

### **III. *Regulatory Landscape in Wyoming and Wyoming's Leadership in Cryptocurrency***

#### **A. Introduction**

Our society has gone through three distinct industrial revolutions.<sup>1</sup> Each revolution impacted and transformed the banking and financial industries in its own way.<sup>2</sup> The first revolution was in the 1700s, when the first American bank was chartered.<sup>3</sup> Additionally, during this time Congress adopted the decimal system, as well as the dollar sign for the official currency.<sup>4</sup> During the second revolution in the 1800s, a national banking system was formed which began operating on a gold backed standard in 1879.<sup>5</sup> During the third revolution in the 1900s, there were advancements in electronics, telecommunications, and computers, leading to advances in financial technology, such as the creation of the Federal Reserve, an increase in banking, and severance from the gold backed standard.<sup>6</sup> Additionally, during this time the credit card, ATM, and PayPal were invented.<sup>7</sup>

It follows naturally that the 2000s will bring the next revolution, with lasting impacts on the banking and financial industries. During the 2000s, new ways to transfer and use currency have already emerged

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<sup>1</sup> iED Team, *The 4 Industrial Revolutions*, INST. OF ENTREPRENEURSHIP DEV. (June 30, 2019), <https://ied.eu/project-updates/the-4-industrial-revolutions/> [<https://perma.cc/QJU3-98HB>].

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

<sup>3</sup> *The History of U.S. Currency*, U.S. CURRENCY EDUC. PROGRAM, <https://www.uscurrency.gov/history> (last visited Nov. 20, 2021). [<https://perma.cc/ZG25-SJQS>].

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

<sup>5</sup> *Id.*; Natasha Frost & Gwynn Guilford, *The Quiet Campaign to Reinstate the Gold Standard is Getting Louder*, QUARTZ (July 3, 2019), <https://qz.com/1646318/why-trump-and-judy-shelton-want-the-us-back-on-the-gold-standard/>.

<sup>6</sup> *FDR takes United States off gold standard*, HIST. CHANNEL (June 17, 2020) <https://www.history.com/this-day-in-history/fdr-takes-united-states-off-gold-standard> [<https://perma.cc/GHZ5-BD8W>].

<sup>7</sup> *The History of U.S. Currency*, *supra* note 3; *The Evolution of the Fintech Industry*, GETSMARTER (Apr. 10, 2018), <https://www.getsmarter.com/blog/career-advice/the-evolution-of-the-fintech-industry/> [<https://perma.cc/KD2Y-PTHS>].

with the advent of Venmo, Google Pay, Apple Pay, and most recently, cryptocurrencies (“crypto”).<sup>8</sup> Developments in financial technologies tend to aim at making transactions more efficient and secure.<sup>9</sup> Crypto is particularly revolutionary because it does much more than create a means of faster transacting. Crypto challenges the status quo of organizations’ governing structures, government’s role in transactions, and how transactions are executed.<sup>10</sup>

The state of Wyoming has become a leader in tackling the regulatory issues in the crypto market.<sup>11</sup> Beginning in 2018, Wyoming passed thirteen crypto blockchain laws that have shaped Wyoming’s reputation as a “crypto-friendly” state.<sup>12</sup> Wyoming legislators have continued to update financial rules and regulations to attract crypto companies.<sup>13</sup> Specifically, Wyoming has become the first state to legally recognize an entity formation for crypto businesses, define crypto technology terms, and outline the categorization of asset classes for blockchain technology.<sup>14</sup> Wyoming’s legislation has put the state ahead of the Federal Reserve and other D.C. regulators, and has

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<sup>8</sup> Marion Laboure & Jim Reid, *The Future of Payments Part II. Moving to Digital Wallets and the Extinction of Plastic Cards*, DEUTSCHE BANK 4 (Jan. 2020).

<sup>9</sup> James O’Donnell, *3 Best Benefits of Digital Wallets*, PLUM POINT OF SALE (Sept. 02, 2021), <https://plumpos.com/en/digital-wallet.html> [https://perma.cc/UN59-D2DD]

<sup>10</sup> E. Napoletano & John Schmidt, *Decentralized Finance Is Building a New Financial System*, FORBES (Apr. 2, 2021), <https://www.forbes.com/advisor/investing/defi-decentralized-finance/> [https://perma.cc/8VK5-JZ9Y]

<sup>11</sup> Gregory Barber, *The Newest Haven for Cryptocurrency Companies? Wyoming*, WIRED (June 13, 2019), <https://www.wired.com/story/newest-haven-cryptocurrency-companies-wyoming/> [https://perma.cc/79TQ-ZVAK]

<sup>12</sup> *Id.*; Adriana Hamacher, *America’s First Legal DAO Approved in Wyoming*, DECRYPT (July 5, 2021), <https://decrypt.co/75222/americas-first-dao-approved-in-wyoming> [https://perma.cc/W7D6-234U]

<sup>13</sup> Gina Chon, *Cryptocurrency’s Wild West in Wyoming*, REUTERS, (Jul. 7, 2021), <https://www.reuters.com/breakingviews/cryptocurrencys-wild-west-is-wyoming-2021-07-07/> [https://perma.cc/SMG6-YEAM]

