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### Cover Page Footnote

John T. Bender is an attorney at Corr Cronin, LLP in Seattle, Washington. Many thanks to Daniel Farber and Hana Ivanhoe of the University of California, Berkeley, School of Law, Lucas Buckley of Hathaway & Kunz, LLP in Wyoming, and the members of the Seattle Journal of Technology, Environmental & Innovation Law Journal for their helpful feedback and suggestions.

# State Crypto Regulation: Competing Priorities Shaping Different Outcomes

John T. Bender\*

## I. INTRODUCTION

“Cryptomania” is approaching fever pitch. Public officials, practitioners, and investors alike are becoming convinced that what began as a thought experiment has given rise to a full-fledged movement that is here to stay. This movement could potentially transform the modern financial system as we know it.<sup>1</sup>

Today, crypto assets and related platforms are increasingly being adopted to store, secure, and transmit massive amounts of monetary value worldwide.<sup>2</sup> Enforcement agencies like the Securities and Exchange Commission and the Commodity Futures and Trading Commission have ventured into the fray by employing existing legal regimes to regulate in this new frontier.<sup>3</sup> At the same time, individual states have been at the forefront of enacting new laws to address crypto and blockchain technology.

Regulation can shape outcomes for any new industry.<sup>4</sup> This article focuses on legislation in three states at the forefront of regulating digital assets—New York, Washington, and Wyoming. Each state has adopted different approaches ranging from liberal to stringent. Examining each approach can help facilitate an informed discussion about the best way to regulate the area in the future.

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\* John T. Bender is an attorney at Corr Cronin, LLP in Seattle, Washington. Many thanks to Daniel Farber and Hana Ivanhoe of the University of California, Berkeley, School of Law, Lucas Buckley of Hathaway & Kunz, LLP in Wyoming, and the members of the Seattle Journal of Technology, Environmental & Innovation Law Journal for their helpful feedback and suggestions.

<sup>1</sup> See, e.g., David Yaffe-Bellany, *The Rise of the Crypto Mayors*, NEW YORK TIMES (Jan. 25, 2022), <https://www.nytimes.com/2022/01/25/business/crypto-mayors.html> [https://perma.cc/3LK9-A2NA]; Romaine Bostick, et al., *Miami Mayor Seeks Wider Crypto Use After Taking Pay in Bitcoin*, BLOOMBERG (Dec. 3, 2021), <https://www.bloomberg.com/news/articles/2021-12-03/miami-mayor-seeks-wider-crypto-use-after-taking-pay-in-bitcoin> [https://perma.cc/2ZQT-L77T].

<sup>2</sup> See Chainalysis Team, *2021 Geography of Cryptocurrency Report*, CHAINALYSIS (Aug. 18, 2021), <https://blog.chainalysis.com/reports/2021-global-crypto-adoption-index> [https://perma.cc/9F5P-H7PF].

<sup>3</sup> See, e.g., Framework for “Investment Contract” Analysis of Digital Assets, SEC (Apr. 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [https://perma.cc/C9VQ-66DX]; CFTC’s *Role in Monitoring Virtual Currencies*, CFTC (2020), <https://www.cftc.gov/digitalassets/index.htm#:~:text=The%20CFTC%E2%80%99s%20Role%20in%20Monitoring%20Virtual%20Currencies> [https://perma.cc/YGQ2-UQUT].

<sup>4</sup> See Michael E. Porter, *Competitive Strategy: Techniques for Analyzing Industries and Competitors* 29 (Free Press, 1998) (explaining how government can affect the structure of competitive markets through various means including regulation).

Legislators and regulators facing the crypto movement bear the difficult task of striking the right balance between deterring potential abuses and fostering technological and economic development. While the verdict is still out on whether one approach is better than another, states risk driving away innovation and beneficial economic activity by overcorrecting. New York and, to a lesser degree, Washington have already borne the ire of disappointed crypto entrepreneurs in response to regulatory action over the past few years.<sup>5</sup> Meanwhile, Wyoming has been heralded as a forward-looking and crypto-friendly jurisdiction.<sup>6</sup> While some might contend that a *laissez faire* approach invites fraud or criminal activity, Wyoming's experience challenges this doomsday scenario.<sup>7</sup> Wyoming's approach, albeit far from *laissez faire*, reflects a purposeful strategy to attract new business by fashioning creative ways to ease the regulatory burdens confronting this new technology.<sup>8</sup>

This essay proceeds in multiple parts. First, New York's regulation of cryptocurrency is examined. New York was one of the first states to regulate in this new area by adopting the "BitLicense," a crypto-specific framework that requires covered entities to obtain a special license to operate and maintain rigorous compliance practices.<sup>9</sup> New York's BitLicense regime has faced steep criticism claiming it has imposed undue costs that inhibit innovation.<sup>10</sup> Second, while Washington has not gone as far as New York, and thus arguably presents a middle-of-the-road approach by comparison, the steps Washington has taken to regulate crypto—which include amending its money-transmission law to expressly cover virtual currencies—has been the source of criticism for the same reason New York's BitLicense has been criticized.<sup>11</sup> Washington's financial regulator has also actively enforced state securities laws against entities engaged in initial coin offerings.<sup>12</sup> Third, the discussion shifts to Wyoming, which has been heralded as the most crypto-friendly jurisdiction in the nation.<sup>13</sup> Since 2018, Wyoming has passed a series of laws favoring crypto and blockchain technology, including exemptions from state money-transmission and securities laws for digital assets and creating special purpose depository institutions that can offer financial products traditionally offered by banks.<sup>14</sup>

To close, this essay compares these different approaches and contends that the regimes adopted in New York and Wyoming reflect competing priorities that have produced dramatically different legal and regulatory landscapes. Wyoming has prioritized easing regulatory

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<sup>5</sup> See *infra* note 134 and accompanying text.

<sup>6</sup> See Caitlin Long, *What Do Wyoming's 13 New Blockchain Laws Mean?*, FORBES (March 4, 2019), <https://www.forbes.com/sites/caitlinlong/2019/03/04/what-do-wyomings-new-blockchain-laws-mean/?sh=14afca875fde> [<https://perma.cc/VTN8-AXJH>] (referring to Wyoming as the "Delaware of digital asset law").

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See N.Y. COMP. CODES R. & REGS. tit. 23§ 200 (2022) for the current regulation.

<sup>10</sup> See *infra* note 134 and accompanying text.

<sup>11</sup> See *infra* note 134 and accompanying text.

<sup>12</sup> *Infra* notes 71-97 and accompanying text.

<sup>13</sup> See Long *supra* note 6.

