

# Crypto Asset Regulation: Is the US or UK Keeping Up Best With This Emerging Market?

**The Capital Commitment Blog** on January 8, 2021

One driver for the first widely adopted cryptocurrency Bitcoin was to create a store of value that existed **outside** of government control. It is therefore no surprise that attempts to regulate the rapidly developing crypto asset market have required great efforts from regulators and legislators around the world to keep apace.

In this blog, we compare key drivers and results of the regulatory approach being taken in the US and UK. While the U.S. is leading the way on the enforcement of crypto regulations, the UK has taken greater steps in relation to banking approvals. With regard to tax treatment, the position is becoming much clearer in both jurisdictions.

First though, is there even “an” approach within each country?

In the US, regulation of crypto is somewhat fragmented as it occurs at both the federal and state levels. In the UK, there is much more of a united approach.

**In the US**, states are increasingly regulating the crypto space, often through legislation. Within this state regulation, there is an emerging split in the approach being taken:

- some states are passing favorable laws in order to attract investment, stimulate the economy or move with modern technology, such as Wyoming (which is often seen as frontrunner in crypto regulation, and has passed various relevant laws, including to [recognize property rights](#) and authorize a new type of [chartered depository institution](#)); Colorado (where cryptocurrencies are [exempt](#) from state securities laws); and Ohio (the [first state](#) that permitted certain taxes to be paid with cryptocurrency); while
- others (notably those with key financial industries such as New York and California) have either passed restrictive legislation regarding crypto assets and investment, or have suggested that this will be their approach in the near future.

For example, New York has a comprehensive regulatory regime that [requires firms to obtain “BitLicenses”](#) to operate a virtual currency business and has [published a “greenlist” of approved virtual currencies](#), although the state’s Department of Finance has recently proposed a [relaxed framework](#) for obtaining BitLicenses.

As a result of these varying approaches, crypto firms are considering ever more closely, where to domicile and conduct business.

In addition, the federal level sees a growing amount of crypto regulation from numerous bodies, many of which have overlapping jurisdictions and differing viewpoints on what ‘crypto’ even is (for example, a commodity, a currency, or property). These authorities include:

- the Securities and Exchange Commission (**SEC**), which does not regulate cryptocurrencies directly but continues to assert its jurisdiction over initial coin offerings (**ICOs**) (which it generally considers securities) and, more broadly, securities linked to crypto (e.g., Bitcoin-linked ETFs);
- the Commodities and Futures Trading Commission (**CFTC**), which has jurisdiction over futures, options and swaps linked to cryptocurrencies as well as authority to prosecute [fraud and manipulation in cryptocurrency spot markets](#);
- the Federal Trade Commission (e.g., for deceptive conduct directed at consumers);
- the Department of Treasury’s Financial Crimes Enforcement Network (e.g. for anti-money laundering purposes); and
- the Department of Justice, for criminal violations of related statutes (e.g., wire fraud, securities fraud, money laundering, etc.).

In contrast, **in the UK**, the national approach is more cohesive. Despite the UK’s increasingly federal structure of domestic governance (Northern Ireland, Scotland and Wales all have ‘devolved’ Parliaments, with differing areas of jurisdiction), there is a unified approach to crypto regulation across the UK. Further, as the UK has now left the European Union and the [‘transition period’ during which EU law still applied in the UK has now ended](#), there is further scope for the UK to carve out a unique model of crypto-regulation, which is not as tightly linked to the EU approach.

At present, although multiple government bodies impact the use of crypto in some fashion (for example, tax is levied through HM Revenue and Customs (**HMRC**)), the Financial Conduct Authority (**FCA**) alone is the key regulator. The FCA's powers are set out in statute and cover a wide ambit. In the [words of Therese Chambers](#), Director of Retail and Regulatory Investigations at the FCA:

*It is sometimes said of London that it is Wall Street and DC all in one. In the same vein, the FCA is like the Commodity Futures Trading Commission (CFTC), Financial Crimes Enforcement Network (FinCen) and the Securities and Exchange Commission (SEC) combined – as we regulate firms' conduct and prudential requirements alongside anti-money laundering controls*

But don't let this apparent simplicity fool you. UK law and regulation on crypto assets can be a mixed bag of both [clarity and confusion](#). Whether that approach becomes more or less clear in the near future will turn on what the UK government does when EU laws no longer apply.

### **Enforcement action**

Regulation is increasing in the both the US and the UK, but what of any actual enforcement?

Here, **the US** regulators have been more active. In October 2020 alone, there were multiple high-profile enforcement actions commenced. The [SEC charged businessman and computer programmer John McAfee](#) for promoting investments in ICOs to his Twitter followers without disclosing that he was paid to do so. In addition, two separate actions have been announced by federal prosecutors and the CFTC against BitMEX, one of the world's biggest cryptocurrency trading exchanges. It is alleged that [BitMEX failed to limit money laundering and other illegal activities of its customers](#), despite being aware of such activities. In the same month, the Attorney-General's Cyber Digital Task Force issued the [Cryptocurrency Enforcement Framework](#), which considers the enforcement challenges arising from the increased uptake of cryptocurrency.

This is on the heels of a few years of enforcement actions, particularly those brought by the SEC for unregistered and fraudulent offerings of ICOs as well as [unregistered crypto-related funds and ICO broker-dealers](#).

**In the UK**, while the number of [investigations carried out by the FCA is on the rise](#), there is yet to be any serious enforcement action taken arising from crypto. It can only be a matter of time, however, before this will change, particularly given the [FCA's recent ban of the sale of crypto-derivatives to retail consumers](#).

### **Tax treatment**

In both the US and the UK, the position on how crypto is taxed is becoming much clearer.

**In the US**, the IRS provided meaningful [guidance](#) on the subject in late 2019, which was the most significant development since a 2014 notice classifying cryptocurrency as “property” for tax purposes. Officials have offered [further clarification](#) since then, though some issues, such as treatment of “airdrops,” remain uncertain.

Similarly, **in the UK**, HMRC has set out guidance for both [individuals](#) and [businesses](#) on their taxation obligations regarding crypto assets. And it is not all doom and gloom on the tax front. For example, one might think stamp duty would be charged on existing exchange tokens, as it is [charged on instruments that transfer stocks or marketable securities](#). However, [it is not](#).

### **Banking Approvals**

Crypto banking **in the US** is largely undeveloped, though making some progress. Kraken, one of the largest cryptocurrency exchanges, announced in September 2020 that it had become “*the first digital asset company in U.S. history to [receive a bank charter recognized under federal and state law](#)*.” Kraken obtained the charter from the State of Wyoming to operate a special purpose depository institution, which will allow it to provide banking services to blockchain innovators.

**In the UK**, the crypto banking space is maturing quickly. In January 2020, the FCA [issued](#) its first Authorized Payment Institution license to a crypto firm. This license enables a firm to offer certain payment services, such as online payment processing and money transfers, across the European Economic Area. The FCA can also approve Electronic Money Institutions licenses, which allow a recipient to store and facilitate transactions of digital currencies, though it does not allow for some traditional banking functions like loan or interest offerings.

The Bank of England has even considered adopting a central bank digital currency, and is part of a [task force](#) to develop the UK's response to cryptoassets and distributed ledger technology.

## **Conclusion**

Regulation and legislation relating to crypto is continuously evolving to try and keep up with the technology. While crypto is quintessentially international in nature, the sting of regulation is largely at the national or sub-national levels. We see a notable divergence of approach at the national (and even sub-national) levels and as a result, firms and users of crypto must be ever vigilant in order to stay on top of their obligations and within the bounds of the law.

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