
THE CRYPTO EXCHANGE: CRYPTO ENFORCEMENT ACTIONS
RECORDED 5/23/23**Ethan Ostroff:**

Welcome to another episode of *The Crypto Exchange*, a Troutman Pepper podcast focusing on the world of digital assets and payments. As longtime leaders in the intersecting worlds of law, business and government regulations, our lawyers can go beyond the buzzwords and headlines to make sense to the emerging legal and regulatory frameworks for operating in the digital asset and payments industries. I'm Ethan Ostroff, one of the hosts of the podcast and a partner at Troutman Pepper. Before we jump into today's episode, let me remind you to visit and subscribe to our blog, consumerfinancialserviceslawmonitor.com. And don't forget to check out our other podcast on troutman.com/podcast.

We have episodes that focus on trends that drive enforcement activity, consumer financial services to Fair Credit Reporting Act and more. Make sure to subscribe to hear the latest episodes. Today I'm thrilled to be joined by my partner Mike Lowe, to discuss crypto enforcement actions, particularly criminal enforcement actions. Prior to joining Troutman Pepper, Mike spent almost 25 years as a federal prosecutor. Mike, I'm looking forward to the discussion today and really appreciate you taking the time to talk about these relevant issues to our audience. I thought we'd talk particularly about criminal enforcement actions and your background as a federal prosecutor for almost 25 years. Interested to learn more about the investigations and prosecutions of cases you were involved with during your career that touched on or involved crypto.

Michael Lowe:

Ethan, first off, thanks for having me on the program. I really appreciate it. I was a prosecutor in Los Angeles at the US Attorney's Office from 1998 to 2011, and during that time I didn't see anything having to do with crypto. I mean, crypto wasn't even something that the federal government was really looking at during any of that phase, and obviously for most of that period of time it didn't even really exist. When I moved to the US Attorney's office in Philadelphia in 2011, that's when I started to see, I think it was around probably 2015 or so that I started to see crypto creeping into some of the fraud cases I prosecuted in different ways. And I think by 2018, if I did a fraud case or a fraud investigation, crypto was usually involved in some way, shape or form, whether it was the fraudsters pretending that they were going to invest client money into crypto or whether it was utilizing crypto as a means of laundering the proceeds.

But what I saw often was what would've been previously prosecuted as securities fraud, essentially investment advisor type people, whether they were legit investment advisors or not holding themselves out to their clients and promising large returns, which is a sort of a standard fraud scheme. But starting in around 2015, it started to be that the investments that were promised were crypto investments. And I think part of the reason for that is a lot of people don't really know or understand crypto, and so the promise of big returns has more of an allure when you couch it as it's an investment in crypto. Are you familiar with the term spoofing in the securities fraud context?

Ethan Ostroff:

I'm not. Would be interested to hear you describe it to our listeners.

Michael Lowe:

Sure. Well, spoofing historically was a type of fraud where it was essentially a market manipulation where a couple of people or maybe even just one person would engage in placing large buy or sell orders for a particular, let's say, a security and then canceling those orders after a price movement had been achieved. And the way markets typically react is if there's a show of demand because there's a lot of buy orders that are suddenly hitting the sheets, then the price will go up. So, with the crypto industry early on, the exchanges were not maintaining records of canceled buy and sell orders. So, there was a lot of ability to manipulate the markets by simply putting in really large, let's say buy orders or really large sell orders depending upon what you were trying to accomplish.

And so, I was involved in the prosecution that that was a major mechanism of moving crypto pricing on an exchange was to spoof the prices and then cancel the orders. In addition to that, I remember there was one case I did, I was investigating a fraud case and while I was investigating that fraud case, the target of my investigation got kidnapped and held for ransom, and the kidnappers demanded payment in guess what? Crypto. So, what you started to see as crypto developed, it began to be used in so many different ways, whether it was to perpetrate a fraud or to induce others to engage in investments that turned out to be fraudulent.

Ethan Ostroff:

Very interesting. So perhaps you might talk a little bit about the Department of Justice's history involving crypto enforcement.

Michael Lowe:

Really, I think when DOJ started getting into the crypto enforcement space full force was in about 2018, and I was and in USA in Philadelphia at the time, and I remember AG Sessions came to visit our office and he created this... It was actually called, I think the Cyber Digital Task Force, and that task force ultimately issued a report later that year that among other things, identified the development and use of cryptocurrency by, quote, 'malicious cyber actors,' close quotes, as one of the emerging threats that DOJ saw on the horizon. To me, that was kind of the starting point where DOJ really began looking hard at crypto in various ways in the criminal justice system. And then later under AG Barr, that same task force issued another report in October of 2020 that identified three really broad categories of crimes that involve crypto.

