
ICOs 2018: The Current State of the Law, Regulation and Taxation

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Securities Exchange Commission

During his February 2018 testimony before the Committee of Banking, Housing, and Urban Affairs, the Chairman of the SEC reiterated the agency's position that typical Initial Coin Offering ("ICO") structures involve the offer and sales of securities and must register their offerings or qualify for an exemption from registration. The SEC cautioned ICO sponsors from elevating form over substance as simply calling your token a "utility token" or giving the token a minimum utility (i.e., access to a platform) is not determinative on whether the token is or is not a security. The threshold question for all ICO sponsors is whether the coin or token is a security: a highly fact-dependent analysis.

What is a Security?

In analyzing whether a token offering is subject to U.S. federal securities laws, we begin with the definition of a security as provided for under the Securities Act of 1933 (the "Securities Act") and the Exchange Act of 1934 (the "Exchange Act"). Section 2(a)(1) of the Securities Act provides this broad definition of a security:

"any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement... investment contract... or, in general, any interest or instrument commonly known as a 'security,' of 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" (emphasis added).[\[1\]](#)

The definition does not list cryptocurrency, digital currency, or tokens as a type of security. It appears that virtual tokens would not be subject to U.S. federal securities laws. However, due to the current unregulated nature of the cryptocurrency market and investment-like rights associated with certain blockchain token offerings, courts have claimed that the term "investment contract" is a catch-all for instruments not explicitly listed under the definition of a security.[\[2\]](#)

Howey Test

In *SEC vs. Howey*, the Supreme Court developed a four-part test to determine whether a contract constitutes an investment contract that meets the definition of a security.[\[3\]](#) Generally, the Howey Test requires that an offering satisfy these requirements to be a security: (i) there is an investment of money (which includes not only fiat currency, but any commonly accepted indication of value)[\[4\]](#); (ii) in a common enterprise (there are three approaches – horizontal,¹ narrow vertical, and broad vertical)[\[5\]](#); (iii) with an expectation of profits; (iv) solely from the

efforts of others (i.e., a promoter or third party)[\[6\]](#). All four factors must be met for a token to be a security. It is also crucial that the token be considered within the entire context of the platform.

Family Resemblance Test and the Risk Capital Test

The Howey Test is not the only test courts may utilize in determining whether a token is a security. The *Reves* family resemblance test articulates four factors to determine whether a note meets the definition of a security.[\[7\]](#) In *Reves*, the presumption that a note is a security may be rebutted if the court determines that this note resembles an excepted non-security note. Courts applying the *Reves* test consider: (i) the parties' motivation for entering the transaction, (ii) whether there was a trading market for the investment of the instrument; (iii) the expectation of the investing public, and (iv) whether there are other regulatory schemes applicable to the instrument that could reduce risk to the buyer. Although the *Reves* family resemblance test applies to notes, courts may apply both tests if a particular note does not meet the Howey test.

Risk Capital Test

Token issuers who intend to sell their tokens throughout the U.S. and believe they are not subject to the SEC's rules and regulations may still be subject to each state's securities laws (i.e., "Blue Sky" laws). In California, for example, courts have instituted a "risk capital" test that considers whether an ICO sponsor is attempting to (i) raise funds for a business venture or enterprise, (ii) through an indiscriminate offering to the public, (iii) where the investor is in a passive position to affect the success of the enterprise, and (iv) the investor's money is substantially at risk because it is inadequately secured.[\[8\]](#)

In applying the risk capital test to an organization's attempt to finance improvements to a country club by selling club memberships, the California Supreme Court looked through the form of the contract to the underlying substance of the transaction, and held that the fact the membership might have been purchased for use and enjoyment of the purchaser rather than as an investment, did not preclude the membership from constituting a 'security' as defined in Section 25008 of the California Corporate Code.[\[9\]](#)

Additional Securities Law Considerations

In addition, on March 7, 2018, the SEC issued a public statement stating that a platform that offers trading of digital assets that are securities and operates as an "exchange," as defined by the federal securities laws, must register with the SEC as a national securities exchange or be exempt from registration. ICO sponsors who are intending for their tokens to be traded on these secondary exchanges should conduct due diligence before making affirmative statements regarding a potential secondary market for their tokens, and indicating the restriction on resale of their specific tokens according to the securities exemption they are relying on when issuing their securities tokens to U.S. persons. In addition, ICO sponsors who intend on launching their own exchange should consult their legal counsel on whether registration may be required, given the SEC's recent announcements.