<sup>14</sup> See *Wyoming’s Pro-Blockchain Laws Tame the Wild West of Crypto*, SYGNA U.S. CRYPTO REGULATIONS, BLOG, <https://www.sygna.io/blog/wyomings-pro-blockchain-laws-tame-cryptos-wild-west/> (last visited Nov. 20, 2021); Vladan Lausevic, *Wyoming as a blockchain and crypto-friendly state*, MEDIUM (Apr. 21, 2021), <https://vladanlausevic.medium.com/wyoming-as-a-blockchain-and-crypto-friendly-state-a9d02746ec9f> [https://perma.cc/WJ4P-Q8E3].

encouraged innovators in the crypto field to conduct business in the state.<sup>15</sup>

This article will discuss and analyze what crypto is, the benefits and drawbacks of crypto technology, the need for regulating crypto, and issues associated with implementing regulations. It will also discuss current federal and state regulations, focusing primarily on Wyoming and its leadership in addressing crypto regulation.

### *1. What Is Cryptocurrency?*

Traditional currencies are known for being “centralized, historically backed, and managed by a recognized government entity, like the U.S. Federal Reserve.”<sup>16</sup> The U.S. dollar became a fiat currency in the 1970s when the country discontinued its gold backing.<sup>17</sup> Essentially all other major currencies have also become fiat.<sup>18</sup> The value of government issued fiat currency is derived from a country’s government and central bank advocating for the currency’s worth.<sup>19</sup> Traditional currency has transformed over time to operate primarily in digital form; examples include credit/debit cards, online banking, and other virtual wallets.<sup>20</sup>

Crypto is a digital asset or currency with no physical form that can be used as a method of payment for goods and services, a means for lending and borrowing, or a store of value.<sup>21</sup> Crypto operates through blockchain technology and computer code, which enable crypto to function virtually on its own without the need for management from intermediaries such as people, companies, banks, or the government.<sup>22</sup>

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<sup>15</sup> Chon, *supra* note 13.

<sup>16</sup> Market Basics, *How Does Crypto Compare to Traditional Currency*, TRADESTATION, <https://www.tradestation.com/learn/market-basics/crypto-currencies/the-basics/how-does-crypto-compare-to-traditional-currency/> (last visited Nov. 16, 2021). [<https://perma.cc/5VDD-UL54>]

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Andrew Beattie, *The History of Money*, INVESTOPEDIA (Aug. 22, 2021), [https://www.investopedia.com/articles/07/roots\\_of\\_money.asp](https://www.investopedia.com/articles/07/roots_of_money.asp) [<https://perma.cc/6G9V-UWAU>]

<sup>21</sup> Bailey Reutzel, *What Is Cryptocurrency? Here’s What You Need to Know about Blockchain, Coins and More*, CNBC (Sept. 22, 2021), <https://www.cnbc.com/select/what-is-cryptocurrency/> [<https://perma.cc/46R8-7JH5>]

<sup>22</sup> *Id.*

This digital crypto system is not controlled by a central authority and therefore is decentralized, efficient, and purportedly less prone to censorship or manipulation.<sup>23</sup> Crypto is a digital representation of value built on a blockchain; generally, these coins are not backed by gold or silver, and gain value primarily from the faith of users.<sup>24</sup> Crypto may also gain value from user demand, coin scarcity, and the coins' capabilities.<sup>25</sup>

It is important to note that there are thousands of cryptos, and that they vary in their underlying goals and codes.<sup>26</sup> The large variation of crypto technology and its stark differences from traditional currency may contribute to the complications and uncertainties regarding the proper regulation and categorization of these technologies. Wyoming has become a leader in determining a regulatory framework for this complex and new crypto technology.<sup>27</sup>

### **B. Pros and Cons of Cryptocurrency Technology and the Need for Regulation**

Crypto technology demonstrates the tension between innovation and the creation of a regulatory framework.<sup>28</sup> It is unclear what existing laws are applicable to crypto, and there is uncertainty regarding which regulatory authority should govern the trading and transfer of digital assets.<sup>29</sup> This lack of clarity has created confusion and ambivalence for market participants and regulators.<sup>30</sup> Understanding the benefits and drawbacks of crypto can illustrate the complexities of the technology, the difficulty in regulating this space, and the need for regulations. However, overregulating the crypto space may cause more

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<sup>23</sup> *Id.*

<sup>24</sup> Market Basics, *supra* note 16.

<sup>25</sup> *Where Do Cryptocurrencies Get Their Value?*, NAGA (Dec. 13, 2019), <https://naga.com/blog/where-do-cryptocurrencies-get-their-value-10996744> [<https://perma.cc/44V6-PGP5>].

<sup>26</sup> Reutzell, *supra* note 21.

<sup>27</sup> Chon, *supra* note 13.

<sup>28</sup> Ephrat Livni, *What's Next for Crypto Regulation*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/01/30/business/dealbook/crypto-regulation-blockchain.html> [<https://perma.cc/N32U-DNV9>].

