

Updating Old Regulations for New Technology

Colorado Digital Tokens Act attempts to tame Wild West of virtual currency

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LAW WEEK COLORADO

When can a digital token trade that may look a lot like a security at first glance get an exemption from Colorado's securities law? A governor-appointed blockchain council and legislators have been getting their arms around the issue with the Colorado Digital Token Act, which took effect Aug. 2.

The new law protects some digital token trading from legal trouble for operating as unregistered securities. It applies to token issuances where the initial buyer intends to use the virtu-

in connection with virtual currency. The SEC has released guidance on how they interpret their regulations to apply to cryptocurrency, and state laws also tend to focus on securities.

"The regulators are taking their existing frameworks that weren't drafted with cryptocurrency in mind, and applying it to the cryptocurrencies," Sanderson said.

Sanderson, who served on Colorado's blockchain council, said Colorado's new law seeks to ensure that digital token trading isn't chilled by lingering skepticism of the currency from traditional bankers and financiers. Banks tend to be wary of pro-

a statutory duty to police fraud, they initially hesitated to create carve-outs from securities regulations. State securities regulators worried that could create a back door for fraud that would be out of their reach.

"Basically what came out of this was kind of going against what they were originally saying they wanted," he said.

Kintner said the blockchain council began its work by mapping out the significant legal issues facing token users. The council sought to address gaps in existing law without creating a host of new unintended consequences.

The bill ultimately addressed fraud concerns by limiting the virtual currency registration exemption to "consumptive" tokens. Consumptive tokens are exchanged for goods or services, rather than sold as investments.

Colorado's law also requires consumptive token issuers to still give a notice of intent to the Colorado securities commissioner.

A U.S. Supreme Court decision with a four-part test for defining a security also governs cryptocurrency trading. According to SEC v. Howey Co., a securities transaction typically involves the investment of capital, in a common enterprise, with an expectation of profits, gained as the result of efforts from a third party. Kintner said that last part is ambiguous in the context of cryptocurrency.

He said profits dependent on activity in a generalized marketplace doesn't match the definition of a stock, and Colorado's law takes that distinction into account.

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—Scott Sanderson, blockchain council member

al currency as money to exchange for goods or services, rather than purchasing the currency as an investment.

Gov. John Hickenlooper convened Colorado's blockchain council in April 2018. Snell & Wilmer partner Eric Kintner, a drafter of the bill and a council member, said the hope is to encourage digital token trading within Colorado. He said another goal is to create a template for other states that may look at creating exemptions in their own securities laws.

Regulating cryptocurrency involves applying existing laws to the new technology. Attorney Scott Sanderson acknowledged there's still a dearth of regulation for securities and banking

viding banking for money from cryptocurrency transactions because it takes a lot of resources to investigate whether the money has come from illegal activities that would put a bank at risk for servicing.

"In my view, the goal of this [Colorado] law is to preserve the safety of people experimenting with these tokens ... so that they can do these experiments without fear of being punished."

Sanderson said he gives a lot of credit to Colorado's securities regulators' commitment to learning the complexities of digital token trading in order to come up with appropriate regulations. He said because they have

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LAW SCHOOL CHOICES

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Higher rates of federal clerkships at the most elite law schools compared with mid-tier schools probably has to do with the scarcity of the positions, McEntee said.

“Judges, just like the other elite employers, are being as picky as possible. And what they do when they’re being picky is they look to class rank, ellipses and law school attended.”

He said ideally, students would use the website’s resources most in the late summer and early fall months when they are working on their law school applications. But based on Law School Transparency’s website traffic patterns ticks up “in April and May, and this because people

are using it to decide among the schools they already picked more than they are using it to decide which schools to apply to.” He added practicing lawyers tend to use the organization’s resources to dig into available data behind law schools that have especially bad reputations.

Research by the Institute for the Advancement of the American Legal System also tangentially implicates the significance of choosing a law school. IAALS manager Zack DeMeola said as part of the organization’s 2014 Foundations for Practice study, they asked practicing lawyers what types of experiences and achievements they look for that can tell them whether law graduates have the characteristics and practical skills for lawyering.

“Survey respondents told us that

they’re looking for people with practical experience, and that came in a variety of specific ways.

Previous legal employment or exposure to legal practice was ranked pretty highly in all of that.”

He added hopefully the study’s findings prompts law schools to look at their curriculums to evaluate whether they focus on teaching the skills lawyers have said are necessary in practice.

The legal profession’s “obsession with prestige,” as McEntee put it, impacts how students’ view each other’s law school choices. He said a fellow student at Vanderbilt University had chosen to take a full ride at the school over instead of choosing Yale for his law degree. Despite Vanderbilt’s ranking at 18 among the U.S. News & World Report’s top law

schools for 2019, the student’s choice was “a huge deal,” McEntee said.

Despite any surprise over his classmate’s choice to forgo Yale, McEntee said it’s becoming more common for law students to choose regional schools, especially for cost reasons, over schools with national name recognition.

The increased availability of data about employment after law school has on one hand has democratized making an informed choice. But on the other hand, McEntee said, the sheer amount of data can be overwhelming.