Financial Crimes Enforcement Network

On February 13, 2018, the Financial Crimes Enforcement Network (“FinCEN”) issued a response to the Honorable Ron Wyden, a ranking member of the Committee of Finance, regarding FinCEN’s oversight and enforcement capabilities over virtual currency financial activities (the “February 2018 Letter”). The February 2018 Letter reiterated the agency’s issued guidance that explicitly stated virtual currency exchangers and administrators are money transmitters and must comply with the Bank Secrecy Act and its implementing regulations.^[10] The response also clarified the agency’s position that under existing regulations and interpretations, a developer that sells convertible virtual currency, including in ICO coins or tokens, in exchange for another type of value that substitutes for currency is a money transmitter and must comply with Anti-money Laundering and Combatting the Financing of Terrorist (AML/CFT) requirements that apply to Money Service Businesses (“MSBs”). In addition, the February 2018 Letter reaffirmed FinCEN’s position that “[a]n exchange that sells ICO coins or tokens, or exchanges them for other virtual currency, fiat currency, or other value that substitutes for currency, would typically also be a money transmitter.”

FinCEN Rules and Regulations

On July 21, 2011, FinCEN published a Final Rule amending the definitions and other regulations related to MSB (the “Rule”).^[11] The amended regulations defined an MSB as “a person wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States, in one or more of the capacities listed in paragraphs (ff)(1) through (ff)(7) of this section. This includes but is not limited to maintenance of any agent, agency, branch, or office within the United States.”^[12] The Rule defines the term “money transmitter” to include “a person that provides money transmission services or any other person engaged in the transfer of funds.”^[13] The term “money transmission services” is defined as “the acceptance of currency, funds, or other value that substitutes 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.”^[14] Whether a person is a money transmitter is determined under a facts and circumstances analysis and the regulations identify circumstances under which a persons’ activities would not make then a money transmitter.^[15]

In analyzing whether a person’s activities qualify them as a MSB, there is no differentiation between real or convertible virtual currency – accepting and transmitting anything of value that substitutes for currency makes a person a money transmitter under the BSA regulations. Under FinCEN’s March 18, 2013 guidance on applying FinCEN’s regulations to transactions in virtual currencies, participants in generic virtual currency arrangements may be “Users”, “Administrators”, or “Exchangers”. ^[16]

A “User” is a person that obtains virtual currency to purchase goods or services on the user’s own behalf. ^[17] An “Exchanger” is a person engaged in the business of exchanging convertible virtual currency for real currency, funds, or other virtual currency.^[18] An “Administrator” is a person engaged in the business of issuing or putting into circulation a convertible virtual currency, and with the authority to redeem (withdraw from circulation) such convertible virtual currency.^[19] A User who mines Bitcoin to purchase goods or services for his own benefit is not an MSB; however, a User who mines Bitcoin and sells Bitcoin in exchange for

fiat or other value that substitutes for currency is a MSB. An Administrator or Exchanger that (1) accepts and transmits a convertible virtual currency or (2) buys or sells convertible virtual currency is a money transmitter under FinCEN's regulations and unless an exception applies.[\[20\]](#)

If the above-detailed analysis leads a person to determine they are an MSB, MSBs are required to “(a) register with FinCEN, (b) conduct a comprehensive assessment of its exposure to money laundering, (c) implement an Anti-Money Laundering Program based on such risk assessment, and (d) comply with the recordkeeping, reporting and transaction monitoring obligations set forth in parts 1010 and 1022 of 31 CFR Chapter X.”[\[21\]](#)

Commodities Futures Trading Commission

On March 6, 2018, Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York ruled that virtual currencies are commodities under the Commodities Exchange Act (“CEA”) and subject to the Commodities Futures Trading Commission (“CFTC”) anti-fraud and anti-manipulation enforcement authority.[\[22\]](#) According to the court, virtual currencies are “‘goods’ exchanged in a market for a uniform quality and value.”[\[23\]](#) Therefore, the court reasoned that virtual currencies are within the common definition of a commodity, and the CEA’s broad definition which includes “all other goods and articles...and all services, rights, and interest...in which contracts for future delivery are presently or in the future dealt in.”[\[24\]](#)

The CFTC has long stood by the stance that virtual currencies are commodities and are subject to their jurisdictional reach. However, as reaffirmed by Judge Weinstein, the CFTC’s jurisdiction relates to transactions involving “commodity interests” (i.e., derivatives markets - futures, options, swaps, and leveraged transactions involving commodities), and the CFTC’s authority over the spot contract markets extends only to “manipulation or fraud”.[\[25\]](#)

