or series of transactions that, while in technical compliance with Regulation D, is deemed to be part of "a plan or scheme to evade the registration provisions of the [Securities] Act".

The regulatory treatment of cryptocurrencies and other digital assets

As discussed above, interests in investment funds themselves are securities; however, these funds may hold a variety of different assets in pursuing their respective strategies – from digital assets (e.g., Bitcoin and Ether) to derivatives instruments (e.g., Bitcoin futures contracts) to securities (e.g., equity in an emerging growth company or interests in another digital asset investment fund). This section provides an overview of the regulatory treatment of such assets, particularly with respect to the definitions of "securities" under the U.S. securities laws and "commodity interests" under the CEA, before explaining how these characterisations impact structuring decisions. Although some generalisations may be inferred about the possible treatment of certain assets based on common features and fact patterns, there is no substitute for a careful case-by-case analysis of each asset, in close consultation with counsel.

In July 2017, in a release commonly referred to the DAO Report,[2] the SEC determined that certain digital assets are securities for purposes of the U.S. federal securities laws. The DAO Report was published in response to a 2016 incident in which promoters of an unincorporated virtual organisation ("**The DAO**") commenced an initial coin offering (an "**ICO**"), a term that generally refers to a sale of tokens to investors in order to fund the development of the platform or network in which such tokens will be used. The DAO was created by a German company called Slock.it, and it was designed to allow holders of DAO tokens to vote on projects that The DAO would fund, with any profits flowing to token-holders. Slock.it marketed The DAO as the first instance of a decentralised autonomous organisation, powered by smart contracts on a blockchain platform. The DAO's ICO raised approximately $150 million (USD) in Ether.

In the DAO Report, the SEC reasoned that The DAO tokens were unregistered securities because they were investment contracts, which is one type of security under the U.S. securities laws. Though it declined to take enforcement action against The DAO, the SEC used this opportunity to warn others engaged in similar ICO activities that an unregistered sale of digital assets can, depending on the facts and circumstances, be an illegal public offering of securities. The SEC has relied on similar reasoning in subsequent actions taken against token issuers that deem certain other digital assets sold in ICOs to be securities (such securities, "**DAO-style tokens**").[3] Many DAO-style tokens are branded by their promoters as utility tokens to convey the idea that such tokens are designed to have some consumptive utility within a broader platform or service. But as noted above, this terminology does not have any legal consequence under the U.S. securities laws. Instead, a proper inquiry must examine the facts and circumstances surrounding the asset's offering and sale, including the economic realities of the transaction.[4] Key factors to consider include: (1) whether a third party – be it a person, entity or coordinated group of actors – drives the expectation of a return; and (2) whether the digital asset, through contractual or other technical means, functions more like a consumer item and less like a security.[5]

In addition to DAO-style tokens, some digital assets are explicitly designed to be treated as securities from the outset and are meant to represent traditional interests like equity and

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debt, with the added benefit of certain features of the digital asset markets, such as 24/7 operations, fractional ownership and rapid settlement. These digital assets are securities by definition, and although they represent an innovation in terms of how securities trade, clear and settle, they are not necessarily a new asset class.

Any cryptocurrencies or other digital assets that are not deemed to be securities under the U.S. securities laws may be considered "commodities" under the CEA, due to the broad definition of the term.[6] For example, the Commodity Futures Trading Commission ("**CFTC**") appears to be treating Bitcoin as an exempt commodity under the CEA, a category that includes metals and energy products,[7] but does not include currencies or securities, which are classified as excluded commodities.[8] In addition, the CFTC recently permitted the self-certification of futures contracts and binary options on Bitcoin by futures exchanges under its rules for listing ordinary futures contracts.[9] And although the SEC has not taken any action with respect to Bitcoin specifically, SEC Chairman Jay Clayton recently acknowledged, and appeared to accept as correct, the CFTC's designation of Bitcoin as a commodity over which the CFTC has anti-fraud jurisdiction.[10] Finally, to the extent that a digital asset is a commodity, any derivatives offered on that commodity – for example, Bitcoin futures contracts and binary options – fall squarely within the definition of commodity interests under the CEA.