<sup>29</sup> Jonathan Marcus & Stephanie Cannuli, *Crypto Bills Show Consensus on Need for Federal Oversight*, LAW360 (Apr. 21, 2021), <https://www-law360-com.ezproxy.bu.edu/articles/1377590/crypto-bills-show-consensus-on-need-for-federal-oversight>

<sup>30</sup> *Id.*

harm than good.<sup>31</sup> For example, Hester Peirce of the Securities and Exchange Commission (“SEC”) advocates against stricter regulatory policies and for “industry-led regulatory activities” because strict rules “eliminate[] the ability of market participants to carry out peer-to-peer transactions.”<sup>32</sup> Regardless of who implements the regulations, clearer legislation is needed to facilitate efficient and stable operations of crypto businesses. While there are many benefits and drawbacks to be weighed when evaluating crypto technology, this section will analyze only a few primary concerns such as criminal activity prevention, efficiency of decentralized transacting, and price volatility.

### *I. Criminal Activity Prevention*

Some claim that crypto technology has the potential to prevent illicit transactions, while others say it is a tool to facilitate it.<sup>33</sup> For example, Bitcoin’s website explains that:

Bitcoin works with an unprecedented level of transparency that most people are not used to dealing with. All Bitcoin transactions are public, traceable, and permanently stored in the Bitcoin network. Bitcoin addresses are the only information used to define where bitcoins are allocated and where they are sent ... [a]nyone can see the balance and all transactions of any address.<sup>34</sup>

This type of blockchain can potentially provide the transparency needed to eradicate fraudulent money schemes because it makes it more difficult for criminals to launder money, and easier for authorities, like the IRS and the FBI, to track transactions that are fully public and permanently recorded.<sup>35</sup> However, criminals can maintain a

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<sup>31</sup>Osato Avan-Nomayo, *Stricter Crypto Laws Will Stifle Innovation, Says SEC Commissioner Hester Peirce*, COINTELEGRAPH (June 9, 2021), <https://cointelegraph.com/news/stricter-crypto-laws-will-stifle-innovation-says-sec-commissioner-hester-peirce> [<https://perma.cc/D8CM-Y9HX>]

<sup>32</sup>*Id.*

<sup>33</sup>*Cryptocurrency Money Laundering Risks and How to Avoid Them*, ELLIPTIC (Feb. 26, 2021), <https://www.elliptic.co/blog/cryptocurrency-money-laundering-risks-and-how-to-avoid-them> [<https://perma.cc/XYP5-3WT9>]

<sup>34</sup> BITCOIN, <https://bitcoin.org/en/protect-your-privacy> (last visited Oct. 30, 2021).

<sup>35</sup> Market Basics, *supra* note 16.

degree of anonymity on some crypto blockchains.<sup>36</sup> For example, Bitcoin's blockchain addresses are not registered directly to an individual or entity, and the digital wallet is only accessible by those who have the digital wallet login information.<sup>37</sup> Essentially, if certain transactions were suspected to be related to criminal activities, it would be difficult for authorities to trace the transactions back to a specific individual or entity.<sup>38</sup> Additionally, a type of crypto known as private coins allow users to hide transaction details.<sup>39</sup> Private coins remain public, like other cryptos, because they also operate on open public ledgers; however, private coins allow end users to hide certain kinds of transaction information to maintain their privacy.<sup>40</sup> Private coins may, too, cause issues with tracing suspected criminal activities, similar to the issues that the Bitcoin blockchain may create.<sup>41</sup>

Surprisingly, studies have discovered that illicit use of crypto is relatively low; in 2020 illicit use of crypto was found to represent less than 1% of all crypto activity.<sup>42</sup> This low percentage of unlawful crypto activity primarily includes scam-related crime.<sup>43</sup> Other prohibited uses of crypto involve darknet markets, ransomware, money laundering, or stolen funds, however these kinds of activities are much less common than scams.<sup>44</sup> Criminal economic activity in traditional financial

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<sup>36</sup> *What is Bitcoin Laundering?*, NYMAN GIBSON MIRALIS (2021), <https://ngm.com.au/bitcoin-laundering/>

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Know Your Coins: Public vs. Private Cryptocurrencies*, NASDAQ (Sept. 22, 2017), <https://www.nasdaq.com/articles/know-your-coins-public-vs-private-cryptocurrencies-2017-09-22>

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

<sup>41</sup> *What is Bitcoin Laundering?*, *supra* note 35.

<sup>42</sup> Michael Morell, *An Analysis of Bitcoin's Use in Illicit Finance*, at 3. (Apr. 6, 2021).

<sup>43</sup> See Global Legal Insights; <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa> (last visited Nov. 16, 2021); Coinbase, *FACT CHECK: Crypto is increasingly being used for criminal activity and is a haven for illicit finance*, COINBASE BLOG (May 6 2021), <https://blog.coinbase.com/fact-check-crypto-is-increasingly-being-used-for-criminal-activity-and-is-a-haven-for-illicit-856a71dfb399>

[<https://perma.cc/B7DK-29KC>]; Chainalysis Team, *Crypto Crime Summarized: Scams and Darknet Markets Dominated 2020 by Revenue, But Ransomware Is the Bigger Story*, INSIGHTS (Jan. 19, 2021), <https://blog.chainalysis.com/reports/2021-crypto-crime-report-intro-ransomware-scams-darknet-markets> [<https://perma.cc/N5F7-HQH3>]

<sup>44</sup> *Id.*

institutions amounted to 2-4% of global GDP from 2017 to 2020.<sup>45</sup> Comparing the percentages of illicit crypto activity to the percentage of criminal economic activity in traditional financial institutions illustrates that the amount of illicit crypto activity is not inordinate .