The CFTC regulates transactions in commodities interests and aims to protect market users and their funds, and the public from fraud, manipulation, and abusive practices related to derivatives and other products subject to the CEA. The CFTC’s jurisdiction flows from the definition of a “commodity” under §1(a) of the CEA.[\[26\]](#) In September of 2015, the CFTC issued a determination that “Bitcoin and other virtual currencies are encompassed in the definition and property defined as commodities.”[\[27\]](#)

Futures Contract versus Spot Transactions / Cash Forward Transactions

Section 2(a)(1) of the CEA provides the CFTC with regulatory jurisdiction over “contracts for sale of a commodity for future delivery”, and provides that the term future delivery “shall not include any sale of any cash commodity for deferred shipment or delivery.” As the statute does not provide additional definitions, courts have discussed the legislative history and concluded that Congress intended “that [a] cash forward contract is one in which the parties contemplate physical transfer of the actual commodity.”[\[28\]](#) Therefore, the court in *CFTC v. Co Petro* held:

In determining whether a particular contract is a contract of sale of a commodity for future delivery over which the [CFTC] has regulatory jurisdiction by virtue of 7 U.S.C. § 2 (1976), no bright-line definition or list of characterizing elements is determinative. The transaction must be

viewed as a whole with a critical eye toward its underlying purpose. The contracts here represent speculative ventures in commodity futures which were marketed to those for whom delivery was not an expectation. 7 U.S.C. § 2 (1976).

In addition, the Supreme Court has defined a spot transaction as a purchase or sale agreement for a commodity.[\[29\]](#)

Because the CEA is aimed at manipulation, speculation, and other abuses that could arise from the trading in futures contracts and options, as distinguished from the commodity itself, Congress never purported to regulate ‘spot’ transactions (transactions for the immediate sale and delivery of a commodity) or ‘cash forward’ transactions (in which the commodity is sold but its delivery is, by agreement, delayed or deferred). [\[30\]](#) Thus Section 2(a)(1)(A) of the CEA, 7 U.S.C. § 2, provides that ‘futures’ regulated by the CEA do not include transactions involving actual physical delivery of the commodity, even on a deferred basis. Transactions in the commodity itself, which anticipate actual delivery, did not present the same opportunities for speculation, manipulation, and outright wagering that trading in futures and options presented. From the beginning, the CEA regulated transactions involving the purchase or sale of a commodity ‘for future delivery’ but excluded transactions involving ‘any sale of any cash commodity for deferred shipment or delivery.’[\[31\]](#) The distinction, though semantically subtle, is what the trade calls the difference between ‘futures,’ which generally are regulated, and ‘cash forwards’ or ‘forwards,’ which are not. Spot transactions are however, as affirmed by *McDonnell*, subject to the anti-manipulation provisions under the CEA and the CFTC’s rules to the extent that such attempted or actual manipulation affects prices in commodity interests.[\[32\]](#)

Tax Considerations

The bill introduced as the Tax Cuts and Jobs Act (the “Act”)[\[33\]](#) has caused ICO sponsors to reassess their offshore entity structuring and offshore token offerings. Section 14213 of the Act amended Section 958(b) of the Internal Revenue Code (the “Code”), which modified the stock attribution rules for determining whether a foreign corporation is a Controlled Foreign Corporation (“CFC”) and whether a U.S. person is treated as a U.S. shareholder of the CFC for U.S. federal income tax purposes.

Section 957 of the Code defines a CFC as a foreign corporation that is more than 50% owned (directly, indirectly, or constructively under Section 958(b) of the Code) by U.S. persons who are U.S. shareholders. Section 951(b) of the Code defines a U.S. shareholder as a U.S. person who owns (directly, indirectly, or constructively as defined under Section 958(b) of the Code) 10% or more of the voting stock of a CFC. Section 958(b) of the Code provides that the constructive ownership rules of Section 318(a) of the Code apply to determine whether a foreign corporation is a CFC under Section 957 of the Code or whether a U.S. person is considered a U.S. shareholder under Section 951(b) of the Code.