<sup>14</sup> See *infra* notes 99-127 and accompanying text.

barriers as part of a deliberate strategy to attract the growing cryptocurrency industry.<sup>15</sup> Whereas, New York and Washington have imposed strict compliance regimes.<sup>16</sup> While the delta between these approaches may set the stage for the adoption of federal legislation, Wyoming's experience illustrates that it is possible to fashion creative ways of lessening regulatory barriers, while maintaining the opportunity for meaningful oversight.<sup>17</sup>

## II. NEW YORK

In August 2015, the New York Department of Financial Services ("NYDFS") issued its "BitLicense" framework to regulate virtual currencies. The final framework was a product of a process that had begun some two years before. In January 2014, the NYDFS convened for two days of public hearings regarding the regulation of virtual currencies that featured testimony from academics, private attorneys, and law enforcement officials.<sup>18</sup> In his opening remarks, NYDFS' then-Superintendent Lawsby characterized the existing legal landscape as "akin to the Wild West" that was "not tenable for the long term."<sup>19</sup> Superintendent Lawsby also announced that his department was evaluating a "so-called 'BitLicense' specifically tailored to virtual currencies."<sup>20</sup> He concluded his remarks by outlining the apparent impetus behind New York's future BitLicense regime:

First, serving as a money changer of choice for terrorists, drug smugglers, illegal weapons dealers, money launderers, and human traffickers can expose the virtual currency industry to extraordinarily serious criminal penalties. Taking steps to root out illegal activity is both a legal and business imperative for virtual currency firms.

Second, safety and soundness requirements help build greater confidence among customers that the funds that they entrust to virtual currency companies won't get caught in a virtual black hole. Indeed, some consumers

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<sup>15</sup> *Supra* note 6 and accompanying text.

<sup>16</sup> *Infra* note 134 and accompanying text.

<sup>17</sup> If news reports are accurate, the U.S. Congress may see activity on the legislative front as early as 2022. See, e.g., Allyson Versprille, *Bitcoin-Ownning Senator Lummis to Propose Crypto Overhaul Bill Next Year*, BLOOMBERG (Dec. 23, 2021), <https://www.bloomberg.com/news/articles/2021-12-23/crypto-senator-lummis-to-propose-overhaul-bill-next-year> [https://perma.cc/Y57Z-BD34]. Moreover, some scholars have advocated for preempting state money-transmission laws with federal law. See Carol R. Goforth, *The Case for Preempting State Money Transmission Laws for Crypto-Based Businesses*, 73 ARK. L. REV. 301 (2020) (arguing in favor of federal preemption of state money transmission statutes). As noted, the scope of this article is limited to analyzing the steps taken to regulate crypto in New York, Washington, and Wyoming. For a broader discussion of crypto and its regulation in the U.S., see PRIMAVERA DE FILIPPI & AARON WRIGHT, *BLOCKCHAIN AND THE LAW* (2018). See also DANIEL STABLE, *DIGITAL ASSETS AND BLOCKCHAIN TECHNOLOGY: U.S. LAW AND REGULATION* (2020).

<sup>18</sup> *NYDFS Virtual Currency Hearing*, NEW YORK DEP'T FIN. SERV.'S (Jan. 28, 2014), [https://web.archive.org/web/20140920015531/http://www.dfs.ny.gov/about/hearings/vc\\_01282014\\_idx.htm](https://web.archive.org/web/20140920015531/http://www.dfs.ny.gov/about/hearings/vc_01282014_idx.htm).

<sup>19</sup> *NYDFS Opening Statement by Superintendent Lawsby*, NEW YORK DEP'T FIN. SERV.'S (Jan. 28, 2014), [https://web.archive.org/web/20141204133845/http://www.dfs.ny.gov/about/hearings/vc\\_01282014/lawsby\\_vchearing.pdf](https://web.archive.org/web/20141204133845/http://www.dfs.ny.gov/about/hearings/vc_01282014/lawsby_vchearing.pdf) [https://perma.cc/9VRL-D229].

<sup>20</sup> *Id.*

have expressed concerns about how quickly their virtual currency transactions are processed. There have also been public reports of virtual currency lost – perhaps irretrievably – through hacking and other cyber security vulnerabilities. Addressing those issues through enhanced safety and soundness requirements would be important to building greater confidence in this technology among the general public and promoting wider adoption.<sup>21</sup>

The final framework, 23 NYCRR Part 200, imposed a special licensure requirement, the “BitLicense,” that entities engaged in certain business activities involving virtual currencies must obtain to lawfully operate within the state. It also imposed compliance standards that faced steep criticism following the framework’s adoption.<sup>22</sup>

A. *“Virtual Currency” and “Virtual Currency Business Activity.”*

The scope of 23 NYCRR Part 200 turns on the definitions of “Virtual Currency” and “Virtual Currency Business Activity.”<sup>23</sup> “Virtual Currency” is defined as “any type of digital unit that is used as a medium of exchange or a form of digitally stored value.”<sup>24</sup> “Virtual Currency Business Activity” is also defined broadly. It includes (1) the receipt or transmission of virtual currencies unless it is for a non-financial purpose and involves a nominal amount; (2) holding or maintaining custody of virtual currencies on behalf of others; (3) buying and selling virtual currencies for customers; (4) performing exchange services for customers; or (5) “controlling, administering, or issuing a Virtual Currency.”<sup>25</sup>

B. *Application and Approval.*

Subject to limited exceptions, any entity engaging in “Virtual Currency Business Activity” must obtain a license from NYDFS.<sup>26</sup> Two categories of entities are exempt: (1) chartered banks that also receive approval to engage in Virtual Currency Business Activity from NYDFS and (2) “merchants and consumers” utilizing virtual currencies “solely for the purchase or sale of goods or services for investment purposes.”<sup>27</sup>

To apply for a license, applicants must submit a host of financial and background information, including two years of audited financial statements, FinCEN registration information, Anti-Money Laundering/Bank Secrecy Act policies, management, and organizational charts, disclosure of executive officers, control persons, and direct and indirect owners (each of whom must submit credit reports and personal

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<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Infra* note 134 and accompanying text.

<sup>23</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.2(p) (2022).

<sup>24</sup> *Id.*

<sup>25</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.2(q) (2022).

<sup>26</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.3(a) (2022).

<sup>27</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.3 (c)(1)-(2) (2022).

financial statements), a detailed business plan, a description of the services or transactions to be conducted in the state, as well as internal compliance policies and risk management programs on a range of topics including privacy, cybersecurity, consumer protection, anti-fraud, and internal complaints.<sup>28</sup>

In determining whether to approve an application, NYDFS must investigate the financial condition, experience, and character of the applicant and find that that “the applicant’s business will be conducted honestly, fairly, equitably, carefully, and efficiently within the purpose and intent of [the regulation], and in a manner commanding the confidence and trust of the community[.]”<sup>29</sup>

### 1. *Anti-Money Laundering and Cyber Security Programs.*

Each BitLicense licensee must comply with strict Anti-Money Laundering (“AML”) requirements. All licensees must conduct an initial risk assessment that considers “legal, compliance, financial, and reputational risks” and implement an AML program based on that assessment.<sup>30</sup> Licensees must also maintain extensive record-keeping practices for every virtual currency transaction.<sup>31</sup>

Unless subject to federal reporting requirements, licensees must report all virtual currency transactions to NYDFS within 24 hours of completion.<sup>32</sup> Licensees must monitor transactions for criminal activity and must file Suspicious Activity Reports (“SARs”) per applicable federal law.<sup>33</sup> Licensees must implement a “know your customer” (“KYC”) program that includes policies and practices for proof of account holders, enhanced due diligence for foreign entities, verification of identity for any transactions over \$3,000, and a prohibition of dealing with “foreign shell entities.”<sup>34</sup>

Licensees must also maintain a cybersecurity program to ensure their systems’ “availability and functionality” and protect “any sensitive data on those systems from unauthorized access, use, or tampering.”<sup>35</sup> Specifically, licensees must implement a written policy, approved annually by its board, addressing 13 prescribed cyber security principles.<sup>36</sup> Licensees must employ a Chief Information Security Officer responsible for “overseeing and implementing” the program and submitting annual cyber security reports to NYDFS.<sup>37</sup> Licensees must also carry out regular vulnerability and penetration testing and maintain an adequate audit trail system that tracks and maintains data in a manner

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<sup>28</sup> *See Id.*

<sup>29</sup> *Id.*

<sup>30</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.15(b) (2022).