Possible obligations of the manager under the Advisers Act or the CEA

The question of whether a digital asset fund manager must comply with additional regulations under either, or both of, the Advisers Act and the CEA turns primarily on the characterisation of the assets its funds hold. First, a manager is deemed an "investment adviser" under Section 202(a)(11) of the Advisers Act, and thus is subject to the rules and regulations thereunder, if it "for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities", or "for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities". So to the extent that a manager of a cryptocurrency or other digital asset fund is advising on "securities" – for example, because its funds hold DAO-style tokens or security tokens – it must register as an investment advisor with the SEC unless such individual or entity qualifies for an exclusion from the definition or an exemption from the registration requirement.[11]

Registration under the Advisers Act subjects advisers to a host of rules and regulations, including those governing advertising, custody, proxy voting, record keeping, the content of advisory contracts and fees. For example, the Advisers Act custody rule[12] (the "**custody rule**") has detailed provisions applicable to any SEC-registered investment adviser deemed to have custody, as defined under the rule. Among other things, it requires use of a "qualified custodian" to hold client funds or securities, notices to clients detailing how their assets are being held, account statements for clients detailing their holdings, annual surprise examinations and additional protections when a related qualified custodian is used. For example, investment advisers dealing in digital assets may need to consider whether a bank, registered broker-dealer, or other firm that meets the definition of a qualified custodian, is willing to take custody of the digital assets.

Second, managers of private funds that invest or trade in "commodity interests", whether as an integral part of their investment strategy or only in a limited capacity, for hedging purposes or otherwise, are subject to regulation under the CEA and the rules of the CFTC thereunder ("**CFTC Rules**"). Commodity interests generally include: (1) futures

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contracts and options on futures contracts; (2) swaps; (3) certain retail foreign currency and commodity transactions; and (4) commodity options and certain leveraged transactions. So to the extent that the activities of a manager of a cryptocurrency or other digital asset fund include trading in commodity interests – for example, because it holds Bitcoin futures contracts or binary options – it will be subject to registration and regulation as a commodity pool operator ("**CPO**") or commodity trading advisor ("**CTA**"), unless it qualifies for an exemption or exclusion under the CEA or the CFTC Rules.

If the activities of an investment fund bring it within the definition of a "commodity pool" under the CEA, the manager is required to register as a CPO with the CFTC, unless such person otherwise qualifies for an exclusion from the definition of CPO or an exemption from the registration requirement. The CEA also provides for the registration of CTAs, which is in some respects analogous to the treatment of investment advisers under the Advisers Act. It should be noted, however, that numerous requirements under the CEA and the CFTC Rules apply to all CPOs and CTAs, even those that are exempt from registration.

Possible obligations of the fund under the 1940 Act or CEA

Similarly, the fund itself may be subject to additional regulations under either, or both of, the 1940 Act and the CEA, an analysis that, again, turns primarily on the assets the fund holds. An investment company is defined under Section 3(a)(1)(A) of the 1940 Act as any issuer that "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities". This subjective test is based generally on how a company holds itself out to the public and the manner in which it pursues its business goals, and is designed to capture traditional investment companies that are deliberately acting in that capacity. Additionally, Section 3(a)(1)(C) of the 1940 Act sets forth an objective, numerical test that applies to companies that hold a significant portion of their assets in investment securities, even if they do not hold themselves out as traditional investment companies.

Companies that fall within one of these definitions of an investment company must either satisfy an exemption from the 1940 Act or register under it. The 1940 Act is a comprehensive statutory regime that imposes strict requirements on registered investment companies' governance, leverage, capital structure and operations. Consequently, most private equity funds, hedge funds and other alternative investment vehicles, which fall squarely within the definition of "investment company," are structured to satisfy an exemption from the 1940 Act.

The 1940 Act provides specific exemptions from the definition of "investment company" for privately offered investment funds and certain other types of companies. For example, Section 3(c)(1) exempts a private investment fund from registration if the outstanding securities of such fund (other than short-term paper) are beneficially owned by not more than 100 persons and such fund does not presently propose to make a public offering of its securities. Further, Section 3(c)(7) excludes an entity from registration as an investment company if all of the beneficial owners of its outstanding securities are "qualified purchasers" and the entity does not make or propose to make a public offering of its securities, and it does not limit the number of beneficial owners.

The CEA defines "commodity pool" as any investment trust, syndicate or similar form of enterprise operated for the purpose of trading in commodity interests. The CFTC interprets "for the purpose" broadly and has rejected suggestions that trading commodity interests must be a vehicle's principal or primary purpose. As a result, any trading by a private fund in swaps, futures contracts or other commodity interests, no matter how limited in scope,

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and regardless of whether undertaken for hedging or speculative purposes, generally will bring a private fund within the commodity pool definition.

According to the CFTC, a fund that does not trade commodity interests directly but invests in another fund that trades commodity interests would itself be a commodity pool. Thus, in a master-feeder fund structure, a feeder fund will be considered a commodity pool if the master fund is a commodity pool. Similarly, a fund of funds that invests in commodity pools may itself be considered a commodity pool.