Related Article: [Tax Treatment of Initial Coin Offerings](#)

Section 14213 of the Act repealed Section 958(b)(4) of the Code which provided that stock owned by foreign corporate shareholders, a foreign partner, or foreign trust were not attributed to U.S. persons to define a CFC or U.S. shareholder. In addition, Section 14212 of the tax

reform bill expanded the definition of a U.S. shareholder to mean any U.S. person who owns 10% or more of the stock of a CFC, both by vote or by value. Therefore, because of the repeal of Section 958(b)(4), a foreign subsidiary that is over 50 percent owned (by vote and value) by a foreign parent corporation would be treated as a CFC if the foreign parent corporation also owns more than 50 percent of the value of the stock of a domestic subsidiary. Because of the constructive ownership rules under Section 318(a)(3)(C) of the Code, the domestic subsidiary of the foreign parent corporation would be treated as constructively owning more than 50 percent of the foreign subsidiary.

Subpart F Income

Notably, the change in the attribution rules does not necessarily subject a U.S. shareholder to U.S. tax on the CFC's foreign earnings due to the change in the constructive ownership rules. Section 951(a)(2) of the Code states that only a U.S. shareholder that directly or indirectly owns stock in a CFC must include in gross income its share of the CFC's Subpart F income; therefore, only if a domestic shareholder directly or indirectly owns stock in a CFC will the U.S. shareholder be subject to Subpart F income inclusion.

The Subpart F provisions eliminate deferral of U.S. tax on some categories of foreign income by taxing certain U.S. persons currently on their pro rata share of such income earned by their CFCs. This approach is based on the principles underlying the U.S.'s taxing jurisdiction. In general, the U.S. does not tax a foreign corporation if the foreign corporation neither receives U.S.-source income nor engages in U.S.-based activities. However, the U.S. does generally tax all income, wherever derived, of U.S. persons. The Subpart F rules operate by treating a U.S. shareholder of a CFC as if it actually received its proportionate share of certain categories of the corporation's current earnings and profits ("E&P"). Subpart F, therefore, does not tax the CFC, but rather its rules apply only to a U.S. person who owns, directly or indirectly, 10% or more of the voting stock of a foreign corporation that is controlled by U.S. shareholders. As provided for under Section 951(a) of the Code, the U.S. shareholder is required to include in income currently its pro rata share of the CFC's Subpart F income.[\[34\]](#)

An area of concern with ICO sponsors incorporating foreign entities to act as token issuers is whether the proceeds the foreign entities receive under the sale of tokens is Subpart F income. Subpart F income includes: insurance income, foreign base company income, international boycott factor income, illegal bribes, and income derived from a §901(j) foreign country, which sponsors terrorism or are otherwise not recognized by the US. Foreign base company income ("FBCI") is the broadest incomes because it includes any income earned that has no economic connection to its country of organization, and includes 5 specific types of FBCI:

- foreign personal holding company income ("FPHCI")
- foreign base company ("FBC") sales income
- FBC services income
- FBC shipping income
- FBC oil-related income

Section 954(c)(1)(B)(iii) of the Code provides that FPHCI includes the excess of gains over losses from the sale of property which does not cause any income. FPHCI includes dividends, interest, rents, royalties, and annuities. It also includes gains from commodities transactions

and gains from certain property transactions.

The Internal Revenue Service has not provided guidance on whether the proceeds received by a CFC under an ICO is Subpart F income.

Foreign Derived Intangible Income (FDII)

Tax Reform added a new deduction equal to 37.5 percent of a domestic corporation's foreign derived intangible income, which reduces the tax rate to 13.125 percent. Broadly speaking, FDII is income from the sale, lease or license of property to foreign purchasers for use outside the U.S. or from services provided to persons located outside the U.S. However, FDII does not include any income derived through a CFC or through a foreign branch of the taxpayer.

FDII is income that is more than 10 percent of a taxpayer's Qualified Business Asset Investment (QBAI). A taxpayer's QBAI are the assets used by the taxpayer in a trade or business that are depreciable under Section 167 of the Code. Income in excess of 10 percent of the QBAI is the Deemed Intangible Income of that taxpayer and to the extent this income is foreign sourced, it is the taxpayer's FDII.

Special rules also are provided for situations in which property is sold to a related foreign person. In such a case, it must be established that the related foreign person sells the property to an unrelated foreign person for foreign use. Alternatively, foreign use can be established if the related foreign person uses the property outside the U.S. in connection with property which is sold to an unrelated foreign person or if the property is used outside the U.S. in providing services to an unrelated foreign person. As noted, for these purposes a sale of property includes a lease, license, exchange or other disposition of the property.

Example: A domestic corporation may license intangible property to a foreign subsidiary. The foreign subsidiary uses the intangible property in marketing and selling its products to unrelated foreign customers. The royalty income earned by the domestic corporation should be foreign-derived income. This also should be the result even if the related foreign person licensing the intangible property from the domestic corporation further licenses it to another related foreign person, which then uses the intangible property to market and sell products to unrelated foreign customers for use outside the United States.