<sup>31</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.15(e) (2022).

<sup>32</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.15(e)(2) (2022).

<sup>33</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.15(e)(3)(i) (2022).

<sup>34</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.15(h) (2022). For background into what “KYC” programs entail, *See* Dan Ryan, *FinCEN: Know Your Customer Requirements*, HARVARD LAW SCHOOL FORUM ON CORP. GOV. (Feb. 7, 2016), [https://corpgov.law.harvard.edu/2016/02/07/fincen-know-your-customer-requirements/\[https://perma.cc/5ML9-WRHG\]](https://corpgov.law.harvard.edu/2016/02/07/fincen-know-your-customer-requirements/[https://perma.cc/5ML9-WRHG]).

<sup>35</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.16(a) (2022).

<sup>36</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.16(b) (2022).

<sup>37</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.16(c) (2022).

that “allows accurate and complete reconstruction of all financial transactions and accounting,” and protects the integrity of data, hardware, and systems “from alteration and tampering.”<sup>38</sup>

## 2. *Customer Disclosures.*

The BitLicense regime imposes specific disclosure requirements on all licensees. Licensees must disclose to their customers clearly and conspicuously “all material risks associated with its products, services, and activities and virtual currency generally[.]”<sup>39</sup> The regulation mandates a series of minimum risk disclosures that must be provided to all customers when either opening a new account or at the time of the initial transaction. The mandate also requires disclosures addressing the fact that virtual currencies are not a legal tender backed or insured by the government, regulatory changes may impact its use or value, losses from “fraudulent or accidental transactions” might not be recovered, and that transactions are subject to an increased risk of cyber-attack or fraud.<sup>40</sup>

Licensees are must various other disclosures to customers when opening an account or executing transactions.<sup>41</sup> These disclosures must be acknowledged by the customer, and licensees must provide receipts to customers containing mandatory information identifying and describing each transaction.<sup>42</sup> Licensees must also take “reasonable steps to detect and prevent fraud, including by establishing and maintaining a written anti-fraud policy.”<sup>43</sup>

## 3. *Material Changes, Change-of-Control, and Mergers.*

Licensees must obtain pre-approval from NYDFS for material changes to their business activities and change-of-control or merger transactions. In particular, licensees must obtain NYDFS approval “for any plan or proposal to introduce or offer a materially new product, service, or activity, or make a material change to an existing product, service, or activity involving New York or New York Residents.”<sup>44</sup> The regulation provides open-ended guidance on the definition of materiality in this context.<sup>45</sup>

In the change-of-control context, an individual or entity seeking to obtain “control” of a licensee, which is defined as having the direct or indirect power to influence management decisions or policies, must submit a written application with NYDFS for approval.<sup>46</sup> NYDFS considers “the public interest and the needs and convenience of the public” when determining whether to approve the transaction.<sup>47</sup> Mergers

<sup>38</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.16(c)(1)-(2) (2022).

<sup>39</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.19(a) (2022).

<sup>40</sup> *Id.*

<sup>41</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.19(c) (2022).

<sup>42</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.19(d)-(e) (2022).

<sup>43</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.19(g) (2022).

<sup>44</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.10(a) (2022).

<sup>45</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.10(b) (2022).

<sup>46</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.11(a) (2022).

<sup>47</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.11(a)(5) (2022).



and acquisitions are subject to similar requirements. The merging or acquiring entity must submit a written application to NYDFS, and NYDFS must consider “the public interest and the needs and convenience of the public” when determining whether to approve the transaction.<sup>48</sup>

#### 4. *Examinations and Reporting.*

The BitLicense regime imposes extensive reporting and examination obligations on licensees, including financial reporting on a quarterly and annual basis, akin to traditional financial institutions.<sup>49</sup> Licensees are also required to submit “special reports” to NYDFS upon request and must “immediately” notify NYDFS “upon the discovery of any violation or breach of law, rule, or regulation.”<sup>50</sup>

In addition, licensees must “permit and assist” NYDFS “to examine the Licensee whenever in [NYDFS’s] judgment such examination is necessary or advisable, but not less than once every two calendar years[.]”<sup>51</sup> Areas of potential NYDFS inquiry include but are not limited to, the licensee’s general financial condition; “safety and soundness of the conduct of its business;” management policies; compliance with laws, rules, or regulations; and “such other matters as [NYDFS] may determine[.]”<sup>52</sup> Licensees must also assist NYDFS in the regular inspection of the licensee’s books and records.<sup>53</sup>

#### 5. *Enforcement.*

NYDFS may suspend or revoke a licensee for failure to comply with the regime’s requirements, “for good cause shown,” or for failure to pay a judgment.<sup>54</sup> The regulation defines “good cause” as “when a Licensee has defaulted or likely to default in performing its obligations or financial engagements or engages in unlawful, dishonest, wrongful, or inequitable conduct or practices that may cause harm to the public.”<sup>55</sup> However, NYDFS may only revoke or suspend a license after notice is given and a hearing is held, and any order suspending or revoking a license must “state the grounds upon which it is based[.]”<sup>56</sup>

NYDFS may also petition a court for a preliminary injunction “deemed in the public interest” to restrain a licensee’s violation of the regulation or other applicable law.<sup>57</sup> The regulation also provides that

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<sup>48</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.11(b)(3) (2022).

<sup>49</sup> See N.Y. COMP. CODES R. & REGS. tit. 23§ 200.14(a)-(b) (2022).

<sup>50</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.14(e) (2022).

<sup>51</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.13(a) (2022).

<sup>52</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.13(a)(1)-(5) (2022).

<sup>53</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.13(b)-(c) (2022).

<sup>54</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.6(c) (2022).

<sup>55</sup> *Id.*

<sup>56</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.6(d) (2022).

<sup>57</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.6(e) (2022).

NYDFS is not precluded from investigating or enforcing any other applicable laws, rules, or regulations against a licensee.<sup>58</sup>

### III. WASHINGTON

While Washington has not gone as far as New York in regulating virtual currencies, the steps Washington has taken to regulate in this area have been consequential. These include amending its Uniform Money Services Act to expressly cover virtual currency as well as the Washington State Department of Financial Institutions (“DFI”) actively enforcing state securities law against ICOs.