And I think I talked about these a little bit. One of them was financial transactions that were associated in some way, shape or form with the commission of a crime, kind of like the kidnapping I mentioned, where crypto was the asset that the ransom was demanded. Same idea if you're engaging in drug transactions and you want crypto as payment, or what we start to see a lot of nowadays is ransomware attacks, which I think a lot of companies are familiar with. And oftentimes the hackers will demand payment in crypto. The second category that the task force identified was money laundering, which just like any other asset, if you're taking fraud proceeds or the proceeds of specified unlawful activity, it doesn't have to be fraud, and you are using it to conceal or disguise the fact that these are fraud proceeds or drug proceeds or whatever the case may be, and you buy crypto with it, that's another area of focus for DOJ.

And then the first stuff I talked about, the first type of crimes, which are basically fraud that directly implicates the crypto market itself, such as what I mentioned, promising investors you'll invest their money in crypto, but instead you keep the money, and you spend it on yourself. And that also includes stealing crypto, basically getting access to someone's wallet maybe because

you were able to exploit vulnerabilities in the wallet or in an exchange. So those are the three types of crimes that DOJ identified in the October 2020 report. One thing I'll add, Ethan, is like anything else of value, cryptocurrency often finds itself at the center of criminal investigations or prosecutions

Ethan Ostroff:

Bringing that forward. I believe it was in September of 2022 that you had the DOJ announced the release of a pretty large report about the role of law enforcement in detecting, investigating and prosecuting criminal activity related to digital assets issued in response to President Biden's March of 2022 executive order, as well as the establishment of a digital asset coordinator network. My understanding is it's essentially a nationwide group of prosecutors designated as legal and technical experts in digital asset cases. Would you be able to shed some light for our listeners about how a network that's established within the DOJ might operate or function in the digital asset space and some things people in the space might want to be thinking about, considering the creation of that type of network?

Michael Lowe:

What I've seen in my career is that it's common that when a type of crime becomes prevalent, DOJ will react by creating whether an official task force, an unofficial task force, a working group, and they'll seek participation from different US attorney's offices around the country. So, I remember when this task force was basically getting created, it was under the Biden administration, it was before I left the US Attorney's office, and they were looking for people who were willing to join. I had some background in crypto. So, typically what they do is they look for people who prosecuted cases like this before or who have a technical background or who are just interested in being part of that and getting in on the ground floor. So once that gets formed, then there's usually coordination meetings and the development of a strategy to bring back to the US Attorney's offices around the country to sort of target and focus resources.

Because the reality as I'm sure you know is that the federal government, while it seems omnipotent in many respects, the prosecutorial resources are limited. The government will try to go after cases or individuals and make cases where they feel they can really make a difference. One of the things that you'll find as you see the sort of evolution of crypto enforcement from the criminal side is that most of what is going to be charged is going to be wire fraud. I mean, that's just the reality of it. It's sort of the go by statute. If you're a fraud prosecutor, there's almost never a good reason to go beyond the wire fraud or mail fraud statute if you have a mailing to incorporate something like securities fraud. And I say that in the crypto context, or in the fraud context in general because when you strip out whatever the asset is, whatever the sort of ultimate object of the fraud, there's one truism.

Fraud is fraud, and the wire fraud statute is so, so broad that it's often all a prosecutor needs to go after criminal conduct that involves fraud. For example, cryptocurrency, I'm sure a lot of your listeners, and obviously you are familiar with the whole issue of whether or not cryptocurrency is a security or is it a commodity? I mean, there's academic debates about it. There's sort of a battle between the SEC and the CFTC. Some crypto has already been deemed to be securities. Some crypto like Bitcoin is already classified as a commodity, but that debate is largely irrelevant to federal prosecutors because they don't need to charge a crypto fraud as a securities fraud or as a commodities fraud. They can just charge it as a wire fraud because every fraud that's going to involve crypto is going to almost without fail involve the use of some kind of an interstate wire.

