

Regulatory and Legal Matters on Blockchain, Cryptocurrencies and Digital Assets (MBA)

B8210-001 - Fall 2022 (1.5 credits) B Term: Thursday 8:30-11:45am

Faculty

Donna Redel

Office Hours

Thursday 12-3 (Or by appt)

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COURSE SUMMARY

This course provides a primer on the regulatory and legal matters on financial services industry in general and blockchain-based applications and digital assets in specific. Given the increasing complexity of such issues, we will use a combination of lectures, concrete case studies, and class discussions to address cryptocurrencies and digital tokens and assets, including stablecoins and Central Bank Digital Coins (CBDCs) from legal, regulatory, policy, business, economic, and privacy perspectives.

The course will introduce students to the primary legal framework in the United States, in particular CFTC, SEC, FINCEN, FINRA, IRS, and state regulators. Understanding the functions and roles of each of these regulatory bodies is important for product offerings as well as for how blockchain entrepreneurs and lawyers have to navigate the complexity of the domain. Students will gain a perspective of how the regulatory uncertainty creates risks, opportunities, and exposure, particularly in the context of jurisdictional and geographic regulatory differences and the effort of certain states (i.e., New York State, Wyoming) from both legal and business viewpoints.

This course has been co-designed and co-developed with R.A. Farrokhnia and through the “Advanced Projects and Applied Research in Fintech” Initiative at Columbia Business School.

COURSE CO/PREREQUISITES

Students interested in registering for this class must either take “Demystifying Blockchain Cryptocurrencies and Digital Tokens” or “Introduction to Blockchain and Cryptocurrencies” as a pre-requisite (recommended) or as co-requisite (allowed).

GRADING

This course has a demanding curriculum and requires active participation, significant readings, and on-time completion of assignments prior to each session. Relevant materials (articles, cases, notes, white- and research papers, news articles, videos, etc.) will be posted in Canvas and/or handed out in before each session.

The final course grades will be calculated using the following criteria:

- a) Weekly Telegram participation (15%): Post articles and/or comment on the already posted articles/readings via Telegram group
- b) Class participation (25%): Note that attendance and quality contributions to class discussions are parts of your participation grade
- c) Final Paper/ Presentation (60%): Topics to be selected in consultation with Professor Redel

The paper or presentation will be between 10 pages, (double-spaced, with citations and the footnotes). The deadline to submit is Dec 15. Additional details will be provided during first class session

EXPECTATIONS AND CONDUCT

Given the complexity of the technical topics covered students are expected to devote significant time to this class. In order to have meaningful discussions, it is imperative that you come prepared ahead of each session. Class attendance and participation is an integral part of this course learning process, and as such, unexcused absences and disruptive behavior will not only have a detrimental effect on your final grade, but also will be considered disrespectful to your classmates. It is imperative that all students be in full compliance with Columbia's honor code of professional conduct.

Thank you for your interest in this course, and I look forward to having a fun, educational, and productive class with you all.

Industry Sources:

Due to the fast-changing nature of the subject matter students are encouraged to stay current Given with developments. For daily breaking news, excellent sources are:

- CoinDesk : <http://www.coindesk.com/>
- The Block: <https://www.theblockcrypto.com>
- The Defiant: <https://www.thedefiant.io>
- Matt Levine: <https://www.bloomberg.com/account/newsletters/money-stuff>
- Morrison Cohen Litigation Tracker: <https://www.morrisoncohen.com/news-page?itemid=471>

Curriculum

The course topics and content roadmap over its six modules are as follows:

Week 1: Building the foundational knowledge of the regulatory structure in the United States

- Definition of money, securities and assets
- What is the difference between currencies, commodities, and tokens in the crypto domain?
- An introduction to the regulatory landscape—SEC, CFTC, FINCEN, FINRA, IRS, OCC, other relevant agencies, and state regulators
- Who has regulatory oversight and why? Do we know?

