

UNDERSTANDING THE EFFECT OF WYOMING'S BLOCKCHAIN AND CRYPTOCURRENCY LEGISLATION

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March was a busy month in the blockchain and cryptocurrency space for the Wyoming state government. The legislature passed, and the governor signed, five bills that many in the industry view as favorable to blockchain and cryptocurrency businesses. While the bills provide some beneficial clarity in this space and may attract businesses to the state, the scope and effect of some of the bills is limited. Accordingly, it is important that industry participants fully understand what the new Wyoming laws address, and, perhaps more importantly, what they do not.

HOUSE BILL 70 ("HB 70")

HB 70 addresses "open blockchain tokens." [1] With limited exceptions, the bill exempts from specified state securities laws and the state money transmitter law, certain activities related to those tokens.

First, the law exempts from specified state securities laws a person who develops or sells the token if: (A) the person files a notice of intent; (B) the "purpose of the token is for a consumptive purpose, which shall only be exchangeable for, or provided for the receipt of, goods, services or content, including rights of access to goods, services or content;" and (C) the person did not sell the token to the initial buyer as a financial investment. [2] To meet this third prong, the token cannot be marketed as a financial investment and at least one of the following must be true:

- the developer or seller must reasonably believe she sold the token for a consumptive purpose;
- the token has a consumptive purpose available at the time of sale and can be used at or near the time of the sale for that purpose;
- the initial buyer is prevented from reselling the token until it can be used for a consumptive purpose; or
- the developer or seller takes reasonable precautions to prevent buyers from purchasing the token as a financial instrument. [3]

The requirements in (B) and (C) attempt to capture what is generally referred to as a "utility token" or "consumer token." State representative Tyler Lindholm, who led the passage of the bills, explained that "[m]ost people who read our legislation can see a clear difference between Utility Tokens and Security Tokens."

Second, the law exempts "facilitators" (people "who facilitate the exchange of an open blockchain token") from specified state securities laws if they file notice of intent, have a "reasonable and good faith belief" that a token subject to exchange meets the requirements of (B) and (C), above, and take "reasonably prompt action" to cease exchanging any token that does not meet those requirements. [4]

Third, the law exempts from the state money transmitter law a person who develops, sells, or facilitates the exchange of an open blockchain token. [5] Notably, this exemption is not limited only to those tokens that meet the requirements of (B) and (C), above.

At best, these exemptions — particularly the first one — provide clarity and opportunity for structuring an initial coin offering ("ICO") or other token-generating event *in Wyoming*. More likely, however, the law is largely symbolic. While Wyoming has the authority to structure its own securities laws, federalism accords that same right to the other 49 states and the federal government. HB 70 does not — and, importantly, cannot — exempt developers, sellers, or facilitators from federal or other states' securities laws. Accordingly, in its most beneficial application, the scope of Wyoming's law may be narrow in scope since it will likely protect only developers, sellers, and facilitators who also comply with federal securities law and the laws of the states in which their token purchasers are located, OR who sell only to Wyoming residents. However, even intra-Wyoming ICOs might implicate federal securities laws because the tokens will likely be sold using the means of interstate commerce. While offerors could claim the SEC's Intrastate Offering Exemption, the restrictions are significant. For example, under Rules 147 and 147A, the issuer must obtain written representations from each purchaser as to residency. Achieving compliance with the various Intrastate Offering Exemptions rules may be difficult, which limits the benefit of the Wyoming ICO exemption.

As for complying with federal securities laws, it is not yet clear how the SEC will treat a token that fits within the Wyoming exemption. The SEC has taken issue with self-described utility tokens in the past. For example, in the Munchee cease-and-desist order (as we previously wrote about here) the SEC stated that the MUN token's purported purpose as a utility token did not exempt it from being a security because the company created a reasonable expectation of profits among investors derived from the company's efforts. [6] However, some of the requirements built into the Wyoming law would seemingly address at least some of these concerns. For example, qualifying tokens cannot be sold to the initial buyer or marketed as a financial investment, and there are specific provisions connecting the time a token is sold with the time it has a "consumptive purpose." Those provisions notwithstanding, there is still flexibility in the law, and it remains to be seen whether the SEC or other state regulators will find that flexibility to be problematic.