#### A. *Amendment of Uniform Money Services Act.*

In 2017, Washington amended its Uniform Money Services Act to include virtual currencies within the scope of the state’s money transmission laws.<sup>59</sup> As a result, businesses that receive or transmit virtual currencies to third parties, such as cryptocurrency exchanges, must obtain a money-transmitter license and comply with the statute’s other requirements, which now include several virtual currency-specific provisions.<sup>60</sup>

The amended statute defines “virtual currencies” broadly as “a digital representation of value used as a medium of exchange, a unit of account, or a store of value, but does not have legal tender status as recognized by the United States government.”<sup>61</sup> Excluded from the definition of “money transmission” are units of value “that are issued in affinity or rewards programs that cannot be redeemed for either money or virtual currencies” or “units of value that are used solely within online gaming platforms that have no market or application outside of the gaming platforms.”<sup>62</sup>

Obtaining a license under the statute requires significant disclosures by the prospective licensee about the nature of its business and its financial condition. Specifically, applicants must define the proposed services to be offered and disclose audited financial statements as well as the personal and financial histories of owners and other key members of the organization.<sup>63</sup> Additionally, virtual currency businesses

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<sup>58</sup> N.Y. COMP. CODES R. & REGS. tit. 23§ 200.6(f) (2022). While the NYDFS has authority to enforce violations of the BitLicense regime, the extent to which it has exercised such authority to date is unclear. By contrast, the New York Attorney General has prosecuted several enforcement actions against crypto platforms and issuers for violations of state securities laws. *See, e.g., Press Release: Attorney General James Directs Unregistered Crypto Lending Platforms to Cease Operations in New York, Announces Additional Investigations*, NEW YORK STATE OFFICE OF ATTORNEY GENERAL (Oct. 18, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-directs-unregistered-crypto-lending-platforms-cease> [https://perma.cc/C3JU-ZBNL].

<sup>59</sup> Other states that have also amended their state money transmitter statutes to cover cryptocurrency include Alabama, Connecticut, Georgia, Florida, North Carolina, and Vermont. And several states including Colorado and Oregon have interpreted existing state law to cover crypto assets. For further discussion about these state amendments or states that have issued agency guidance interpreting their existing money transmitter laws to cover crypto, *See Goforth, Preempting Statement Money Transmission Laws*, 73 ARK. L. REV. at 327-36.

<sup>60</sup> WASH. REV. CODE § 19.230.010(18) (2017); WASH. REV. CODE § 19.230.030 (2017).

<sup>61</sup> WASH. REV. CODE § 19.230.010(30) (2017).

<sup>62</sup> WASH. REV. CODE § 19.230.010(18) (2017).

<sup>63</sup> WASH. REV. CODE § 19.230.040(1)-(2), (4) (2017).

must now “obtain a third-party security audit of all electronic information and data systems acceptable to the director” and provide the results of such audit.<sup>64</sup> All applicants for a money transmission license are also subject to an investigation by Washington’s DFI into the applicant’s “financial condition and responsibility, financial and business experience, competence, character, and general fitness.”<sup>65</sup>

If approved, licensees are subject to annual and periodic reporting requirements. Among other things, licensees must submit their most recent audited financial statements and descriptions of any material changes on an annual basis and notify DFI of any material changes within 30 days.<sup>66</sup> DFI has the authority to conduct investigations or examinations of a licensee “for the purpose discovering violations of this chapter or rules adopted under this chapter, discovering unsafe and unsound practices, or securing information lawfully required.”<sup>67</sup> Licensees must also comply with all federal suspicious transaction and money laundering requirements and maintain copies of all such records and reports.<sup>68</sup>

In addition, licensees must obtain pre-approval from DFI for any change-of-control transactions. DFI will only approve such transactions if it finds that “the person, or group of persons, requesting approval meets the criteria for licensing” and that “the public interest will not be jeopardized by the change of control.”<sup>69</sup> Licensees also are required to maintain sufficient permissible investments to cover the average daily sum of outstanding money transmissions; licensees transmitting virtual currencies must also maintain the same volume of “like-kind virtual currencies” to cover the volume “obligated to consumers.”<sup>70</sup>

The 2017 amendment also added a provision imposing mandatory disclosures on licensees transmitting virtual currencies. Specifically, the law now requires disclosure of the licensee’s liability for “unauthorized, mistaken, or accidental transfers” and a description of “the user’s responsibility for providing notice of such mistake to the licensee and of general error-resolution rights applicable to any transaction” and any other disclosures required by DFI rules.<sup>71</sup>

### *B. Enforcement of state securities laws.*

In the absence of legislative intervention, Washington’s DFI has filled the void by actively enforcing state securities laws against businesses conducting initial coin offerings (“ICOs”).<sup>72</sup>

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<sup>64</sup> WASH. REV. CODE § 19.230.040(5) (2017).

<sup>65</sup> WASH. REV. CODE § 19.230.070(1) (2017).

<sup>66</sup> WASH. REV. CODE § 19.230.150(2) (2017).

<sup>67</sup> WASH. REV. CODE § 19.230.130(1)-(2) (2017).

<sup>68</sup> WASH. REV. CODE § 19.230.180 (2017).

<sup>69</sup> WASH. REV. CODE § 19.230.160(1)-(3) (2003).

<sup>70</sup> WASH. REV. CODE § 19.230.200(1) (2017).

<sup>71</sup> WASH. REV. CODE § 19.230.370 (2017).

<sup>72</sup> In April 2019, DFI issued agency guidance concluding that state and federal securities laws commonly apply to the offer and sale of tokens or digital assets in ICOs. See *Digital Assets and Securities Laws*, WASHINGTON DEP’T. OF FIN. INST. (April 3, 2019), <https://dfi.wa.gov/sites/default/files/digital-assets->

For example, in January 2021, DFI published a Consent Order in an action brought against Dragonchain, Inc., regarding claims that the Bellevue, Washington-based blockchain platform failed to register a 2017 ICO that allegedly raised \$12.7 million from 5,000 investors.<sup>73</sup> The alleged purpose of the ICO was to “develop Dragonchain’s business and compensate Dragonchain’s employees.”<sup>74</sup> DFI alleged that the purchasers were predominantly passive investors whom the firm allegedly did not screen to determine their accreditation.<sup>75</sup> According to DFI, the company made various statements suggesting that the value of its tokens would increase over time, and told purchasers they would receive discounted prices on tokens offered by startup companies that used Dragonchain as an incubator.<sup>76</sup> The discount program was later disbanded.<sup>77</sup> The company agreed to pay a \$50,000 fine and \$10,000 in investigative costs to resolve the action.<sup>78</sup>

In September 2020, DFI published a Consent Order concerning Unikrn, Inc.’s \$47 million offering of “UKG,” a virtual currency that the company created for use on its esports betting platform.<sup>79</sup> According to DFI, Unikrn represented to customers that the funds would be used “for the ongoing development of the [Unikrn] platform and associated open-source software tools for users and developers to leverage the platform.”<sup>80</sup> DFI alleged that Unikrn made statements that created a reasonable expectation on the part of purchasers that purchasing UKG would return a profit.<sup>81</sup> For example, Unikrn’s marketing of UKG to pre-sale investors included statements that the value of the token would appreciate as “turnover and betting volume of UKG on our platform” increased.<sup>82</sup> DFI also took issue with public remarks by Unikrn’s CEO, stating, among other things, that “[i]t is very important for us to create a stable ecosystem and stable token so that over time, when we add more features and more people start using the platform and when we can

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securities-laws.pdf. In so doing, DFI adopted a position that tracked that of the SEC. *See supra* note 2 and accompany text (SEC guidance). DFI’s 2019 Guidance states “[t]he definition of security under the Securities Act of Washington [in particular] is well established and very broad.” Washington has adopted not only the so-called *Howey* test for a security (which considers whether there is an investment of money in a common enterprise with the expectation of sharing profits derived from the efforts of others, *see SEC v. W.J. Howey*, 328 U.S. 293, 301 (1946)) as well as the “risk capital test,” which does not require an expectation of profit sharing, but only an expectation of some valuable benefit without managerial control. *See* RCW 21.20.005(17)(a). The risk capital test has been criticized as ambiguous, especially with respect to the degree of risk necessary to qualify as a security. *See* James D. Cox, et al., *Securities Regulation: Cases and Materials*, at 34 (9th ed. 2020).