- Rules vs. Principles Based Regulation

Readings:

- WATCH: “Functions of Money” Khan Academy, <https://www.khanacademy.org/economics-finance-domain/ap-macroeconomics/ap-financial-sector/definition-measurement-and-functions-of-money-ap/v/functions-of-money>
- *SEC v Howey*, Supreme Court (1946), https://en.wikipedia.org/wiki/SEC_v._W._J._Howey_Co.
- <https://supreme.justia.com/cases/federal/us/328/293/case.html>
- Principles based regulation: see Former Chairman of CFTC article, <https://fortune.com/2019/11/19/bitcoin-blockchain-fintech-regulation-cftc/>
- Tools for Crafting Sound Financial Regulation, https://www.hblr.org/wp-content/uploads/sites/18/2020/05/Tarbert_Final_Draft_vFINAL-1.pdf
- FinCEN on Digital Currencies, <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block>
- CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets, https://www.cftc.gov/sites/default/files/idc/groups/public/@customerprotection/documents/file/backgrounder_virtualcurrency01.pdf

Optional Readings:

- The Regulation of Commodity Options - Robert C. Lower, Duke Law Journal, <https://scholarship.law.duke.edu/dlj/vol27/iss5/1/>
- Technical knowhow trumps legal training in chase for patent talent, <https://www.ft.com/content/8470164a-7711-11e9-b0ec-7dff87b9a4a2>
- LabCFTC Primer on Virtual Currencies, https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcf_tc_pri_mercurrencies100417.pdf
- Michael Saylor, CEO of Microstrategy, and Ross Stevens, <https://www.youtube.com/watch?v=B2I0FB2Wn50&feature=youtu.be>
- Remarks of Chairman J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference, Naples, Florida, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo34>

Week 2: What is an ICO? What is a SAFT?

The ICO craze of 2015-2018 put into perspective. What were the pros and the cons, and what are the legal issues surrounding it? ICOs raised over \$6 billion in 2017 and over \$12 billion in 2018. At one point, there was a serious discussion that ICOs would threaten VC capital fund raising and touted as the new democratic answer to funding startups. What went wrong? Is any portion of the ICO model viable?

What is an accredited investor? Recent SEC changes to Accredited Investor Rules. What is the current regulatory status...do we know? How can retail investors participate in token offerings?

Assignment: Review of key terms, cases, and news articles related to a few prominent ICO offerings. Cases: The DAO, Howey Coins and EOS, KIK, Telegram, Ripple update, plus recent SEC cases.

Examine the key questions and considerations:

- How was the token marketed?
- When will the product be released?
- What are the legal issues and cases that are relevant to the ICO?
- Does this project need a blockchain or does a centralized database work?
 - What advantages would a blockchain give?
 - What advantages would a centralized database give? A distributed database?Why does this project require a token?
- Are there restrictions for the founders, equity investors, early token investors and early token users? How does it deal with the rights and restrictions of early equity investors? Why does this matter?
- What is the business case for the project?
- Is it a currency, commodity or asset? What regulations are applicable?
- What is the governance structure? What is legal binding on the part of the founders? Cryptographically secure governance? Governance by consensus? Does the value of the token rely on mass adoption? Does the token use price appreciation to achieve mass adoption?

Readings:

- *The SAFT Project*, <https://saftproject.com/>
- *SEC Howey Coins* (<https://www.sec.gov/news/press-release/2018-88>)
- “An assessment of the DAO” SEC report on DAO (July 2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf>
- Bloom v SEC, <https://www.sec.gov/litigation/admin/2022/33-11089.pdf>
- Kik v SEC (annotated), <https://www.katherinewu.me/writings/2019/6/4/annotated-guide-to-the-secs-complaint-against-kik>
- EOS (Block.one) Settlement with the SEC, <https://www.sec.gov/news/press-release/2019-202>
 - Annotated EOS (Block.one) settlement by Katherine Wu, <https://www.katherinewu.me/s/33-10714.pdf>
- Telegram Decision, <https://www.courtlistener.com/docket/16325310/227/securities-and-exchange-commission-v-telegram-group-inc/>
- Kik (Wells submission), SEC complaint, rebuttal by Kik, Judge Hellerstein decisions, <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2019cv05244/516941/88/>
- SEC Modernizes the Accredited Investor Definition, <https://www.sec.gov/news/press-release/2020-191>
- Accredited Investor Standards, <https://www.investor.gov/introduction-investing/investing-basics/glossary/accredited-investors>
- <https://www.sec.gov/smallbusiness/exemptofferings/faq?auHash=rh5WfJi9h3wR>