Generally, in traditional financial markets, financial regulations protect consumers from financial risk and fraud.<sup>46</sup> As a matter of policy, regulations in the crypto market may be similarly beneficial. Regulation for the crypto market may help reduce risk for investors, give companies clearer guidelines on how to operate in accordance with the law, and increase consumer protection.<sup>47</sup>

## 2. *Efficiency of Decentralized Transacting and Price Volatility*

Crypto technology facilitates a shift from traditional centralized finance to a global, open digital economy of decentralized finance to effectuate more efficient and transparent transacting.<sup>48</sup> Although crypto technology allows transactions to be executed more efficiently, there are disadvantages to be weighed. In traditional currency transactions there are intermediaries such as banks, custodial services, companies, or transfer agents.<sup>49</sup> Decentralized finance shifts the power and control from these middlemen and gatekeepers to everyday people via peer-to-peer exchanges.<sup>50</sup> Essentially, there is no need for middlemen or gatekeepers to manage the system because crypto transactions are autonomously governed by the blockchain; information is verified and recorded automatically through this technology when parties transact.<sup>51</sup> These intermediaries delay transactions and often result in significant fees/costs charged to users.<sup>52</sup> Since crypto operates without intermediaries, it saves the user both time and fees in transactions.<sup>53</sup> For

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<sup>45</sup> Morell, *supra* note 41, at 4.

<sup>46</sup> Kimberly Amadeo, *Financial Regulations Do Regulations Keep Your Money Safer?*, *THE BALANCE* (Apr. 30, 2021), <https://www.thebalance.com/financial-regulations-3306234> [<https://perma.cc/KGQ7-K7QQ>]

<sup>47</sup> *Id.* (finding financial regulations protect consumers from financial fraud).

<sup>48</sup> Market Basics, *supra* note 16.

<sup>49</sup> *How Blockchain Could Disrupt Banking*, CBINSIGHTS (Feb.11, 2021), <https://www.cbinsights.com/research/blockchain-disrupting-banking/> [<https://perma.cc/77YA-YAKX>]

<sup>50</sup> Napoletano, *supra* note 10.

<sup>51</sup> *Id.*

<sup>52</sup> *How Blockchain Could Disrupt Banking*, *supra* note 48.

<sup>53</sup> Market Basics, *supra* note 16.

example, a user can lend money directly to others rather than going through a bank or other third party; they can also avoid fees, interest rates, and processing time, and pocket the profit that would have gone to the intermediary.<sup>54</sup> The downside to this efficiency is an increased difficulty in recovering crypto when a user is subject to online theft, or if the user forgets or loses their unrecoverable passwords.<sup>55</sup> Also, because crypto is not currently backed by a government, asset protection insurance is usually unavailable.<sup>56</sup> Government regulation for asset protection and insurance in the crypto space could significantly reduce the financial risk for consumers investing in crypto. Supporters of decentralized finance believe that the blockchain technology makes financial transactions more secure and transparent than the private, traditional centralized finance systems.<sup>57</sup>

Critics of decentralization argue that cryptos are too volatile due to the lack of backing and centralization of a government.<sup>58</sup> Although traditional fiat money slowly changes in value over time, it is generally much more stable on a day-to-day basis than crypto value, which rises and falls regularly.<sup>59</sup> Extreme price volatility is a major ongoing issue that the crypto market faces.<sup>60</sup> Crypto price volatility has been historically so severe that it negatively impacts an investor's selling and purchasing power.<sup>61</sup> The lack of stability of crypto poses a serious issue because it causes buyers and sellers to lack confidence in projecting the value of their investments over time.<sup>62</sup>

Stablecoins have been developed to address the volatility issue. Stablecoins are a type of crypto that maintain a stable value because they are backed by an outside asset, such as the U.S. dollar or gold.<sup>63</sup> However, stablecoins seem to be a band-aid solution to the volatility issue of the non-stablecoin crypto market at large. Traditionally, users convert their non-stablecoin digital assets into a stablecoin when the

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<sup>54</sup> Napoletano, *supra* note 10.

<sup>55</sup> Market Basics, *supra* note 16.

<sup>56</sup> *Id.*

<sup>57</sup> Napoletano, *supra* note 10.

<sup>58</sup> *Id.*

<sup>59</sup> Alyssa Hertig, *What Is a Stablecoin?*, COINDESK (Dec. 29, 2020), <https://www.coindesk.com/learn/what-is-a-stablecoin/> [<https://perma.cc/6PC3-NTDV>].