A special rule is also provided for determining foreign-derived income when a domestic corporation provides services to a related person not located in the United States. Such services will qualify only if it is established that the service is not substantially similar to services provided by such related person to persons located within the United States. Thus, it will be important to show that the services are being used outside the U.S.

Foreign Sourced Dividend Deduction (DRD)

Tax Reform allows a 100 percent deduction of the "foreign-source portion" of any dividend a domestic corporation receive from a 10 percent owned foreign corporation (other than a PFIC – passive foreign investment company). DRD is only available to U.S. C corporations. A U.S. corporation must be a "U.S. Shareholder" of and satisfy a holding period requirement regarding the foreign corporation, and the Section 1249 dividend is eligible for the deduction if the U.S.

Corporation held the stock of the foreign corporation for at least 1 year (satisfy 365 day in a 731 day period).

Limitations for DRD include: (i) no foreign tax credit (“FTC”) is allowed with respect to deducted amounts, (ii) the DRD will not apply to a “hybrid dividend”, (iii) new Section 91 of the Code generally requires a U.S. corporation to recapture U.S. tax benefits of any losses deducted immediately upon incorporating a foreign branch, and (iv) Section 961 of the Code was amended to provide that to determine loss upon a disposition, the adjusted basis in the stock of a foreign corporation is generally reduced by previously allowed deductions.

Global Intangible Low Taxed Income (GILTI) Tax

Newly adopted Section 951A of the Code imposes a foreign minimum tax on U.S. shareholder’s allocable share of the GILTI of the CFC. This is a new category of income similar to subpart F because it is deemed repatriated in the year earned. GILTI is the income of a CFC, reduced for certain adjustments (i.e., U.S. effectively connected income or other Subpart F income), that exceeds 10 percent of the CFC’s Qualified Business Asset Investment (i.e., assets used by the taxpayer in a trade or business that are depreciable under Section 167 of the Code). An individual shareholder or an investor in a flow through entity with GILTI is taxed at the highest ordinary income tax rate applicable to that individual. A U.S. corporate shareholder who owns a CFC receives a 50 percent deduction of the GILTI and is subject to a 10.5 percent tax rate on its GILTI.

U.S. Taxation of Convertible Virtual Currencies and Tokens

In March 2014, the IRS released Notice 2014-21, 2014-16 IRB 938, which provides the agency’s conclusions on some basic tax principles about cryptocurrencies. Notice 2014-21 defined virtual currency as “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value,” and defined a convertible virtual currency as virtual currency “that has an equivalent value in real currency, or that acts as a substitute for real currency.”[\[35\]](#) The notice explicitly limited the guidance provided to convertible virtual currencies such as Bitcoin, Ethereum, and Ripple.[\[36\]](#) Therefore, the guidance that convertible virtual currencies are treated as property for federal income tax purposes still leaves a lack of clarity on the potential tax consequences of transactions involving virtual currencies.[\[37\]](#)

Tax Characterization of Proceeds Received from a Token Sale

To date, the IRS still has not provided explicit guidance on the characterization of proceeds received under an ICO. Under the premise that convertible virtual currency is property, the IRS may argue that an ICO sponsor is taxable on all proceeds received from an ICO because the tokens are property and therefore taxable income to the ICO sponsor, or at least the portion of the proceeds allocable to the utility.

To further complicate matters, employees, consultants, directors, and advisors are being issued tokens in exchange for services rendered to the ICO sponsor. Under Code Section 83, which taxes compensatory transfers of property, service providers must report the receipt of tokens as income based on their value during receipt or lapse of a substantial risk of forfeiture, or earlier if properly elected under section 83(b). Again, there is no specific guidance from the IRS and we

are left to apply general principles of taxation to the compensatory receipt of tokens.

[1] Note that the Supreme Court has stated that the definitions of “security” under the Securities Act and the Exchange Act are treated as being the same. *SEC v. Edwards*, 540 U.S. 398 (2004) (citing, *Reves v. Ernst & Young*, 494 U.S. 56, 61 n.1 (1990)).

[2] *Golden v. Garafolo*, 678 F.2d 1139, 1144 (2d. Cir. 1982).

[3] *SEC v. Howey*, 328 U.S. 293 (1946); *SEC vs. Edwards*, 540 U.S. 398 (2004).

[4] See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, No. 81207 (July 25, 2017).

