

CFTC injunction in cryptocurrency fraud case upheld by federal judge; Interview with Brian Michael, Partner at King & Spalding law firm



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Partner at King & Spalding law firm

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The recent rise of the Initial Coin Offering (ICO) as a vehicle for funding companies in the blockchain space is drawing increased scrutiny from regulators. The SEC Chairman, Jay Clayton, recently said at a U.S. Senate hearing, "I believe every ICO I've seen is a security." As part of its own efforts to regulate parts of the virtual currency business, the CFTC in January sued Patrick McDonnell, operator of a company called Coin Drop Markets, for fraud and misappropriation. Judge Jack Weinstein in the Eastern District of New York on March 6 granted a preliminary injunction thus creating precedent for the CFTC to assert jurisdiction over cryptocurrencies as commodities.

I recently interviewed Brian Michael, a Partner in the Special Matters and Government Investigations practice at law firm King & Spalding. He is a former Deputy General Counsel and Group Chief Compliance Officer at 21st Century Fox, and previously served as the Assistant United States Attorney in both the Southern District of New York and the Central District of California. According to Brian, "This is a milestone for the CFTC. They've already claimed the mandate and political will to police cryptocurrency frauds – now they have a federal judge confirming their legal authority. It puts another piece of the puzzle in place for the CFTC's plan for its enforcement agenda."

I asked Brian about his view on the recent popularity of Simple Agreements for Future Tokens (SAFT) as a method of raising capital as a security to fund token offerings and he said, "the use and reliance on SAFTs has come under scrutiny more recently by regulators, and their use is being reconsidered by some in the marketplace. The mere fact that token offerings are characterized as offerings of securities does not mean they cannot be deemed commodities under certain facts and circumstances." Brian went on to say, "There is a divergence of views and some are stepping away from using SAFTs because there is no absolute clarity about how they will be viewed by regulators. It is very challenging for an issuer to know if it is in full compliance with the law because the regulatory framework is unclear. If you are trying to navigate the regulatory framework in connection with a token offering, you should consider consulting a lawyer with the right type of securities law experience, because there are few bright lines for guidance. If you are contacted by SEC enforcement attorneys, it may be time for you to seek counsel with a securities enforcement background."

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