<sup>60</sup> Market Basics, *supra* note 16.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Hertig, *supra* note 58.

non-stablecoin digital assets are displaying volatility.<sup>64</sup> Although converting digital assets into a more stable coin when the market is volatile helps users maintain profits, it does not seem to be a solution for creating long-term stability in the crypto market.<sup>65</sup> Comprehensive government regulation could be a solution to minimize volatility in a decentralized market. Generally, the absence of regulation in free markets poses a risk for consumers to significantly bid up prices of stock, or in this case crypto value, which can create market bubbles that eventually “burst,” causing prices to tank; this can lead to financial crisis.<sup>66</sup> In the long term, regulation will likely stabilize the crypto market, prevent risks for market bubbles, and ultimately make crypto a safer investment.<sup>67</sup>

### C. Federal Action Regulating Cryptocurrency and Obstacles to Overcome

There is not a clear and cohesive approach to regulating blockchain technology.<sup>68</sup> Lawmakers are having trouble categorizing crypto in our current regulatory environment.<sup>69</sup> Regulating crypto stirs significant debate over whether crypto should be considered a property, commodity, or security under the law.<sup>70</sup> This lack of legal framework is not benefitting potential investors, and it is also making it difficult for crypto innovators to conduct business.<sup>71</sup> Many have pushed for federal lawmakers to enact clear legislation defining crypto, and to provide guidance regarding how to comply with existing laws.<sup>72</sup>

Since there is no universal definition of crypto, there is tension regarding how to categorize this technology into an asset class.<sup>73</sup> Federal regulatory agencies such as the SEC and the Commodity Futures Trading Commission (CFTC) have taken few steps to clarify

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<sup>64</sup> *President’s Working Group on Financial Markets Releases Report and Recommendations on Stablecoins*, U.S. DEP. OF THE TREASURY (Nov. 1, 2021), [https://home.treasury.gov/system/files/136/StableCoinReport\\_Nov1\\_508.pdf](https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf)

<sup>65</sup> *Id.*

<sup>66</sup> Kimberly Amadeo, *supra* note 45.

<sup>67</sup> *Id.*

<sup>68</sup> Marcus & Cannuli, *supra* note 29.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Global Legal Insights, *supra* note 42.

the law surrounding crypto, perhaps due to fear of overregulation, which could deter innovation.<sup>74</sup>

The CFTC defines some crypto as commodities; therefore the CFTC would have regulatory authority over this technology.<sup>75</sup> Specifically, in 2021 CFTC commissioner Brian Quintenz stated that “pure commodities, including crypto assets, fall under the jurisdiction of his agency.”<sup>76</sup> The Digital Asset Market Structure and Investor Protection Act was introduced in 2021, which would establish that the SEC “has authority over digital asset securities and the [CFTC has] authority over digital assets.”<sup>77</sup> There are thousands of crypto technologies that vary in their functions, goals, and codes.<sup>78</sup> This wide variance in function may explain why some cryptos are considered securities under SEC authority, while others are assets under CFTC authority.

The SEC has taken its stance on the asset class debate as well, claiming that some crypto are securities that have been sold in unregistered offerings, and therefore fall under the purview of the SEC’s regulatory authority.<sup>79</sup> Determining whether a kind of crypto is a security is very technical and fact specific.<sup>80</sup> If a crypto is a security, then it will be subject to SEC reporting and disclosure rules.<sup>81</sup> The SEC sued crypto company Ripple in the U.S. District Court for the Southern District of New York, alleging that the company should have registered

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

<sup>75</sup> Kevin Helms, *SEC Has No Authority Over Pure Commodities Like Crypto Assets, Says CFTC Commissioner*, BITCOIN, (Aug. 4, 2021), <https://news.bitcoin.com/sec-no-authority-over-pure-commodities-crypto-assets-cftc-commissioner/> [<https://perma.cc/6VKS-DY69>].

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

<sup>77</sup> Kevin Helms, *US Lawmaker Introduces Legislation to Regulate Crypto Assets and Protect Investors*, BITCOIN (Aug. 2, 2021), <https://news.bitcoin.com/us-lawmaker-legislation-regulate-crypto-assets-protect-investors/> [<https://perma.cc/E4YT-R24E>].

<sup>78</sup> Reutzel, *supra* note 21.

<sup>79</sup> Marcus & Cannuli, *supra* note 29.

<sup>80</sup> David Borsack & Cole Schotz, *Cryptocurrencies and The Securities and Exchange Commission*, JDSUPRA (Aug. 4, 2021), <https://www.jdsupra.com/legalnews/cryptocurrencies-and-the-securities-and-6989064/> [<https://perma.cc/N78U-CUYE>].

<sup>81</sup> Crypto Law Corner, *When Is a Crypto Asset a “Security,” and Why Does That Matter? (Part I)*, WINSTON & STRAWN, LLP (Jan. 17, 2019), <https://www.winston.com/en/crypto-law-corner/when-is-a-crypto-asset-a-security-and-why-does-that-matter-part-i.html> [<https://perma.cc/5H3J-6LWZ>].

XRP, a cryptocurrency that was designed to function as a currency exchange and money transfer system rather than as a payment for goods and services.<sup>82</sup> The SEC claims that Ripple is a security pursuant to the investment contract test articulated in *SEC v. Howey*.<sup>83</sup> Ripple filed a motion to dismiss, claiming that XRP is a medium of exchange similar to the function of cash and not a security.<sup>84</sup> Other types of crypto such as Bitcoin were determined to be commodities and therefore not securities because their blockchain technology acts as a means of exchange.<sup>85</sup> The outcome of the *Ripple* case may provide more guidance as to how the federal government will categorize crypto as an asset class, as well as further establish that crypto functioning as a medium of exchange or store of value will not be under SEC's jurisdiction. The lack of concrete federal regulation has led several states to pass their own laws regarding crypto technology.