<sup>73</sup> In re Dragonchain, Inc., Order No. S-18-2433-21-CO01, (Wash. Dep’t of Fin. Inst. filed Jan. 26, 2021) <https://dfi.wa.gov/documents/securities-orders/S-18-2433-21-CO01.pdf> [https://perma.cc/EM6N-RHM8].

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.* at 6.

<sup>78</sup> *Id.* at 6.

<sup>79</sup> In re Unikrn, Order No. S-18-2441-20-CO01, (Wash. Dep’t. of Fin. Inst. filed Sept. 24, 2020), <https://dfi.wa.gov/documents/securities-orders/S-18-2441-20-CO01.pdf> [https://perma.cc/G7CX-EY9W].

<sup>80</sup> *Id.* at 4-5.

<sup>81</sup> *Id.* at 2.

<sup>82</sup> *Id.* at 5.

further justify the value as that grows.”<sup>83</sup> Unikrn agreed to pay DFI a fine of \$300,000 plus investigative costs to resolve the case.<sup>84</sup>

In February 2020, DFI published a Consent Order with RChain Cooperative, a Washington cooperative association operating a blockchain network with over 1,700 global members.<sup>85</sup> DFI alleged that RChain raised \$30 million through offerings of its “RHOC” token that it issued and distributed using the Ethereum blockchain.<sup>86</sup> The first offering limited participation to members and had a minimum purchase amount of \$50,000 at \$0.20 per token.<sup>87</sup> The alleged purpose was to “facilitate the provision, creation, execution, and maintenance of scalable decentralized applications . . . within the RChain blockchain network.”<sup>88</sup> RChain increased the per-token price to \$0.35 in its second offering while lowering the minimum purchase limit to \$10,000.<sup>89</sup> Over few days, the closing price of RHOC allegedly rose as high as \$2.42, and its daily trading volume reached more than 5 million tokens.<sup>90</sup> DFI found that RChain had failed to make various material disclosures in connection with these offerings, including disclosing information about key personnel and the purpose of the funds it ultimately raised.<sup>91</sup>

In December 2019, DFI filed a Statement of Charges against Duber Technologies, a Washington company formed to develop and operate a digital platform to connect cannabis sellers with consumers.<sup>92</sup> According to DFI, in 2017, the company announced plans to expand operations by raising \$100 million through the sale of a digital token that would be used as a medium of exchange across its platform.<sup>93</sup> Customers were allegedly told they would receive tokens in exchange for creating content, providing customer reviews, referring new customers to the platform, making loyalty purchases from retailers on the platform, and participating in the company’s marketing program.<sup>94</sup> The company also stated that consumers could use the token to purchase cannabis from retailers.<sup>95</sup> While it is unclear how many tokens the company sold, DFI alleged that purchasers never received their tokens, but rather a “Simple Agreement for Future Tokens.”<sup>96</sup> Additionally, midway through the offering, the company announced that it would discontinue the sale and issue purchasers a refund.<sup>97</sup> In the Statement of Charges, DFI asserted that both the offer for sale and the offer of rescission were securities

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 11.

<sup>85</sup> In re RChain Cooperative, No. S-18-2463-20-CO01 (Wash. Dep’t of Fin. Inst. filed Feb. 28, 2020), <https://dfi.wa.gov/documents/securities-orders/S-18-2463-20-CO01.pdf> [<https://perma.cc/5EM2-CHWL>].

<sup>86</sup> *Id.* at 2.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 3.

<sup>89</sup> *Id.* at 6.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 8-9.

<sup>92</sup> In re Duber Technologies, No. S-18-2475-19-SC01 (Wash. Dep’t of Fin. Inst. filed Dec. 18, 2019), <https://dfi.wa.gov/documents/securities-orders/S-18-2475-19-SC01.pdf> [<https://perma.cc/VK8R-7DT3>].

<sup>93</sup> *Id.* at 1.

<sup>94</sup> *Id.* at 2.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.* at 3.

transactions that required registration—and that the company had failed to disclose certain details material to the offering, including an alleged \$50 million acquisition of cannabis distribution centers located in multiple western states.<sup>98</sup>

#### IV. WYOMING

Between 2018 and 2019, Wyoming enacted 13 bills focused on crypto and blockchain technology.<sup>99</sup> As discussed in more detail below, the Wyoming legislature has carried out a deliberate strategy of encouraging the growing crypto sector to flock to their state by taking affirmative steps to clarify the rules of the road affecting the industry.<sup>100</sup>

##### A. *Exemption to Wyoming Money Transmitter Act.*

Wyoming's legislature amended the Wyoming Money Transmitter Act in 2018 to exempt businesses engaged in virtual currency transactions.<sup>101</sup> Proponents of exempting crypto from state money transmitter laws have contended that this step is warranted because crypto differs substantially from the conventional money transmission services traditionally offered by companies such as PayPal.<sup>102</sup> Under Wyoming's amended law, the term "virtual currency" is defined broadly to include "any type of digital representation of value that: (A) is used as a medium of exchange, unit of account, or storage of value; and (B) is not recognized as legal tender by the United States government."<sup>103</sup> The statutory exemption provides that the WMTA does not apply to "[b]uying, selling, issuing, or taking custody of payment

<sup>98</sup> *Id.* at 3-4.

<sup>99</sup> See *supra* note 6 and accompanying text. Since then, Wyoming also adopted the first statute recognizing the legal status of decentralized autonomous organizations or "DAOs." See WS 17-31-101. The contours of this statute are beyond the scope of this article.

<sup>100</sup> Jed Pressgrove, *Wyoming Continues to Pursue a Future with Blockchain*, GOV'T TECH. (Oct. 10, 2019), <https://www.govtech.com/products/wyoming-continues-to-pursue-a-blockchain-heavy-future.html> [<https://perma.cc/P75S-B7MT>] (quoting Tyler Lindolm, former co-chair of Wyoming's Blockchain Task Force, as stating, "You don't have to adopt our laws verbatim, but you should be looking at the situation and realizing that technology is moving much faster than government, which is normal . . . So we're playing a catch-up game right now, and without clarity or legal precedence, your companies will exit your state. And it'll be my goal to take them away from these other governments."). By all accounts, Wyoming's efforts to attract crypto businesses to its state has been successful. See Elena Botella, *Wyoming Wants to be the Crypto Capital of the U.S.*, SLATE (June 28, 2021), <https://slate.com/technology/2021/06/wyoming-cryptocurrency-laws.html#:~:text=The%20state's%20rally%20to%20become,2019%2C%20have%20partially%20set%20up> [<https://perma.cc/3Q66-53QP>].

