

Proskauer's Cross-Disciplinary Blockchain Group Hosts 'Digital Assets in Business and Law' Symposium

Blockchain and the Law on **September 23, 2022**

Back in 2013, the first cryptocurrency matter hit our desks. That was the beginning of the exponential growth of our digital assets practice. Recognizing the importance of the area, we launched this blog, *Blockchain and the Law*. In our first cluster of posts, we covered topics such as [cryptocurrency taxation](#), [blockchain and privacy](#), and [issues surrounding initial coin offerings](#) (or ICOs), one of the hottest issues at that time and a practice that [still garners SEC scrutiny in 2022](#) (interestingly, there is still no consensus around when a digital asset, outside of Bitcoin, which is considered a commodity, is a “security”).

Today, blockchain-based innovations continue apace, continuously offering new opportunities (and raising challenges). In the push toward Web3 – with its decentralized, permissionless, tokenized core – there are a variety of new technologies and innovations, from DeFi to DAOs to NFTs to fan tokens to the Merge to the metaverse. We have been privileged to work with many of the most dynamic clients in helping them build businesses around these advances.

We were thrilled to host a three-day symposium from September 19-21, 2022 to highlight some of the hottest legal and business issues affecting digital assets, featuring a full slate of discussions among our attorneys and guests from the industry. At the symposium, we programmed virtual panels across a range of topics: SEC enforcement and securities regulation of digital assets, asset manager considerations surrounding digital assets, employee compensation and benefits issues, cryptocurrency AML considerations, digital assets in bankruptcy, decentralized autonomous organizations (DAOs), and sports and media trends and issues in Web3. The final day of the event culminated in an in-person reception and a “Voices from the Industry” panel featuring an eclectic group of executives from across the digital asset space talking about issues that are top of mind. In the span of a few days, we learned a lot.

Below is a brief rundown of some of the topics covered in our seven virtual panels:

- **Securities Regulation and Enforcement in Digital Assets:** The discussion took a holistic look at the SEC's response to the digital asset industry. In the absence of Congressional action, the SEC and the CFTC have attempted to stake out their respective jurisdictions in the digital asset space. Panelists opined that better coordination of federal regulation and enforcement would be a welcome change in the future.
- **Asset Manager Considerations and Strategies:** Panelists noted the growing awareness of institutional investors becoming involved in the digital assets space, evidenced by an increasing baseline understanding and comfort level and a realization that this is a new asset class and not merely an uncertain bet on coins or tokens. Echoing the prior panel, the consensus was that funds would welcome one "referee" to release concrete rules, as a lack of coherent regulation is itself a risk and can be a drag on investment. Panelists also delved into the unique diligence and risk factors for investors in this class, including custody issues, governance and investor control, valuation, certain complexities from exotic digital assets, and liquidation and redemption of investments.
- **Cryptocurrency Regulation and Enforcement: What to Expect:** The focus of this panel was on the current state of AML/KYC and sanctions compliance and enforcement in the digital assets industry. The group analyzed a recent action by the U.S. Treasury Department sanctioning a cryptocurrency mixer – a non-custodial, smart contract-based software application that runs on the Ethereum platform – an action that sent shockwaves through the industry in that Treasury essentially sanctioned a technology rather than an entity. As a result, a panelist suggested that Web3 companies, virtual currency exchanges, DeFi developers and NFT platforms, as well as more traditional financial service firms that transact in crypto, reexamine potential exposure to sanctioned individuals and vulnerability to fraud and ensure that compliance procedures match these risks.
- **How Do You DAO?: Forming, Operating and Doing Business With DAOs:** The discussion here centered on the importance of decentralized autonomous organizations (DAOs) creating a legal "wrapper" or real world structure early on to give it a coherent legal identity, limit the liability of participants, and facilitate various transactions and registrations in the real world. As for options, the panelists discussed several at length, including the particulars of the popular Cayman Foundation Company and DAO-specific LLC entities permitted under certain state laws. The group concluded by stressing that counterparties to agreements with DAOs should look to deal with DAOs protected by a wrapper, and given the lack of court precedent surrounding DAOs, seek additional contractual protections.