#### **D. Wyoming's Cryptocurrency Regulatory Leadership**

Since most federal action regarding crypto has been done at the agency or administrative level, many states have passed laws to promote crypto or to issue warnings about the technology.<sup>86</sup> Some state legislatures, such as Wyoming's, believe that crypto-friendly laws will have positive impacts on the economy by creating revenue, jobs, and capital for the state.<sup>87</sup> Additionally, Wyoming's politicians strongly believe in diversifying the state's economy by attracting advanced emerging technologies because the state's current focus on industries such as coal, oil, and gas may not be the most reliable long-term investments due to a

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<sup>82</sup> See *What Is the Difference Between Bitcoin and XRP?*, LUNO, <https://www.luno.com/learn/en/article/what-is-the-difference-between-bitcoin-and-ripple> (last visited Nov. 20, 2021) [<https://perma.cc/U8Y4-S3H5>]; Keith Lewis, *Ripple case seen as precedent for cryptocurrency regulation*, ROLL CALL (May 4, 2021), <https://www.rollcall.com/2021/05/04/ripple-case-seen-as-precedent-for-cryptocurrency-regulation/> [<https://perma.cc/G7E4-PXMK>]

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

<sup>84</sup> Keith Lewis, *supra* note 81.

<sup>85</sup> *Id.*

<sup>86</sup> *Blockchain & Cryptocurrency Laws and Regulations 2021*, *supra* note 36.

<sup>87</sup> *Wyoming's Pro-Blockchain Laws Tame the Wild West of Crypto*, *supra* note 12.

shift toward renewable resources.<sup>88</sup> It has become fairly easy for the Wyoming legislature to pass crypto-friendly regulations due to the strong support from politicians and government officials.<sup>89</sup> The state of Wyoming is gaining a reputation as “Cryptocurrency’s Wild West” because of its leadership in passing crypto-friendly laws, and because these new laws are attracting many crypto companies to the state.<sup>90</sup>

There are several elements to the groundbreaking crypto-friendly Wyoming legislation. Specifically, the Wyoming crypto legislation provides clear definitions of the technology and divides blockchain based assets into three different categories of personal property assets.<sup>91</sup> Additionally, the legislation establishes an entity formation for blockchain technology known as decentralized autonomous organizations (DAOs), and allows for the chartering of special purpose depository banking institutions, which enable banks to provide blockchain based services to customers.<sup>92</sup>

### 1. *Asset Classifications*

Wyoming is the first state to create new classes of assets for crypto technology.<sup>93</sup> The state enacted this regulation to clarify the legal status of digital assets by dividing digital assets into three different categories—digital consumer assets, digital securities, and virtual currencies.<sup>94</sup> Digital consumer assets have been defined as general intangibles (e.g., utility tokens).<sup>95</sup> Digital securities are defined as

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<sup>88</sup> Chris Matthews, *How Wyoming Became the Promised Land for Bitcoin Investors*, MARKETWATCH (April 24, 2021), <https://www.marketwatch.com/story/how-wyoming-became-the-promised-land-for-bitcoin-investors-11619201182> [https://perma.cc/LFG2-TVF3]

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

<sup>90</sup> Maria Aspan, *How Caitlin Long Turned Wyoming into Crypto Country*, FORTUNE (July 29, 2021), <https://fortune.com/2021/07/29/caitlin-long-wyoming-crypto/> [https://perma.cc/59HB-SQE5].

<sup>91</sup> *Wyoming’s Pro-Blockchain Laws Tame the Wild West of Crypto*, *supra* note 12.

<sup>92</sup> *Id.*

<sup>93</sup> Caitlin Long, *What do Wyoming’s 13 New Blockchain Laws Mean?*, FORBES (Mar. 4, 2019), <https://www.forbes.com/sites/caitlinlong/2019/03/04/what-do-wyomings-new-blockchain-laws-mean/?sh=385f42045fde> [https://perma.cc/DR79-P2UV]

<sup>94</sup> *Wyoming’s Pro-Blockchain Laws Tame the Wild West of Crypto*, *supra* note 12.