And wires are, they could be an email, it could be a financial transaction where you're wiring money, it could be a phone call. So, you really nowadays can't perpetuate any kind of fraud without using wires. If you're a prosecutor, why would you get involved in charging something as a securities fraud and then providing the defense an opportunity to challenge the designation of the crypto at issue as a security? Because that would be the first line of defense, right? If you're a defense attorney, for example, if one of my clients gets charged with securities fraud involving crypto, I'm going to argue that this is not a security. DOJ generally avoids that whole problem by just charging it as wire fraud.

Ethan Ostroff:

And of course, the use of the mail is reduced so significantly, right? You now rarely see actual mail fraud charged. Is that right?

Michael Lowe:

Yeah, I could say that I charged mail fraud as a federal prosecutor, but it became less and less common. And the mail fraud usually would be when you had an investment advisor fraud type situation where they were actually mailing false statements to the victims to show them, oh, look, here's how much money you have in your account. And most frauds nowadays won't bother putting stuff like that in the mail. They'll email it or they'll provide access to like a web portal.

Ethan Ostroff:

Sure, sure. Makes sense. Let me ask you this. I guess some of the interesting things that I've noted recently is an increase in international cooperation. And the DOJ making public statements, I think in July, I believe of 2022 when they issued a report recommending increased cooperation amongst international law enforcement agencies to deal with these issues. And as part of that, since then we've seen, I believe it was November 22, a \$3 billion seizure in a dark web fraud case involving the Silk Road dark web marketplace. And then more recently in March of 2023, the DOJ, along with Europol and German police shut down a dark web cryptocurrency mixer called ChipMixer. Is that something that you foresee will increase as well as these international cross border activity amongst the DOJ and their counterparts across the world?

Michael Lowe:

Oh, a hundred percent. One of the things that I saw as a prosecutor was it was often difficult to get foreign governments to cooperate with us in investigations if the government at issue didn't feel they had an interest in doing so. It really would come down to what type of crime we are talking about, who were the perpetrators, and what country is it. Is this a country that is a haven for this type of criminal conduct or is it one of our partners that would generally be speaking, and upholding law and order? When you're talking about fraud of the nature you just mentioned, every country that sort of follows the rule of law has a strong interest in preventing that type of conduct and in shutting it down. And there's also a lot of money at stake, and one of the things that drives cooperation in these cases is the ability to share for these countries who are making seizures, let's say, to share in the spoils, so to speak.

And I don't mean to suggest that there's anything nefarious about it, but if you follow the forfeiture laws that govern the different countries that are involved in these type of enforcement actions, every one of them is going to have some ability to forfeit funds that were obtained via

fraud. And so, with the explosion in crypto, with the explosion in crypto fraud, with the dark web, I've seen both an informal cooperation increases and a formal cooperation increase. And I don't know if you're familiar with the differences, but to really get formal cooperation between foreign governments like the United States and another government, there's a lot that's involved, and a lot of it is paperwork. I mean, we have treaties with many of these countries. They're referred to as mutual legal assistance treaties. And so, if we want to get records that we could use in a criminal prosecution, I can't just send one of my FBI agents when I was a prosecutor, I couldn't just say - hey, go over to Germany and ask them for some records.

The government would have to make a formal request to Germany through a special office in DOJ called the Office of International Affairs. And it takes a long time. Everything has to get translated into the language of the host country that you're seeking the records from. And so, because of that, there's also this network of informal cooperation that arose between the agents that are stationed there. So, for example, the FBI has legal attachés in most of our allied countries in Europe, or they'll have one in a country that covers multiple countries. And so those legal attachés have staff who are typically, if it's an FBI legal attaché, they'll have FBI agents working there and they develop relationships with local law enforcement in that country.

And so, there is an informal cooperation network, especially when you need to get something done quickly, then agent to agent can talk and then that country can take it up through its chain. And so, I think that's why you see so much more quick reaction in the crypto seizure space is because these other countries realize there's a need to act fast and they can do things on their end, and we can do things on our end and just coordinate it informally together.

Ethan Ostroff:

Very interesting. Given all of your experience both as a prosecutor and now on the defense side, is there a particular type of fraud case relating to crypto that the DOJ seems to be prosecuting more than others?

Michael Lowe:

Well, I would say, pretty consistent, with what I said earlier -most of the crypto fraud you'll see prosecuted is really Ponzi scheme fraud. If you strip out crypto as the asset, if you want to call it that, was at the heart of the fraud, almost everything is going to be a Ponzi fraud. Even if you look at what the most high-profile crypto fraud case right now is the Bankman-Fried prosecution out of the Southern District of New York. I mean, I think everybody's familiar with that. If you take a look at not just the charging document, the indictment, but also go behind it and look at the SEC complaint, you could really get a sense for what the case is all about. And at its heart, it's a Ponzi scheme. The government effectively is alleging both through the DOJ and the SEC that Bankman-Fried was running a Ponzi scheme where he was inducing investors to put money in. He was taking the money out to do with it as he pleased, and then in order to keep the whole scheme going, he needed more money coming in.