<sup>101</sup> In 2017, New Hampshire also amended its money transmitter statute to exempt virtual currencies. The amended law excludes from the applicable definition "[p]ersons who engage in the business of selling or issuing payment instruments or stored value solely in the form of convertible virtual currency or receive convertible virtual currency for transmission to another location." N.H. REV. STAT. ANN. § 399-G:3 (2017). Additionally, several states including Illinois have interpreted their existing money transmission laws as excluding cryptocurrency. See Ill. Dep't of Fin. and Prof. Reg., Digital Currency Regulatory Guidance (June 13, 2017), <https://www.idfpr.com/Forms/DFI/CCD/IDFPR%20-%20Digital%20Currency%20Regulatory%20Guidance.pdf> [<https://perma.cc/685Z-YR3F>].

<sup>102</sup> For an excellent discussion of the legal and policy arguments in favor of exempting crypto from state money transmission laws, See Carol R. Goforth, *The Case for Preempting State Money Transmission Laws for Crypto-Based Businesses*, 73 ARK. L. REV. 301 (2020) (contending that state money transmission laws have been construed broadly to cover business activities that differ substantially from conventional money transmission such as crypto-based businesses, and that the patchwork of inconsistent state laws favoring market incumbents such as banks).

<sup>103</sup> WYO. STAT. ANN. § 40-22-102(a)(xxii) (2021).

instruments or stored value in the form of virtual currency or receiving virtual currency for transmission to a location within or outside the United States by any means.”<sup>104</sup>

### *B. Open Blockchain Token Exemption to Securities Laws.*

Under the Wyoming Utility Token Act of 2018, businesses and individuals that sell, develop, or exchange “open blockchain tokens” for consumptive purposes are shielded from Wyoming’s state securities laws so long as they file notice with the secretary of state and pay a fee.<sup>105</sup> Exempting certain tokens from securities laws provides clarity to an area fraught with risk based, at least in part, on the broad analytical framework applied to the question of transactions subject to state and federal securities laws.<sup>106</sup>

To qualify as an “open blockchain token,” the Wyoming law requires (1) that the “predominant purpose” of the token be “consumptive,” i.e. exchangeable for receipt of goods or services; (2) that the developer not market the token as a “financial investment” to the initial buyer; and (3) at least one of the following: (i) that the token have a consumptive purpose available at or near the time of sale, and that the seller take “reasonable precautions” to ensure buyers are not acquiring buying the token as an investment, (ii) that the seller or developer reasonably believe that it sold the token to the initial buyer for a consumptive purpose at the time of sale, or (iii) that the initial buyer of the token be “prohibited from reselling the token until the token is available to be used for a consumptive purpose.”<sup>107</sup>

### *C. Financial Technology Sandbox.*

Wyoming passed the Financial Technology Sandbox Act in 2019. Under this law, the state may exempt companies developing an “innovative financial product or service” from certain state laws for up to two years.<sup>108</sup> Wyoming’s Division of Banking has explained that the purpose of the law is “to allow individuals and companies with new ideas

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<sup>104</sup> WYO. STAT. ANN. § 40-22-102(a)(vi) (2021).

<sup>105</sup> See WYO. STAT. ANN. § 34-29-106(c) (2021).

<sup>106</sup> See, e.g., *Framework for “Investment Contract” Analysis of Digital Assets*, SEC (April 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [https://perma.cc/685E-SUQ2]. The discussion ahead regarding Washington state’s regulation of cryptocurrency through agency enforcement and the different tests applied in Washington as to the existence of a security illustrates these risks.

<sup>107</sup> WYO. STAT. ANN. § 34-29-106(b) (2021).

<sup>108</sup> WYO. STAT. ANN. § 40-29-103(a). The statute defines “Financial product or service” and “innovative” separately, but in essence it means a new or emerging technology that provides a novel product or service in the areas of banking, securities, consumer credit or money transmission. See WYO. STAT. ANN. §40-29-102(iv), (vi). WS 40-29-103(a). The statute defines “Financial product or service” and “innovative” separately, but in essence it means a new or emerging technology that provides a novel product or service in the areas of banking, securities, consumer credit or money transmission. See WYO. STAT. ANN. §40-29-102(iv), (vi).

to bring their product or service to market in a supportive environment that facilitates collaboration, consumer protection and innovation.”<sup>109</sup>

Notably, the program is only available to Wyoming-based companies and does not extend to state consumer protection or criminal laws.<sup>110</sup> As a result, all individuals who are “substantially involved” in the “development, operation or management” of the project must consent to a criminal background check.<sup>111</sup> The law requires the state to consider various factors, including the nature of the product or service and risk to consumers.<sup>112</sup> An applicant that receives approval must post a “consumer protection bond” of at least \$10,000 to cover consumer losses.<sup>113</sup> Additionally, the banking commissioner and secretary of state have authority to revoke the authorization under certain conditions, such as a violation of the statute or any rule, order or decision.<sup>114</sup> The Financial Technology Sandbox Act is yet another example of Wyoming’s early efforts to attract and promote innovation by decreasing the regulatory burden on crypto and blockchain-based businesses.

#### *D. Special Depository Institution Act.*

Wyoming adopted the Special Purpose Depository Institution Act in 2019, which created a new form of financial institution specific to virtual currencies.<sup>115</sup> These Special Purpose Depository Institutions (“SPDIs”) are authorized to engage in activity “incidental to the business of banking” such as (1) custodial, safekeeping, and asset servicing, (2) investment adviser, investment company, and broker-dealer activities, (3) fiduciary powers, (4) receiving deposits, and (5) other commissioner-approved incidental activities.<sup>116</sup> While SPDIs may have customers and open branches outside of Wyoming, they may not make loans and must be headquartered in Wyoming.<sup>117</sup> SPDIs must maintain liquid assets sufficient to cover 100% of their depository liabilities.<sup>118</sup>

The SPDIA empowers the state banking commissioner to monitor chartered SPDIs and imposes ongoing reporting and examination requirements to facilitate such monitoring. Specifically, the banking commissioner may request special reporting from an SPDI to monitor its financial condition.<sup>119</sup> The law also requires the banking

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<sup>109</sup> *Financial Technology Sandbox*, WYOMING DIV. OF BANKING, <https://wyomingbankingdivision.wyo.gov/banks-and-trust-companies/financial-technology-sandbox> [<https://perma.cc/QB4P-6NYR>].

<sup>110</sup> WYO. STAT. ANN. § 40-29-103(b)-104(b) (2021).

<sup>111</sup> WYO. STAT. ANN. § 40-29-104(d) (2021).

<sup>112</sup> WYO. STAT. ANN. § 40-29-104(f) (2021).