<sup>95</sup> 2019 Bill Text WY S.B. 125

intangible securities and investment property, excluding digital consumer assets and virtual currency (e.g., investment contracts which are securities under the SEC).<sup>96</sup> Virtual currencies are used as a medium of exchange or store of value, functioning as money, but have not been previously recognized by the government as legal tender (e.g., Bitcoin, Ether, and other altcoins).<sup>97</sup> Put more simply, digital securities are essentially a digital tradable stock investment, while virtual currencies are essentially money.<sup>98</sup> Digital consumer assets are not considered money and are not investment contracts or securities; rather, these assets are for consumptive purposes, and are only exchangeable for “goods, services or content, including rights of access to goods, services or content.”<sup>99</sup>

The Wyoming statute establishes that these digital classifications are within the well-established law of the Uniform Commercial Code (UCC).<sup>100</sup> Additionally, all three asset classes are considered personal property, as opposed to private property.<sup>101</sup> All Wyoming laws authorizing and protecting transfers of personal property therefore apply to these digital assets, increasing consumer protection.<sup>102</sup>

## 2. DAOs

A decentralized autonomous organization is an organization managed by smart contracts encoded on a computer program, as opposed to the traditional hierarchical management structures and actors

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

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

<sup>98</sup> *Token Classes Explained: Coin vs. Utility Token vs. Security Token*, INVAO GROUP, <https://invao.org/token-classes-explained-coin-vs-utility-token-vs-security-token/> (last visited Nov. 20, 2021). [<https://perma.cc/M486-E7KN>].

<sup>99</sup> Matthew Kohen & Carlton Fields, *State Regulations on Virtual Currency and Blockchain Technologies*, JDSUPRA (April 19, 2021), <https://www.jdsupra.com/legalnews/state-regulations-on-virtual-currency-2160466/> [<https://perma.cc/M5A2-QXR2>].

<sup>100</sup> *Wyoming’s Pro-Blockchain Laws Tame the Wild West of Crypto*, *supra* note 12.

<sup>101</sup> Landon Manning, *Wyoming Passes New Friendly Regulations for Crypto Assets*, BITCOIN MAGAZINE (Feb. 15, 2019), <https://bitcoinmagazine.com/business/wyoming-passes-new-friendly-regulations-crypto-assets> [<https://perma.cc/2UMD-NQ9T>]

<sup>102</sup> *Id.*

such as boards, officers, and executives.<sup>103</sup> Smart contracts are essentially rules encoded on the blockchain that help automate organizational governance.<sup>104</sup> The code of the blockchain acts as a means of collective management for users, and therefore DAOs do not have central leadership because of their operating structures.<sup>105</sup>

The legal status of DAOs is unclear in most jurisdictions.<sup>106</sup> Wyoming's bill clarified how to treat these organizations by categorizing them pursuant to the Wyoming Limited Liability Company Act, so they can have the legal status of limited liability companies.<sup>107</sup> The statute specifies that a DAO is a type of limited liability company that is given the unique option to file as algorithmically managed through the execution of smart contract technology on the blockchain, or the traditional option of filing as member managed within the articles of organization.<sup>108</sup> Additionally, a DAO must include "a publicly available identifier of any smart contract directly used to manage, facilitate or operate the DAO" in order to update the articles of organization if needed.<sup>109</sup> Giving legal status to DAOs helps to clarify the legal rights of these organizations, thereby helping these organizations to exist and innovate.<sup>110</sup>

### 3. *Charter Banks for Blockchain-Based Business*

In 2019, Wyoming became the first state to create a "charter for banks that deal mainly in digital assets called a special purpose depository institution [("SPDI")].<sup>111</sup> The law was created to remedy

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<sup>103</sup> Lin Pang & Guy E. Flynn, *Wyoming Takes a Step Ahead to Clarify the Legal Status of Decentralized Autonomous Organizations*, DLA PIPER (Mar. 17, 2021),

<https://www.dlapiper.com/en/us/insights/publications/2021/03/wyoming-takes-a-step-ahead-to-clarify-the-legal-status-of-decentralized-autonomous-organizations/> [<https://perma.cc/2UMD-NQ9T>].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Wyo. Stat. § 17-31-104 (2021).

<sup>109</sup> Pang & Flynn, *supra* note 102.

<sup>110</sup> *Id.*

<sup>111</sup> Chon, *supra* note 13.

banking issues that crypto blockchain businesses face.<sup>112</sup> SPDI is essentially a new kind of banking category because their model allows for both traditional banking aspects and crypto.<sup>113</sup> SPDI is a type of centralized crypto exchange because they act as a third party to a buyer and seller.<sup>114</sup> Centralized crypto exchanges are the most common types of exchanges for crypto because they generally provide a user-friendly platform, security and reliability for users, and they usually facilitate the conversions of crypto into fiat currency or vice versa.<sup>115</sup> Kraken became the first SPDI in the United States when the company received a Wyoming SPDI banking charter in September of 2020.<sup>116</sup> Another company called Avanti followed suit shortly after Kraken and chartered as a Wyoming SPDI in October of 2020.<sup>117</sup>

SPDI offers traditional banking activities, such as making cash deposits, as well as partaking in crypto banking.<sup>118</sup> The crypto side of the SPDI banking allows customers to store or transfer digital assets generally, such as digital securities and digital consumer assets, as well as virtual currencies.<sup>119</sup> The structure and function of an SPDI is said to resemble custody banking models because like custody banks, SPDI will engage in custody, safekeeping, and asset servicing activities.<sup>120</sup> The Wyoming digital assets law explicitly authorizes banks to provide custodial services for digital assets and outlines the procedures for such

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<sup>112</sup> Jimmy Aki, *Wyoming Passes Bill to Secure Banking Relations for Blockchain Companies*, BITCOIN MAGAZINE (Dec. 3, 2018), <https://bitcoinmagazine.com/culture/wyoming-passes-bill-secure-banking-relations-blockchain-companies> [<https://perma.cc/5ALM-4NVA>]