Even if issuers restrict their ICO to Wyoming residents, they may need to take steps to minimize the risk that tokens will be sold to non-Wyoming residents or that there will be secondary trading of the token outside of Wyoming.

HOUSE BILL 19 ("HB 19")

The Wyoming Money Transmitters Act (the "Act") requires a license to "engage in the business of money transmission."⁷ The phrase *money transmission* means to engage in "business to sell or issue payment instruments, stored value or receive money or monetary value for transmission" [8] In 2015, Coinbase

announced it would cease operations in Wyoming because of what it described as "impractical" "regulatory policies" the Wyoming Division of Banking communicated regarding the Act. [9]

HB 19 amends the Act and makes Wyoming the first state to provide a broad exemption from a state money transmitter law for virtual currency activity. The bill adds to the Act a definition of *virtual currency*: "any type of digital representation of value that [i]s used as a medium of exchange, unit of account or store of value; and [i]s not recognized as legal tender by the United States government." [10] It then exempts from the Act "[b]uying, selling, issuing, or taking custody of payment instruments or stored value in the form of virtual currency or receiving virtual currency for transmission" [11]

The exemption added by HB 19 is in addition to the exemption added by HB 70, discussed above.

OTHER LEGISLATION

The remaining three bills that became law are:

- House Bill 101: amends the Wyoming Business Corporations Act to authorize corporations to create and maintain their records through "electronic networks" like blockchains; to create "data addresses" (aka a user's public key on the electronic network that a corporation uses) for each shareholder and to verify a shareholder's identity through her data address; and to validate shareholder votes if the shareholder signs her vote with the "network signature" (aka her private key) that corresponds to her data address. The law also allows corporations to affect written notices to shareholders by submitting notices to the shareholders' data addresses.
- Senate File 111: exempts virtual currencies from the state's property tax.

CONCLUSION

As companies examine whether the recent Wyoming amendments provide them with any opportunities, they must carefully consider the actual reach and implications of the amendments. ICO issuers, for example, should carefully consider whether their token will qualify under Wyoming's narrow exemption, the risk of implicating federal securities laws, and whether the benefits of limiting their issuance to Wyoming residents achieve their goals for the ICO.

Notes:

[1] The phrase *open blockchain token* is defined as a digital unit that is created "[i]n response to the verification or collection of a specified number of transactions relating to a digital ledger or database" or "[b]y deploying computer code to a blockchain network that allows for the creation of digital tokens or other units" or a combination of the two, that is "[r]ecorded in a digital ledger or database which is chronological, consensus-based, decentralized and mathematically verified in nature . . . and capable of being traded or transferred between people without an intermediary or custodian of value." Wyo. Stat. § 17-4-206(e).

[2] Wyo. Stat. §§ 17-4-206(a)(i)–(iii).

[3] Wyo. Stat. §§ 17-4-206(a)(iii)(A), (B).

[4] Wyo. Stat. § 17-4-206(b).

[5] Wyo. Stat. § 40-22-104(a)(vi). (Note, there are now two different Sections 40-22-104(a)(vi) because House Bills 70 and 19 both added such a provision.)

[6] *In re. Munchee, Inc.*

[7] Wyo. Stat. § 40-22-103(a).

[8] Wyo. Stat. § 40-22-102(a)(xiii).

[9] See <https://support.coinbase.com/customer/portal/articles/1999937-coinbase-accounts>.

[10] Wyo. Stat. § 40-22-102(a)(xxii).

[11] Wyo. Stat. § 40-22-104(a)(vi).

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