Finally, an investment vehicle can be both an "investment company" under the 1940 Act and a "commodity pool" under the CEA, and an exception from the registration requirements of the 1940 Act does not generally imply an exception from CPO registration under the Commodity Exchange Act (or vice versa). Similarly, an exception from registration under the Advisers Act does not generally imply an exception from CTA registration (or vice versa). Furthermore, interests in commodity pools are "securities" under the Securities Act, and therefore the Securities Act applies to the offer and sale of interests in a commodity pool to the same extent as it applies to any other type of security. Accordingly, offering of interests in a private fund that is a commodity pool generally will be structured to meet the requirements of a Securities Act exemption (e.g., Regulation D, as discussed above).

Applying this framework to digital asset funds

Given the regulatory minefield laid out above, managers face a multitude of structuring decisions in conceiving and launching digital asset funds aimed at U.S. investors. These decisions will often influence, and be influenced by, the manager's investment strategy – particularly as it relates to the types of assets the fund should be permitted to hold. This section explores some common structures and the strategies they support. In each of these cases, one should keep in mind that interests in the digital asset fund itself are securities, as noted above, that must be offered and sold pursuant to an exemption, such as Regulation D, except in the case of registered (i.e., public) funds, which are offered and sold in fully-registered securities offerings.

First, the manager may decide that the fund should have flexibility to invest in securities. It may want to invest in "traditional" securities like equity or debt in a company within the digital asset industry (including through tokenised securities), or DAO-style tokens and other digital assets at risk of being deemed investment contracts. In this case, the adviser will likely need to register under the Advisers Act and comply with the host of rules and regulations thereunder, including those governing advertising, custody, proxy voting, record-keeping, the content of advisory contracts, and fees. Non-U.S. advisers, however, can potentially rely on Advisers Act Rule 203(m)-1 (the "**private fund adviser rule**").[13]

Custody poses unique questions in the digital asset context, and it is not clear in all cases whether digital assets would be viewed as funds or securities, such that the custody rule would apply. Currently, most qualified custodians do not offer custody services for digital assets. In any case, the manager should familiarise itself with the operational considerations of digital asset custody. First, what does it mean to have custody of an asset that is not physical and even in digital form, does not exist on a centralised database, but instead on one that is universal and distributed? For example, one cannot physically move units of Bitcoin off of the Bitcoin blockchain and store them elsewhere. However, in order to exercise control over one's Bitcoins, one needs a private and a public key. These keys are a series of hexadecimal characters (e.g., 1A1zP1eP5QGefi2DMPTfTL5SLmv7DivfNa), which must be stored carefully. The public key is the identity of the address on the network

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that has ownership and control of those Bitcoins – this key can be shared with anyone, and in fact, it must be shared in order to receive Bitcoins. The private key is essentially a password, and Bitcoins can be transferred out of a particular address by anyone with possession of that address's corresponding private key. So in the case of a blockchain-based asset like Bitcoin, control of the private key may be tantamount to custody. As there is simply no recourse to retrieve Bitcoins when a private key is lost or stolen, a critical operational point for managers is safe and secure private key storage, for example through "deep cold" storage.[14]

If the manager believes the digital asset fund may invest in securities, the fund itself would likely be structured so as to meet one of the various registration exemptions for entities that would otherwise be classified as "investment companies" under the 1940 Act.[15] For offshore funds, the requirements of Sections 3(c)(1) and 3(c)(7), which are discussed above, generally only apply to U.S. investors.

Alternatively, the manager may decide that the fund should be a registered investment company. In fact, there have been a number of requests to list on national securities exchanges the shares of such funds. The SEC has repeatedly denied such requests, and in January 2018, the SEC's Division of Investment Management outlined several questions that sponsors would be expected to address before it would consider granting approval for funds holding "substantial amounts" of cryptocurrencies or "cryptocurrency-related products."[16] The questions, which focus on specific requirements of the 1940 Act, generally fall into one of five key areas: valuation, liquidity, custody, arbitrage and potential manipulation. And although such funds alternatively could potentially be offered to the public as non-investment companies (to the extent they do not hold significant amounts of securities) under the Securities Act, the SEC has indicated that significant, similar questions exist there also.[17]

Second, the manager may decide that the fund should have flexibility to invest in commodity interests, such as futures contracts or binary options, either for hedging or speculative purposes. Any such trading by a private fund, no matter how limited in scope, and regardless of the purpose, would generally make such fund a "commodity pool," as discussed above. In this case, the manager may be required to register as a CPO or CTA with the CFTC, although certain exemptions exist for non-U.S. managers and for funds that invest in only limited amounts of commodity interests. Even if the manager decides that such fund should only invest in commodity interests and not securities, interests in commodity pools are "securities" under the Securities Act, and therefore, the fund would generally be structured to meet the requirements of a Securities Act exemption (e.g., Regulation D, as discussed above).