<sup>113</sup> WYO. STAT. ANN. § 40-29-104(h) (2021).

<sup>114</sup> WYO. STAT. ANN. § 40-29-107 (2021).

<sup>115</sup> As of August 2021, Wyoming remained the only state that had passed such a law. However, the Illinois legislature is considering analogous legislation that would allow chartered trust entities to engage in the business of banking tailored to digital assets. Patrick Andriesen, *Illinois May Become 2nd State Allowing Financial Services Run on Cryptocurrency*, ILLINOIS POLICY, <https://www.illinoispolicy.org/illinois-may-become-2nd-state-allowing-financial-services-run-on-cryptocurrency/> [<https://perma.cc/W87F-DKZ3>].

<sup>116</sup> WYO. STAT. ANN. § 13-12-103(b)(vii).

<sup>117</sup> WYO. STAT. ANN. § 13-12-103(c)-(f).

<sup>118</sup> WYO. STAT. ANN. § 13-12-105(a).

<sup>119</sup> WYO. STAT. ANN. § 13-12-119(a).



commissioner to examine “the condition and resources” of an institution, “the mode of managing institution affairs and conducting business, the actions of officers and directors in the investment and disposition of funds, the safety and prudence of institution management, compliance with the requirements of this chapter[,] and such other matters as the commissioner may require.”<sup>120</sup> The commissioner is authorized to revoke a charter if the SPDI fails to comply with an adjudicated order or if the application, charter, or other document submitted during the application process contains a false statement or material misrepresentation or omission.<sup>121</sup> In addition, the commissioner is authorized to appoint a conservator if it finds an SPDI has “failed” or is “operating in an unsafe or unsound condition,” where such condition is not remedied.<sup>122</sup> The statute defines “failed” or “failure” in this context as (1) a failure to comply with the statute’s capital or liquidity requirements, (2) a failure to maintain a required contingency account, or (3) a failure to meet its obligations to depositors or customers “in the manner commonly accepted by business practices[.]”<sup>123</sup> The statute further defines the term “unsafe or unsound condition” as a “circumstance” likely to result in (1) the SPDI’s “failure,” (2) a “substantial dissipation of assets or earnings,” (3) a substantial disruption of services to depositors, or (4) “[o]therwise substantially prejudice the depository interests of depositors.”<sup>124</sup>

#### *E. Digital assets recognition.*

In 2019, Wyoming clarified the legal status of digital assets under Articles 8 and 9 of the UCC. The statute defines “digital asset” broadly as “a representation of economic, proprietary or access rights that is stored in a computer readable format,” and classifies three categories under this definition: “digital consumer asset,” “digital security,” and “virtual currency,” each of which has their own definition.<sup>125</sup>

In addition, the bill authorized traditional banks to provide “custodial services” of digital assets under specific conditions.<sup>126</sup> The statute defines “custodial services” as “safekeeping and management of customer currency and digital assets through the exercise of fiduciary trust powers under this section as a custodian, and includes fund administration and the execution of customer instructions.”<sup>127</sup> Thus, traditional banks in Wyoming may now offer custodial services for crypto assets even if they are not chartered SPDIs.<sup>128</sup>

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<sup>120</sup> WYO. STAT. ANN. § 13-12-119(c).

<sup>121</sup> WYO. STAT. ANN. § 13-12-120.

<sup>122</sup> WYO. STAT. ANN. § 13-12-122(a).

<sup>123</sup> WYO. STAT. ANN. § 13-12-122(b)(i).

<sup>124</sup> *Id.*

<sup>125</sup> WYO. STAT. ANN. § 34-29-101(a)(i).

<sup>126</sup> WYO. STAT. ANN. § 34-29-104(a)-(m).

<sup>127</sup> *See* WYO. STAT. ANN. § 34-29-104(p).

<sup>128</sup> *See supra* notes 48-58 and accompanying text.

## V. COMPARISON OF STATE APPROACHES

While it would be premature to characterize one state's regulation of crypto as superior to another, what is clear is that the different regulatory environments reflect, at least in part, competing priorities between lawmakers that can significantly impact an industry valued at an estimated \$1.6 trillion.<sup>129</sup> The crypto and blockchain movement is driving innovation throughout the financial sector, including banking, securities, and e-commerce.<sup>130</sup> Crypto and related platforms offer new ways to transact and access financial services around the world at faster speeds and at lower cost without the need for traditional intermediaries.<sup>131</sup> The technology empowers users to transfer and convert value across borders and Cryptocurrency and related platforms seem poised to benefit emerging economies, where lack access to traditional means of banking and other financial services.<sup>132</sup>

New York's adoption of the BitLicense regime was animated by concerns about preventing fraud and criminal activity.<sup>133</sup> New York opted to impose significant regulatory requirements that apply depending on whether one is engaged in broadly defined "Virtual Currency Business Activity," which could conceivably include the issuance of a single digital token.<sup>134</sup> In doing so, however, New York arguably discouraged entry by companies that may be wary of the requirements or simply cannot afford to comply; the BitLicense regime has faced criticism by those who have perceived it as imposing undue compliance costs that stifle innovation—some of whom have relocated to Wyoming.<sup>135</sup> Mid-way through 2021, NYDFS had issued just 19

<sup>129</sup> See Sophia Cai, *Crypto-Savvy U.S. Senator Sees the Future in Wyoming*, BLOOMBERG (Aug. 26, 2021), <https://www.bloomberg.com/news/articles/2021-08-26/crypto-regulation-wyoming-senator-cynthia-lummis-favors-hands-off-approach> [https://perma.cc/423K-8KLH].

<sup>130</sup> PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW (2018). While a full inventory of the ways crypto and related technologies is driving innovations in the financial sector are beyond the scope of this article, their novelty is based on several characteristics that distinguish crypto from traditional fiat currency systems. At a basic level cryptocurrencies or digital assets are intangible bits of code stored on a computer network. See *Id.* at 21. Unlike fiat currencies, there is no government or bank backing its value, nor is there a single entity that functions as a central clearinghouse to transmit and verify transactions. *Id.* In general crypto relies on an open and decentralized peer-to-peer network to replace traditional fiat-based intermediaries, which in turn records and verifies transactions in accordance with a public protocol. *Id.* This decentralization enables users to execute transactions anonymously in a matter of seconds using a private cryptographic key paired with their individual accounts. *Id.*

<sup>131</sup> See generally *Id.* at 21.

<sup>132</sup> *Id.* at 64. See *Blockchain: Opportunities for Private Enterprises in Emerging Markets*, INT'L FIN. CORP. (Jan. 2019), <https://www.ifc.org/wps/wcm/connect/2106d1c6-5361-41cd-86c2-f7d16c510e9f/201901-IFC-EMCompass-Blockchain-Report.pdf?MOD=AJPERES&CVID=mxYj-sA> [https://perma.cc/N36Z-7LH3].

<sup>133</sup> See *supra* notes 18-21 and accompanying text.

<sup>134</sup> See *supra* notes 24-25 and accompanying text.