<sup>113</sup> *Id.*

<sup>114</sup> Kanan, Arora, *Centralized and Decentralized Exchanges*, ANALYTIC STEPS (Aug. 6, 2021), <https://www.analyticssteps.com/blogs/centralized-and-decentralized-cryptocurrency-exchanges> [<https://perma.cc/Y9YJ-QKLZ>]

<sup>115</sup> *Id.*

<sup>116</sup> Martin Young, *Wyoming Legally Recognizes First DAO in the United States*, COINTELEGRAPH (July 5, 2021) <https://cointelegraph.com/news/wyoming-legally-recognizes-first-dao-in-the-united-states> [<https://perma.cc/87PU-NKKG>].

<sup>117</sup> *Id.*

<sup>118</sup> Chon, *supra* note 13.

<sup>119</sup> *Special Purpose Depository Institutions*, WYO. DIV. OF BANKING, <https://wyomingbankingdivision.wyo.gov/banks-and-trust-companies/special-purpose-depository-institutions> (last visited Nov. 20, 2021). [<https://perma.cc/W6VR-BQFU>]

<sup>120</sup> *Id.*

services.<sup>121</sup> Custodial services are defined as “the safekeeping and management of customer currency and digital assets through the exercise of fiduciary and trust powers as a custodian, including fund administration and the execution of customer instructions.”<sup>122</sup> Digital assets have been traditionally difficult to acquire for investors, but Wyoming’s authorization of digital qualified custodian services helps consumers attain diversified portfolios with both digital and traditional assets more easily.<sup>123</sup> This custodial service law also clarifies that investment consultants must keep their clients’ assets with a qualified custodian.<sup>124</sup>

Additionally, any profits made from the storing of these cryptos can be deposited into the bank and converted into U.S. dollars.<sup>125</sup> Other means of converting crypto to U.S. currency may be cumbersome and include fees, whereas this hybrid U.S. dollar and crypto banking system allows users to more easily convert crypto into dollars by avoiding third party conversion fees.<sup>126</sup> SPDIs also give these banks the right to possess the unique code that allows bitcoin and crypto owners to access their digital assets.<sup>127</sup> Banks possessing this access code may help recover digital assets in the event of online theft, or if the user forgets or loses their passwords.<sup>128</sup> The new legislation in Wyoming gives investors and consultants a clearer legal framework in which they can engage lawfully in acquiring and safekeeping digital assets, digital securities, and virtual currencies.<sup>129</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Wyoming’s Pro-Blockchain Laws Tame the Wild West of Crypto*, *supra* note 14.

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

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Market Basics, *supra* note 16.

<sup>129</sup> *Id.*

### E. Conclusion

Crypto financial technology may be the future of transacting; however, as discussed there are regulatory and logistical obstacles to overcome before widespread adoption and usage will be achieved. Many state and federal lawmakers are looking to enact clear legislation defining crypto under the law and provide guidance regarding how to comply with existing laws.<sup>130</sup>

While financial regulators like the SEC and CFTC have tried to classify crypto, Wyoming's new crypto legislation further clarifies how crypto companies and investors can operate without fear of violating the law.<sup>131</sup> Wyoming's crypto-friendly legislation likely provides more consumer protection and investment security, as well as an easier means of acquiring digital assets. Increased consumer protection and fewer barriers to investing in digital assets will certainly encourage more individuals to partake in digital asset investing.

Generally, there is a positive response from crypto businesses, as many crypto businesses have since come to Wyoming to operate under this newly passed crypto-friendly legislation.<sup>132</sup> Some well-known companies that have registered within the state include Coinbase, Ripple, and Kraken.<sup>133</sup>

Wyoming's leadership may have prompted other states to follow in its legislative footsteps.<sup>134</sup> Other states may be attracted by the crypto industry's potential to create jobs and capital for the state; they also may wish to stay on pace with the emergence of this innovative technology.<sup>135</sup> Regardless of what influences a state to contemplate crypto legislation, many states will consider adopting such legislation in 2021 and 2022, according to the National Conference of State Legislators.<sup>136</sup>

When crypto companies have a better understanding of their legal status due to a clear regulatory framework, it will likely decrease

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<sup>130</sup> Marcus & Cannuli, *supra* note 29.

<sup>131</sup> *Id.*

<sup>132</sup> Barber, *supra* note 11.

<sup>133</sup> *Id.*

<sup>134</sup> Kristin Alford, *Wyoming House Bill Further Defines a Digital Asset*, NCS (April 26, 2021), <https://www.ncscredit.com/education-center/blog/wyoming-house-bill-further-defines-a-digital-asset/> [<https://perma.cc/ZJ8B-APWZ>]

<sup>135</sup> *Wyoming's Pro-Blockchain Laws Tame the Wild West of Crypto*, *supra* note 14.

<sup>136</sup> Kristin Alford, *supra* note 133.

operational risk and uncertainty. Less risk will not only incentivize consumers to invest and engage with crypto technology, but also encourage crypto companies to continue operating and innovating toward the future of digital asset technology.

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