[5] See *Curran v. Merrill Lynch*, 622 F.2d 216 (6th Cir. 1980)(horizontal refers to the pooling of funds from a group of investors); See *SEC v. Eurobond Exchange Ltd.*, 13 F.3d 1334 (9th Cir. 1994), See *SEC v. Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974) (Narrow and board vertical tie the profits or success of investors to the efforts of a promotor).

[6] Generally, the third and fourth elements are viewed together to infer the generation of passive income to the investor; See *Sec v. Glenn W. Turner Enters.*, 474 F.2d 476 (9th Cir. 1973)(the term “solely” is broadly defined term to include significantly from the efforts of others).

[7] *Reves v. Ernst & Young*, 494 U.S. 56, 61 n.1 (1990).

[8] *Silver Hills Country Club v. Sobieski*, 55 Cal.2d 811 (1961).

[9] *Id.*

[10] Amendments to Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses, 76 FR No. 140(July 21, 2011); <https://www.gpo.gov/fdsys/pkg/FR-2011-07-21/pdf/2011-18309.pdf>; the BSA is codified at 12 U.S.C. §§ 1829b, 1951-1959 and 31 U.S.C §§5311-5314,5316-5332. Regulations implementing the Bank Secrecy Act currently appear in 31 C.F.R. Chapter X.

[11] Bank Secrecy Act Regulations – Definitions and Other Regulations Relating to Money Services Businesses, 76 FR 43585 (July 21, 2011).

[12] 31 CFR § 1010.100(ff).

[13] See FIN-2014-R001, *Application of FinCEN’s Regulations to Virtual Currency Mining Operations*.

[14] 31 CFR § 1010.100(ff)(5)(i)(A).

[15] 31 CFR § 1010.100(ff)(5)(ii).

[16] See FIN-2013-G001, *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*.

[17] FinCEN's regulations define "person" as "an individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities." 31 CFR § 1010.100(mm).

[18] See FIN-2013-G001.

[19] *Id.*

[20] See FIN-2013-G001, *Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*; FIN-2014-R001, *Application of FinCEN's Regulations to Virtual Currency Mining Operations*

[21] See FIN-2014-R012, *Request for Administrative Ruling on the Application of FinCEN's Regulations to a Virtual Currency Payment System*.

[22] *Commodity Futures Trading Comm'n v. McDonnell*, No. 1:18-cv-00361-JBW-RLM, slip op. (E.D.N.Y. Mar. 6, 2018)(mem.).

[23] *Id.*

[24] *Id.* at 24; 7 U.S.C. § 1a(9).

[25] *CFTC v. McDonnell*, slip op. at 24 (referring to the CFTC's limitation of spot market regulatory authority as a "boundary [that] has been recognized by the CFTC"); *Id.* at 25-26 (the court referred to the CEA's anti-manipulation and fraud provisions of Section 6(c) and CFTC regulations implementing those provisions that prohibit employing a fraudulent scheme "in connection with a contract of sale of any commodity in interstate commerce"); see 7 U.S.C. §9(1); 17 CFR § 180.1.

[26] 7 U.S.C. §1(a)(9) (2012).

[27] *In re Coinflip Inc.*, CFTC No. 15-29 WL 5535736 (Sept. 17, 2015).

[28] *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 576 (9th Cir. 1982)

[29] *Dunn v. CFTC*, 519 U.S. 465,472 (1997).

[30] *CFTC v. Erskine*, 512 F.3d 309, 321 (6th Cr. 2008).

[31] 7 U.S.C. § 2.

[32] See, e.g., 7 U.S.C. §§ 9, 15 (2012); 17 C.F.R. § 180.1(a) (2016)

[33] Public law no. 115-97, an Act to provide for reconciliation pursuant to titles II and V of the

concurrent resolution on the budget for fiscal year 2018.

[\[34\]](#) The Subpart F inclusion will generally bring an indirect foreign tax credit with it under I.R.C. § 960. Note that the Subpart F inclusion is not a dividend and consequently does not qualify for the lower rate of tax under I.R.C. § 1(h)(11). See *Rodriguez v. Commr.*, Fifth Circuit Court of Appeals, July 5, 2013, 2013 TNT 130-11 and Notice 2004-70.

[\[35\]](#) Notice 201-21 at 938.

[\[36\]](#) See American Institute of CPAs, “Comments on Notice 2014-21: Virtual Currency Guidance” (June 10, 2016).

[\[37\]](#) Notice 2014-21, Q&A-1 and Q&A-2.