Finally, the manager may decide that the fund should hold neither securities nor commodity interests – in other words, a fund that holds only commodities, or "pure cryptocurrencies," such as Bitcoin, and no commodity interests. Because this category does not have independent legal significance under U.S. law, such determinations regarding the risk that a given digital asset could be deemed a "security" for U.S. securities laws purposes should be made carefully and together with legal counsel. In this case, the fund would not be governed by the 1940 Act, and the manager's activities with respect to the fund would not be governed by the Advisers Act, as both of these regimes are premised upon the fund holding securities, as discussed above. Further, because the fund does not hold commodities interests, it would likely not be considered a "commodity pool", and the manager would likely not be required to register as a CPO or CTA with the CFTC. However, the fund and the manager in this case would not be entirely unregulated. As noted above, interests in the fund are securities (regardless of the underlying assets that the fund invests in), the

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offer and sale of which must comply with U.S. securities laws. Additionally, the CFTC has some, albeit limited, jurisdiction over the spot market for commodities pursuant to its anti-fraud and manipulation authority.[18] Moreover, the manager of such a fund would likely be considered a common law fiduciary to such a fund and thus subject to fiduciary duties in its management of the fund.

While beyond the scope of this paper, many fund-structuring decisions are driven by U.S. federal income tax considerations. For example, many private investment fund structures typically consist of at least two investment vehicles: a vehicle that is organised in the United States and is treated as a partnership for U.S. federal income tax purposes (the "Onshore Fund"); and a vehicle that is organised in a tax haven jurisdiction, such as the Cayman Islands or the British Virgin Islands, and is treated as a corporation for U.S. federal income tax purposes (the"Offshore Fund"). U.S. taxable investors generally invest in the Onshore Fund. Because of the transparency of partnerships for U.S. federal income tax purposes, the U.S. investors are generally treated as if they directly derived their shares of the Onshore Fund's items of income, gains, losses, and deductions. The Offshore Fund is a passive foreign investment company ("PFIC"), for U.S. federal income tax purposes.

Conclusion

Over the past decade, digital assets have come a long way – from Satoshi's original Bitcoin white paper to today's broad universe of 1,600-plus digital assets trading across hundreds of online trading platforms. As this market and the surrounding industry matures, asset managers will likely continue to identify opportunities to either deploy novel investment strategies or adapt their tried-and-true strategies in this new context. As set out above, such managers face a complex array of statutes and regulations in offering digital asset funds to U.S. investors. These considerations, together with the investment strategies that the manager desires to pursue, affect fund structuring decisions, and accordingly, are best addressed together with counsel.

* * *

Endnotes

1. Historically, issuers and any persons acting on their behalf were prohibited from engaging in any form of general solicitation or general advertising in Rule 506 offerings. However, in July 2013, the SEC adopted final rules to permit general solicitation and general advertising in Rule 506 offerings under new Rule 506(c). Additional requirements apply to Rule 506(c) offerings, including the requirement to take reasonable steps to verify an investor's accredited investor status. Under Rule 506(b), an investment fund may offer securities pursuant to Rule 506 without complying with these additional requirements if it does not use general solicitation. Currently, most private funds offered in the United States choose not to use general solicitation.
2. SEC Release No. 81207, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO* (Jul. 25, 2017).
3. *See, e.g.*, SEC Release No. 10445, *In the matter of Munchee, Inc.* (Dec. 11, 2017).
4. This includes, for example, (1) whether the investor's fortunes are interwoven with those of other investors or the efforts of the promoter of the investment, and (2) whether the investor's expectation of profits are based predominantly upon the entrepreneurial

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or managerial efforts of the promoter or other third parties. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946).