- **Beefing up Your Digital Wallet: Compensation and Benefits Issues with Cryptocurrency:** This panel focused on labor and employment, tax, and sophisticated compensation issues with respect to remunerating employees with digital assets, as well as a discussion of ERISA compliance and digital asset options in 401(k) plans. The panel agreed that in these emerging areas, the trend was likely continued scrutiny from multiple government agencies, with many questions and few concrete answers. As to ERISA compliance, the panel stressed that plan sponsors should proceed with caution so as to act consistently within fiduciary standards. Recent guidance from the U.S. Labor Department stated that the agency had “serious concerns” with offering a digital asset option for 401(k) plans (e.g., the speculative nature of digital assets, lack of traditional data surrounding the investments, prevalence of cyber theft and fraud, and custodial and valuation challenges). The group closed with a discussion of the emergence of “crypto-IRAs,” or retirement investments featuring digital asset investments that may not necessarily have the protections of ERISA.
- **Sports and Media in Web3: Trends, Legal Considerations and Strategies:** The panel first explored the legal and business developments happening at the intersection of sports, media and digital assets, which include use cases in fan tokens, NFTs, esports, DAO team ownership, sports ticketing, sports betting, play-to-earn games, the metaverse, memorabilia, college athlete NIL rights, and fantasy sports, and addressed the many areas in which collaboration between business and legal teams in the Web3 space is important. The speakers conversed about day-to-day legal, business and technical considerations and emphasized how digital asset technology can improve fan experiences, expand the value of existing IP and enable new business models.
- **The Other Side of the Coin: Digital Assets in Bankruptcy:** During a discussion of some recent notable bankruptcy filings in the DeFi space, the panel dove into how the restructuring laws were not written with decentralized DeFi companies in mind. This is particularly the case when determining who owns the underlying digital assets that customers may have deposited onto a DeFi platform (that may have acted in ways more than a simple digital wallet provider) and what method should be used to value claims on the bankruptcy estate. All of the panelists noted that investors in this space must not only understand the terms and conditions and redemption rights of any specific platform, but also must perform their own due diligence, which might include code audits, examination of the tech team, and how the process of staking works.

“Voices from the Industry”

At the final day of the symposium, we hosted in our offices a diverse panel of industry executives from Web3 companies, a metaverse architecture firm, and investment managers sharing insights about trends they have observed and key lessons they have gleaned as the space has evolved. The group first took stock of the state of Web3 amid the recent downturn (or so-called “crypto winter”) and the wave of token failures and DeFi-related bankruptcies. Despite the recent challenges in the market, the panelists anticipated even more mainstream adoption, as well as growing use cases involving blockchain technologies that bring inherent value and deliver utility, and viewed the current environment as an opportunity for compelling projects to rise and differentiate themselves. Blockchain was conceived with a decentralized zeal in mind, but following the latest turmoil, the panel opined that complete decentralization may not always be the optimal structure; instead, they saw the mainstream as somewhere in the middle, welcoming a hybrid approach that can bring true innovations and remove unneeded intermediaries, yet still maintain certain oversight and protections. In closing, the panel recognized the legal and technological uncertainties in Web3, yet emphasized that businesses with a solid vision, ample financing, trusted counsel and a business that can nimbly react to the market and its own community of users and developers should “push the envelope” in this evolving space instead of taking a timid approach that awaits clarity in the muddy areas of regulation and enforcement.

Final Thoughts

Web3 is a dynamic space that evolves on a daily basis, with new business models and strategies continuously emerging and complex legal issues to consider on many fronts. The depth and breadth of Proskauer’s experience advising on the use of new and emerging technologies, specifically in the blockchain and digital asset space, equips our cross-disciplinary Blockchain Group with the practical acumen to counsel our clients in navigating all technical, business and legal issues that arise. We help clients understand the changing landscape, find solutions to challenges and capture opportunities. We will continue to address the industry’s biggest legal questions, such as: When is a digital asset a security? What is the right degree of decentralization and asset portability? How should due diligence be conducted differently in the blockchain and DeFi spaces? How do we protect intellectual property and brand value and mitigate risk in Web3? What does (or should) it mean to “own” a digital asset?

We’re excited to be helping to build what’s next.

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