- Bad Actor, https://www.sec.gov/smallbusiness/exemptofferings/faq?auHash=rh5WfJi9h3wRzP6X2anOmgYLdhPHNuo-3Vw0YNZyR_M#faq5
- Reg A+, <https://www.sec.gov/education/smallbusiness/exemptofferings/rega>
- Gabe Shapiro v Lewis Cohen see podcast, <https://podtail.com/podcast/the-blockchain-debate-podcast/motion-legally-speaking-tokens-are-more-like-commo/>

Optional Readings or Podcast:

- Munchee ICO White Paper, <https://www.theventurealley.com/wp-content/uploads/sites/5/2017/12/Munchee-White-Paper.pdf>
- SEC cease and desist against Munchee Inc. (December 2017), <https://www.sec.gov/litigation/admin/2017/33-10445.pdf>
- “So Long ICOs, Hello Airdrops: The Free Token Giveaway Craze Is Here”, <https://www.coindesk.com/long-icos-hello-airdrops-free-token-giveaway-craze/>
- Laura Shin Unchained on uncovering the DAO’s hacker, https://www.youtube.com/watch?v=8kEu-b_3SIU
- Ripple White Paper: <https://www.allcryptowhitepapers.com/ripple-whitepaper/>

Week 3: The legal landscape under Chair Clayton of SEC and Chair Gensler, A review of the key milestones in SEC regulation of digital assets: review of the Hinman speech, SEC framework. Contrast the legal landscape under Chair Gensler of SEC. Who is Commissioner Hester Peirce (Crypto Mom)? Review of the Biden administration position on digital assets.

- Review of The Hinman Speech
- The Framework on Digital Assets
- Gensler Aspen speech
- Insider trading and Digital Assets – a look at OpenSea and Coinbase
- What is a security digital asset? What are the consequences of a token being declared a security? What does the ecosystem look like security digital assets?
- Update of the Executive Order

Readings:

- Digital Asset Transactions: When Howey Met Gary (Plastic), <https://www.sec.gov/news/speech/speech-hinman-061418>
- Statement on Digital Asset Securities Issuance and Trading, <https://www.sec.gov/news/public-statement/digital-asset-securities-issuance-and-trading>
- Digital Assets as Securities: SEC Corporation Finance Director Lays Out the Staff’s Analysis in Assessing Whether Digital Assets Constitute Securities, https://www.sullcrom.com/siteFiles/Publications/SEC_Publication_SEC_Director_Remarked_on_the_Application_of_Securities_Laws_to_Digital_Assets.pdf
- Gensler Aspen Speech, <https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03>

- OpenSea Insider Trading, <https://www.documentcloud.org/documents/22048988-chastain-indictment>)
- NFT Case Promises to Test Boundaries of Insider-Trading Laws, <https://www.wsj.com/articles/insider-trading-in-nfts-thats-not-a-crime-defense-lawyers-claim-11661938202>
- Insider Trading and NFTs: What Should Companies Be Doing, <https://www.skadden.com/insights/publications/2022/08/insider-trading-and-nfts-what-should-companies-be-doing>
- DOJ Charges Former NFT Marketplace Employee with Insider Trading, <https://www.quinnemanuel.com/the-firm/publications/doj-charges-former-nft-marketplace-employee-with-insider-trading/>
- Coinbase Insider Trading, <https://www.sec.gov/litigation/complaints/2022/comp-pr2022-127.pdf>
- Concerning Questions Raised by SEC Action Against Former Coinbase Employee, <https://www.natlawreview.com/article/concerning-questions-raised-sec-action-against-former-coinbase-employee>
- Kennedy and Crypto, <https://www.sec.gov/news/speech/gensler-sec-speaks-090822>
- SEC Chair Gensler Says "Vast Majority" of Crypto Tokens Are Securities, <https://www.findknowdo.com/news/09/08/2022/sec-chair-gensler-says-vast-majority-crypto-tokens-are-securities>

Optional Readings:

- WATCH: SEC Chairman Jay Clayton's Interview Consensus Invest, <https://www.coindesk.com/sec-jay-clayton-consensus-invest-video>
- *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir. 1985), <https://law.justia.com/cases/federal/appellate-courts/F2/756/230/162082>

Week 4: A look at DeFi regulation. How is it regulated? What are Governance Tokens? Liquidity Tokens? How are institutions and VCs moving into the field of digital assets? **What are exchanges, platforms, and crypto lending?** How are they regulated? How should they be regulated? **What is custody?** What happens in **bankruptcy**? How do bankruptcy laws apply to crypto? **Cases:** 3AC, Voyager, Celsius, Grayscale