“It’s that effort of weighing information that is so difficult, and what makes it so easy to say, ‘U.S. News says this, so I’ll just go with that, because how else am I supposed to make sense of it?’” •

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COURT OPINIONS

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statute.

The court held that a defendant may not be charged under both subsections for two reasons.

First, the court concluded that charging the same conduct under both subsections would violate a defendant’s right to equal protection because the subsections carry different maximum penalties.

Second, the court concluded, from

the legislative history, that when the General Assembly amended the second-degree assault statute to add the strangulation subsection, it intended all strangulation conduct to be charged under this specific subsection, rather than under the more gen-

eral deadly weapon subsection.

Accordingly, the court affirmed the district court’s order dismissing the second-degree assault deadly weapon and crime of violence counts filed against the defendant, Dearies Deshonnie Austin Lee. •

DU LAW

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gram since last year have also widened the law school’s reach. Prior to 2018, Sturm’s part-time program had been

an evening program requiring students to be on campus four nights a week, making it hard to recruit students from even Colorado Springs or Castle Rock.

After switching to weekend classes with a significant online com-

ponent last fall, Sturm’s four-year part-time JD program began drawing students from as far as Salt Lake City, Omaha and Dallas, according to Smith.

“It has brought in incredible stu-

dents — students with extensive work experience in financial compliance, oil and gas, higher-ed and law enforcement — across a range of specialty areas,” he said. •

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CRYPTOCURRENCY

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“I would not disagree that there are token offerings that look like securities, but there are also token offerings that I’ve seen that don’t look like securities,” he said.

Gov. Jared Polis has not officially reconvened the blockchain council, but Kintner said the council members have continued to meet in working groups. He said now that the council has identified the major issues facing cryptocurrency, one of its “phase two” goals is to look at different ways blockchain technology can play a role in government innovation. Virtual currency

is probably the best-known use of blockchain technology, but the decentralized nature of blockchain has implications for broader, growing technology concerns such as cybersecurity.

Denver tested the use of blockchain in its May municipal elections with a pilot smartphone app that allowed remote voting for deployed military personnel and other overseas citizens.

“There are various kinds of projects that we see within government that might benefit from us helping to ... continue to discuss solutions between government and industry,” Kintner said. •

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DISCRIMINATION RULE

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the rule’s tie to unlawful conduct will be a useful check on the legitimate advocacy exception.

Allan Keyes, who chairs Vermont’s Advisory Committee on the Rules of Civil Procedure, said the state had a rule about discrimination before the ABA adopted 8.4(g), but it didn’t extend to harassment.

He said when Vermont decided to adopt the model rule, they used the state’s public accommodations law as a reference to come up with a list of protected characteristics.

The characteristics in Vermont’s updated rule include race, color, sex,

religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Despite concerns that California’s sweeping new rule could result in a flood of complaints, Tuft said he isn’t aware of any new cases yet, though it’s been less than a year since it went into effect. He said he hopes 8.4.1’s impact will be proactive: Its complexity will motivate employers to bolster their anti-discrimination and harassment efforts in fear of getting caught in 8.4.1’s web.

“The proof will be in the pudding,” Tuft said. •

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DUI CONVICTIONS

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accept that burden if they want to charge people with felonies,” he said.

Tiftickjian said that in his practice, he often sees DUI convictions on driving records that are not true convictions. For example, a driver may be charged with a DUI but then not go to court, which the DMV will record as a default conviction.

“The person never went to court, the person never entered a plea, there was no finding made against the person. So, it’s not a conviction,” he said, adding that the danger in how the law has been interpreted so far is that records like these can be submitted to courts and held to a lower standard while resulting in a

felony conviction.

Brauchler said that if the Colorado Supreme Court ends up deciding to treat prior convictions as elements of the crime to be decided by a jury, it would likely require a bifurcated trial process for future cases.

If the state Supreme Court overturns the previous rulings, it could also affect dozens or even hundreds of convictions since Colorado adopted the felony DUI legislation four years ago, according to Brauchler. He said that in the 18th Judicial District alone, there have been 24 felony DUI convictions since 2015.

“Depending upon how the Supreme Court rules, it would undo, in essence, the convictions on all 24 of those cases,” he said. •

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TARIFFS

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said.

Companies that sell products seasonally, find adjusting to tariffs to be particularly challenging, Suneson said. They receive orders and create products for a future season, and then sell them to retailers. Decisions such as pricing and sourcing have to be done ahead of each season and not “midstream,” he said.

Underscoring the U.S. business community’s uncertainty surrounding the trade war is the prospect that the tariffs’ products, duty amounts and effective dates could change depending on U.S.-China negotiations. The White House has even considered rolling back some tariffs to help

mitigate the prospect of a recession, the New York Times reported Aug. 19. The report didn’t specify which tariffs were discussed for reversal.

Still, it might not benefit companies to take a wait-and-see approach in some situations to the tariffs that affect them, Suneson said. This is especially true with the apparel industry and similar season-centric companies that sell to retailers, he added. “The problem is if you wait too long, you may be locked in for the current batch of orders.” Delaying decisions can also cause friction with business partners, he said.

“No one likes to have to add a tariff,” Suneson said. “But predictability is equally important, to know what you’re going to do.” •

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