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PERSPECTIVE

Cryptocurrencies muddy money laundering law

By Jeff Steiner and Sean Sullivan

A Florida judge's recent ruling in *State v. Espinoza*, Criminal Division Case No. F14-2923 (Fla. 11th Cir. Ct. 2016), dismissing anti-money laundering (AML) charges against a defendant accused of unlawfully engaging in business as a money services business (i.e., a money transmitter) and money laundering in violation of Florida law, in connection with the sale of bitcoin to an undercover agent, has sent waves through the cryptocurrency community and may result in ripple effects in existing statutes and regulations in California and other jurisdictions.

On July 22, Miami-Dade County Circuit Court Judge Teresa Pooler dismissed the AML charges against Michell Espinoza, stating that the plain meaning of "money transmission" under the relevant Florida statutes did not encompass the sale of bitcoin and concluding that bitcoin was not "currency, monetary value or a payment instrument." Among other things, Pooler cited the Internal Revenue Service's classification of cryptocurrencies (aka virtual currencies) as property and not currency. The state of Florida has since appealed the decision to Florida's 3rd District Court of Appeal.

While we will need to wait to see the result of the appeal, Pooler's conclusion that bitcoin is not "monetary value" or a "payment instrument" under the Florida statutes highlights an interesting issue that users of cryptocurrencies and blockchain technology face with existing rule sets, both at the state and federal levels — how new technology and the use of cryptocurrency complies and fits into those existing regulations. What is clear from the *Espinoza* decision is that evolving technologies like cryptocurrencies and the blockchain do not always fit neatly into existing statutes and regulations. In fact, Pooler explicitly pointed out the vagueness of the Florida statutes and called for legislative action "geared towards a much needed update" to their language.

In the United States, cryptocurrencies face regulation not only at the state level, but also at the federal level. Regardless of its final outcome upon appeal, the *Espinoza* decision may lead state and federal regulators to rethink whether shoehorning cryptocurrencies into existing rule sets is the best course of action, or whether lawmakers and regulators should instead revise existing rules to more directly address cryptocurrencies, or even develop separate rule sets for cryptocurrencies and the use of blockchain technology. In this regard, the New York State Department of Financial Services has led the way at the state level by developing a separate registration regime for those engaged in cryptocurrency activities (including the transmission of cryptocurrency), known as a BitLicense, which came into effect in August 2015.

Given the many laws and regulations at the state and federal levels that potentially are implicated by cryptocurrencies and blockchain technology, the inevitable reality of conflicting, duplicative and burdensome rule sets is daunting for those engaged in the industry and risks stifling innovation. Some federal regulators have openly acknowledged the need to revisit and update existing rules to directly address blockchain technology, but have also stressed the importance of taking a balanced approach that does not harm innovation, particularly as blockchain has the potential to revolutionize aspects of

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global banking. For example, the Commodity Futures Trading Commission (CFTC) has taken the position that bitcoin is a commodity for purposes of derivatives based on bitcoin, and yet CFTC Commissioner J. Christopher Giancarlo, in his March 29 special address before the Depository Trust and Clearing Corporation at the 2016 Blockchain Symposium, expressed hope that "each regulatory agency can take steps now to ensure that its existing rules do not inhibit [distributed ledger technology] development and adoption."

While some market participants may be content with the ambiguity in existing regulations to the extent these ambiguities benefit particular self-interests, others see the need for certainty under the rules with respect to the treatment of cryptocurrencies and the implementation blockchain technology. A recent survey from the World Federation of Exchanges, which represents market infrastructure providers (including exchanges and central clearing counterparties), calls for clarity from regulators over the use of blockchain technology, as well as harmonization of global standards. Most recently, in the wake of the 2008 Financial Crisis, international groups developed global standards for implementing rules. Notably, the Basel Committee on Banking Supervision, the International Organization of Securities Committees (IOSCO) and the G-20, among others, have worked to develop standards for derivatives and other financial markets. In the context of cryptocurrencies and blockchain technology, IOSCO and/or other groups could similarly organize cross-jurisdictional groups to develop international standards that each participating jurisdiction would follow in implementing their own rules thereby promoting harmonization.

Whatever the ultimate outcome of *Espinoza*, it is clear that the Florida laws at issue are only the first that should be expected to be challenged as a result of the increased use of cryptocurrencies and blockchain technology.

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