Readings:

- Statement on Digital Asset Securities Issuance and Trading, <https://www.sec.gov/news/public-statement/digital-asset-securities-issuance-and-trading>
- SEC settlement with EtherDelta Founder, <https://www.sec.gov/news/press-release/2018-258> (Press Release); <https://www.sec.gov/litigation/admin/2018/34-84553.pdf> (Order)
- Framework for "Investment Contract" Analysis of Digital Assets, <https://www.sec.gov/files/dlt-framework.pdf>

- Speech by Commissioner Peirce, <https://www.sec.gov/news/speech/peirce-2021-10-08>
- Speech by Commissioner Crenshaw, <https://www.sec.gov/news/speech/crenshaw-sec-speaks-20211012>
- The Deal Podcast with Adam Levitin, <https://www.thedeal.com/podcasts/fresh-start-professor-adam-levitin/>
- Unchained podcast with Adam Levitin, <https://unchainedpodcast.com/tag/adam-levitin/>
- Levitin, Adam J., Not Your Keys, Not Your Coins: Unpriced Credit Risk in Cryptocurrency (July 15, 2022). Texas Law Review, Vol. 101, 2022, Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4107019 (PDF will be distributed and available on file at the library) - Adam Levitin
- Blockfi Settlement, <https://www.sec.gov/news/press-release/2022-26>
- <https://www.sec.gov/litigation/admin/2022/33-11029.pdf>
- Celsius case study (TBD)
- Grayscale (<https://grayscale.com/>) TBD
- Fortune: August/Sept 2022 p8 The Next Warren Buffet?

Optional Readings:

- SEC reg relating to ATS: 17 CFR §242.301 regarding specific requirements for alternative trading systems: <https://www.law.cornell.edu/cfr/text/17/242.301>
- SEC Obtains Emergency Asset Freeze to Stop Purportedly Fraudulent Initial Coin Offering: <https://www.sec.gov/litigation/complaints/2017/comp-pr2017-219.pdf>
- CFTC Orders Bitcoin Exchange Bitfinex to Pay \$75,000 for Offering Illegal Off Exchange Financed Retail Commodity Transactions and Failing to Register as a Futures Commission Merchant, 17, <https://www.cftc.gov/PressRoom/PressReleases/7380-16>
- BitMEX, <https://www.cftc.gov/PressRoom/PressReleases/8412-21>

Week 5: Deep Dive into Stablecoins and Central Bank Digital Coins (CBDC): What are stablecoins and how are they regulated? How should they be regulated? What difference does the reserve backing of stablecoins make to the regulators? What is **Circle**? What is all the fuss about **Tether**? **Terra/Luna + Diem/Libra** case studies. What are CBDCs and their global status? Review of President's Working Group and **Project Hamilton** at the Federal Reserve. The Digital Dollar Project.

Readings:

- Algorithmic stablecoins: Basis, https://www.basis.io/basis_whitepaper_en.pdf
- TerraLuna (TBD)
- Tether White Paper, <https://tether.to/wpcontent/uploads/2016/06/TetherWhitePaper.pdf> (goes page called Transparency)
- Paxos USD, https://www.paxos.com/wp-content/uploads/2019/02/PAX_Whitepaper.pdf
- Project Hamilton,

<https://www.bostonfed.org/publications/one-time-pubs/project-hamilton-phase-1-executivesummary.aspx>

- The Digital Dollar Project, <https://digitaldollarproject.org>

Optional Readings:

- Libra Whitepaper, <https://libra.org/en-US/white-paper/> (Page Not Found)
Libra Revised Whitepaper (to be provided on Canvas) Terra/Luna primer (to be provided on Canvas)
- Facebook's Cryptocurrency, Libra: Senate Banking Testimony
<https://www.forbes.com/sites/caitlinlong/2019/07/15/facebook-cryptocurrency-libra-senate-banking-testimony/?sh=a52ae4213786>
- Watch: Secretary Munchin on Libra, <https://www.youtube.com/watch?v=zAICzg8ir50>
- The differences between Bitcoin and Libra should matter to policymakers,
<https://www.coincenter.org/the-differences-between-bitcoin-and-libra-should-matter-to-policymakers/>
- Digital Currency Initiative <https://dci.mit.edu/project-hamilton-building-a-hypothetical-cbdc>
- Project Hamilton - Building a Hypothetical Central Bank Digital Currency,
<https://a16zcrypto.com/stablecoins-defense/>