5. Director William Hinman, Remarks at the Yahoo Finance All Markets Summit, *Asset Transactions: When Howey Met Gary (Plastic)* (Jun. 14, 2018), *available at* https://www.sec.gov/news/speech/speech-hinman-061418. Further, the speech indicates that a digital asset that was originally offered in a securities offering may later be sold in a manner that does not constitute an offering of a security, in limited circumstances, where: (i) there is no longer a central enterprise being invested in; and (ii) the asset is only being sold to end users who will purchase a good or service available through a network. This also raises a counterfactual question – that is, whether a token network that was once decentralised could "centralise", such that it would fall within the scope of the securities laws.
6. *See* 7 U.S.C. § 1a(9).
7. *See* 7 U.S.C. § 1a(20) (defining exempt commodity to mean any commodity that is not an agricultural commodity or an excluded commodity; excluded commodity is defined in Section 1a(19) of the CEA to include any "interest rate, exchange rate, currency, security, security index" and other financial rates and assets).
8. *See In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736 (Sept. 17, 2015). In this order, the CFTC found that Coinflip's Bitcoin options were offered in violation of CFTC regulation 32.2, which governs commodity option transactions. The CFTC noted that the options "were not conducted pursuant to [CFTC] Regulation 32.3", the so-called "trade option exemption", which permits trading of commodity options on exempt and agricultural commodities, but not on excluded commodities such as securities, currencies, interest rates and financial indices. The CFTC, in describing why the trade option exemption was not available for Coinflip's options, focused on requirements under CFTC regulation that the options must be offered by eligible contract participants to commercial users of the underlying commodity, and not on the classification of Bitcoin as an excluded commodity.
9. *See* CFTC Release pr7654-17, CFTC Statement on Self-Certification of Bitcoin Products by CME, CFE and Cantor Exchange (Dec. 1, 2017). *See also* CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets (Jan. 4, 2018) (describing the CFTC's authority with respect to virtual currency and the "heightened review" employed during the Bitcoin futures self-certification process).
10. SEC Chairman Jay Clayton, Statement on Cryptocurrencies and Initial Coin Offerings, at n. 2 (Dec. 11, 2017) ("The CFTC has designated Bitcoin as a commodity. Fraud and manipulation involving Bitcoin traded in interstate commerce are appropriately within the purview of the CFTC, as is the regulation of commodity futures tied directly to [B]itcoin."); *see also* CNBC, *SEC Chief Says Agency Won't Change Securities Laws to Cater to Cryptocurrencies* (Jun. 6, 2018) ("'Cryptocurrencies: These are replacements for sovereign currencies, replace the dollar, the euro, the yen with [B]itcoin,' Clayton said. 'That type of currency is not a security.'").
11. Investment advisers not registered with the SEC may be subject to registration with U.S. states.
12. 17 U.S.C. § 206(4)-2.
13. For an adviser that has its principal office and place of business outside of the United States, an Advisers Act registration exemption is available under the private fund

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adviser rule, so long as: (i) the adviser has no client that is a U.S. person (generally as defined in Regulation S under the Securities Act) except for "qualifying private funds" (as defined in the rule); and (ii) all assets managed by the adviser at a place of business in the United States are solely attributable to private fund assets with a value of less than $150 million. Advisers relying on this exemption are still required to file certain information with the SEC.

14. Cold storage refers to the process of storing digital assets, such as bitcoins, offline (i.e., storing the private keys on a device not connected to the internet). However, the private keys associated with this process may have been exposed to the internet at some time during the generation of the signing process. Deep cold storage, however, is a type of cold storage where not only are the digital assets stored offline, but also the private keys associated with those assets are generated in offline systems, and the signing process of the transactions is also made in offline systems. The systems used in this type of storage never touch the internet; they are created offline, they are stored offline, and they are offline when signing transactions.
15. *See* 1940 Act § 3(c)(1)-(7).
16. SEC, Staff Letter: Engaging on Fund Innovation and Cryptocurrency-related Holdings (Jan. 18, 2018), available at https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm (the "**Letter**").
17. On March 23, 2018, the SEC issued an order instituting proceedings to determine whether it will approve a proposal by NYSE Arca to list two ProShares-sponsored Bitcoin futures-backed exchange-traded funds ("**ETFs**"). On April 5, 2018, the SEC published a second order instituting proceedings relating to a rule-change proposal by Cboe BZX Exchange, Inc. that would allow for the listing of two GraniteShares-sponsored ETFs that invest in Bitcoin futures contracts (both orders together, the "**Orders**"). The Orders ask for comments on many of the same issues raised in the Letter and institute a new period of review for such products, including a request for public comment on 12 areas of interest. These areas include concerns relating to: (1) such ETFs' investment practices; (2) the underlying spot and futures markets for Bitcoin; and (3) how such markets may in turn affect ETFs that invest in Bitcoin futures. For example, the SEC requests comments on the ETFs' valuation policies (e.g., how would such policies account for the possibility of a hard fork), including how such policies relate to the underlying Bitcoin spot markets, their potential for manipulation and what, if any, effect these factors could have on the ETFs' net asset value. On July 26, 2018, the SEC issued an order disapproving a rule-change proposal by Bats BZX Exchange, Inc. that would have allowed for the listing of the Winklevoss Bitcoin Trust.
18. *See* CFTC Rule 180.1.

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