<sup>135</sup> For example, the CEO and co-founder of Kraken commented that "[t]he heavy compliance costs [of New York's regulation] on digital currency exchanges will make it much more difficult to operate a profitable exchange in the state. Many fear it will stifle innovation..." Tom Jackson, *The Bitcoin Community Reacts to the NY BitLicense*, COINTELEGRAPH (June 4, 2015), <https://cointelegraph.com/news/the-bitcoin-community-reacts-to-the-ny-bitlicense> [https://perma.cc/KXJ5-WDQU]. Kraken later announced that it would cease operating within the state in a blog post titled, "Farewell, New York." See *Farewell, New York*, KRAKEN (Aug. 9, 2015), <https://blog.kraken.com/post/253/farewell-new-york/> [https://perma.cc/EE7M-TF2T]. Kraken subsequently became the first entity to become a licensed SPDI in Wyoming. See *Kraken Wins Charter Bank Approval*, KRAKEN (Sept. 16, 2020), <https://blog.kraken.com/post/6241/kraken-wyoming-first-digital-asset-bank/> [https://perma.cc/UUV6-XDDU].

licenses to entities other than chartered trust institutions since the regulation was first implemented in 2015.<sup>136</sup>

Whereas Wyoming amended its money-transmitter statute to exempt businesses engaged in the transmission of virtual currencies, Washington amended its money-transmitter statute to specifically cover them, providing just narrow exemptions for token-rewards programs and online gaming tokens that have no secondary market or application outside of the platform.<sup>137</sup> Entities such as crypto exchanges subject to the statute must comply with the law's licensure and operational requirements, some of which are analogous to the requirements imposed under New York's BitLicense regime.<sup>138</sup> At the same time, Washington's DFI has aggressively enforced state securities laws against companies conducting ICOs in a variety of contexts—a trend that can and should be expected to continue in the absence of legislative guidance.<sup>139</sup> While Washington's amendment of its money-transmitter law has faced criticism similar to that of New York's BitLicense, over 50 virtual currency businesses have been licensed in the state, suggesting that Washington's money-transmitter regime is perceived as less burdensome.<sup>140</sup>

Wyoming has taken an altogether different tact. Wyoming has prioritized easing regulatory barriers as part of a deliberate strategy to attract the growing crypto and blockchain industry to take root there.<sup>141</sup> This strategy was not undertaken by accident—Wyoming lawmakers seized the opportunity to encourage cryptocurrency and blockchain businesses to flock to their state by taking affirmative steps to clarify the rules affecting the industry.<sup>142</sup> While Wyoming has enacted several measures to accomplish this, three stand out. Wyoming's amended Money Transmitter Act now exempts businesses engaged in virtual currency transactions, where other states have imposed them.<sup>143</sup> In enacting the Special Depository Institution Act Wyoming created a new type of financial institution that is authorized to engage in traditional banking activities using crypto assets.<sup>144</sup> Wyoming's Financial Technology Sandbox Act enables companies developing an innovative financial product or service to apply for and receive a waiver of certain

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<sup>136</sup> See Regulated Entities, NEW YORK DEP'T OF FINANCIAL SERV.'S, [https://www.dfs.ny.gov/apps\\_and\\_licensing/virtual\\_currency\\_businesses/regulated\\_entities](https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulated_entities) [<https://perma.cc/RQY2-649Y>].

<sup>137</sup> See *supra* notes 59-70 and accompanying text.

<sup>138</sup> Compare notes 21-53 with 59-70.

<sup>139</sup> See *supra* notes 73-99 and accompanying text.

<sup>140</sup> Washington's amendment of its money transmitter law to expressly cover transmission of cryptocurrencies "prompted both scorn and praise within the cryptocurrency community." See Drew Atkins, *New Bitcoin Regulations Shake Up Washington State's Cryptocurrency Industry*, GEEKWIRE (Aug. 1, 2017), <https://www.geekwire.com/2017/new-bitcoin-regulations-shake-washington-states-cryptocurrency-industry/> [<https://perma.cc/R8FL-LWCQ>]. See *List of Companies Licensed Under the Uniform Money Services Act for Virtual Currency Activities in Washington State*, WASH. DEP'T OF FIN. INST., <https://dfi.wa.gov/sites/default/files/documents/virtual-currency-licensee-list.pdf> [<https://perma.cc/JF7L-9QHV>].

<sup>141</sup> See *supra* note 101 and accompanying text.

<sup>142</sup> *Id.*

<sup>143</sup> WYO. STAT. ANN. § 40-22-102(a)(xxii).

<sup>144</sup> WYO. STAT. ANN. § 13-12-103(b)(vii) (2021).

regulations for up to two years.<sup>145</sup> These and other laws epitomize Wyoming's forward-looking philosophy when it comes to cryptocurrencies and related platforms, but still implement conditions promoting meaningful oversight. Chartered SPDIs, for example, are regulated by the state's banking commissioner and are subject to enhanced regulatory requirements in exchange for the right to lawfully offer services traditionally offered by banks. SPDIs are subject to specific capitalization and liquidity requirements and ongoing reporting and examination requirements to maintain a license.<sup>146</sup> Entities that receive a Financial Technology Sandbox exemption, in turn, can have their authorization revoked if they violate the law, if the state determines that continued testing of the innovative product or service is deemed likely to harm consumers, or if the company experiences operational or financial failure.<sup>147</sup>

The differences between Wyoming's regulatory approach versus that of New York's reflect competing priorities that have produced different legal and regulatory landscapes. Wyoming lawmakers have passed laws that acknowledge the new technology's disruptive capacity and encourage the growing crypto industry to take root in the state by reducing regulatory barriers.<sup>148</sup> New York's adoption of the BitLicense regime, by contrast, was motivated by concerns about the crypto industry enabling criminal and fraudulent activity.<sup>149</sup> In many ways, Wyoming's experience thus far presents an alternative narrative to this early-doomsday scenario. Wyoming has shown that it is possible to promote innovation by fashioning creative ways of lessening regulatory barriers to entry, while still maintaining the opportunity for meaningful oversight. It has also shown that this approach can be an effective strategy for attracting new business, even for states that may find themselves on the periphery of advances in the technology sector.

## VI. CONCLUSION

Laws have consequences for any new industry. New York and Wyoming's different approaches to crypto regulation reflect competing philosophies about regulating crypto in the financial sector. Wyoming has committed to promoting innovation and related economic growth by attempting to ease regulatory barriers to entry. New York, motivated by deterring the risk of fraud or criminal activity, has imposed regulatory barriers at the risk of losing businesses to other states. Time will tell whether these different philosophies will drive permanent consequences. New York's status as the mecca of the U.S. financial industry may limit its exposure to long-term consequences, but other states are not so conveniently positioned. Regulators and lawmakers in other states and on the federal level will have to decide how the balance between risk

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<sup>145</sup> WYO. STAT. ANN. § 40-29-103(a) (2021).

<sup>146</sup> WYO. STAT. ANN. § 13-12-105(a), (b) (2021).

<sup>147</sup> WYO. STAT. ANN. § 40-29-107(a)(i)-(iv) (2021).

<sup>148</sup> See *supra* note 133 and accompanying text.

<sup>149</sup> See *supra* notes 18-21 and accompanying text.

deterrence and fostering innovation is best struck in their own jurisdictions.