Optional Reading Re: Tether and Bitfinex

- Bitfinex Covered \$850 Million Loss Using Tether Funds, NY Prosecutors Allege,
<https://www.coindesk.com/bitfinex-ny-prosecutors-tether-850-million-allege>
- NY AG Filings, <https://ag.ny.gov/press-release/2019/attorney-general-james-announces-court-order-against-crypto-currency-company>;
https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=vlexA1b0spKOnK_PLUS_ZUGTJ3A==&system=prod
- NY AG sues Bitfinex and Tether to unearth "fraud being carried out" by the firms,
<https://www.theblock.co/post/20978/ny-attorney-general-sues-bitfinex-and-tether>
- Tether wants to 'invest' more of \$2.1 billion dollar reserves, lawyers say,
<https://modernconsensus.com/cryptocurrencies/tether/tether-wants-invest-reserve-cash-lawyers-say/>
- Bitfinex owner plans to raise \$1 billion in an exchange token offering,
<https://modernconsensus.com/cryptocurrencies/tether/bitfinex-ifinex-exchange-token-offering-leo/>

Week 6: A closer look at KYC/AML, Sanctions, FATF. What is the travel rule? What is FinCEN's role? Tornado Cash – the implications. NFTs and DAOs legal issues. Paper topics discussion

- We will discuss KYC/AML. What is it and how does it operate is it effective? Is it effective?
- Overview of global regulation trends. In particular the EU and MICA.
- Is legal jurisdictional arbitrage relevant today?
- US jurisdiction: Wyoming, Delaware. NYS.
- *NYSDFS is responsible for financial regulation in NYS for crypto. What is the Bit License and a Trust license?*

- *NFTs and DAOs legal issues*
- Final projects discussion and deliberations

Readings:

- CoinCenter on Tornado Cash, <https://www.coincenter.org/education/advanced-topics/how-does-tornado-cash-work/>
- Community Involvement, <https://web.archive.org/web/20220617060922/https://docs.tornado.cash/general/community-involvement>
- Analysis: What is and what is not a sanctionable entity in the Tornado Cash case, <https://www.coincenter.org/analysis-what-is-and-what-is-not-a-sanctionable-entity-in-the-tornado-cash-case/>
- Unchained with Laura Shin and Drew Hinkes
- Unchained with Laura Shin and CoinCenter
- OFAC Takes Action Against Virtual Currency Tornado Cash in Novel Application of Sanctions Authorities, https://www.virtualcurrencyreport.com/2022/08/ofac-takes-action-against-virtual-currency-tornado-cash-in-novel-application-of-sanctions-authorities/#_ftn1
- Jake Chervinsky writings from Blockchain Association (To be distributed)
- Miles Jennings on DAOs (<https://a16zcrypto.com/dao-legal-entity-how-to-pick/>)
- <https://a16z.com/2022/05/23/dao-legal-frameworks-entity-features-selection/>
- NY State BitLicense, https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/bitlicense_faqs (Not Found – alternative here? <https://www.dfs.ny.gov/search/site?search=bitlicense>)
- Podcast -Unchained with Stuart Levi and Laura Shin, <https://unchainedpodcast.com/excited-about-your-bored-ape-or-crypto-punk-make-sure-you-understand-your-ip-rights/>
- KYC/AML, <https://www.sec.gov/about/offices/ocie/amlsourcetool.htm>
<https://www.sec.gov/about/offices/ocie/amlmfsrcetool.htm>
<https://go.chainalysis.com/links-virtual.html>

Optional Readings:

- Sanctions and Censorship Implications for Blockchain Infrastructure, <https://www.paradigm.xyz/2022/09/base-layer-neutrality>
- Brian Armstrong's Finest Hour: Backing Tornado Cash Suit Against Treasury, https://www.coindesk.com/layer2/2022/09/09/brian-armstrongs-finest-hour-backing-tornado-cash-suit-against-treasury/?utm_source=Sailthru&utm_medium=email&utm_campaign=Node%20-%20Sep%209&utm_term=The%20Node