One of the things that's really interesting about that case is that it does charge securities fraud. And so, at first glance, you might think that the government was alleging that the crypto or any sort of crypto was a security, but if you really look at the SEC complaint, the securities fraud is really, at least from what I can read, it's the securities in FTX. Bankman-Fried was inducing investors to buy shares in his company, and he did that without telling them that he was going to be taking money out of the company and transferring it into his hedge fund Alameda, and then using that to make his own investments. So it was really just a classic securities fraud case where investors are not being told that their money is really going into a Ponzi scheme, which

was interesting because until I really look closely at this, my first thought was, oh, the SEC must really be pushing DOJ to characterize crypto as a security, but in fact, it doesn't look like that's what happened here at all.

Ethan Ostroff:

Well, that's very interesting. I hadn't heard anyone make that distinction and drill down that far into what that case is about. Fascinating to think about the prosecutors bringing this back to more traditional theories under sort of traditional criminal law as opposed to trying to push the boundaries of what qualifies as a security and what does not.

Michael Lowe:

Well, I could tell you, Ethan, that from my own personal experience dealing with the SEC, if they're involved in a crypto fraud investigation and they, in order to get their jurisdiction need the crypto to be deemed a security, they will push the US Attorney's office to try to get the US Attorney's office to charge securities fraud. There's two ways that gets resolved. If it's going to be a negotiated guilty plea and global resolution where the target is willing to plead guilty to criminal charges and resolve the SEC civil investigation, then those are usually the cases where you'll see the criminal charging document call it a security, and maybe even charge securities fraud.

Because at that point, there's not going to be litigation on whether or not it's a security. But if you're talking about a straight indictment where the charges are going to be fought, then the prosecutor in my experience is much more likely to say, I'm not charging this as securities fraud. I understand you, SEC, you want this to be a securities fraud and you go ahead and charge this to securities fraud, but there's no reason for you, me, Mr. Prosecutor here to get involved in that legal battle. So that's why I think you'll see in contested cases, most of it just charges wire fraud.

Ethan Ostroff:

Very interesting. I take it, this comes up a lot in this situation where you have a concurrent civil criminal scenario, and that seems to be pretty typical in this space as well.

Michael Lowe:

Yeah, that is very typical. One of the most common ways that DOJ gets these cases brought to their attention is from the SEC. So, the SEC starts a civil investigation, thinks that it's a pretty strong case that there is criminal liability, and then they make a referral to DOJ, usually to the relevant US attorney's office for whatever jurisdiction. But there are certain jurisdictions that are way more likely to bring crypto prosecutions. And one of them, I think, as everyone would suspect, it's the Southern District of New York. I mean, that's the heart of the financial market. It's the heart of the banking system in this country. They, generally speaking, can have venue on a wire fraud case, and if there's a sizable dollar amount, then SDNY will often be the first place that SEC tries to shop the case.

When I was a federal prosecutor in Philadelphia, we worked hard to establish a good relationship with the SEC in Philadelphia and let them know that this was another venue for them to bring cases, particularly if we could establish venue in EDPA. And I think as a result of that, we saw more securities fraud prosecutions out of Philadelphia in the last few years than we had for many years before. But I think typically where you'll find most of these cases coming from are the Southern district of New York, the Eastern District of New York, my old office in Los

Angeles, the central district of California, and then also Florida. And if you'd like, I could talk about some of the recent cases that have been brought in some of those jurisdictions.

Ethan Ostroff:

Yeah, I think that'd be great to hear a little bit about what these different jurisdictions are doing and the types of cases they're bringing.

Michael Lowe:

Well, besides the Bankman-Fried case, Southern District of New York also charged the case in August of 2020, and it just recently resolved by way of a guilty plea in March of this year. And that was against an individual named Dos Santos. And that was your standard, an individual who's holding himself out as an investment advisor, inducing customers to invest by promising high daily returns on crypto mining and trading. But in reality, there was no mining and trading, there was just somebody taking client money and spending it on himself. Another case out of Southern District of New York was the Carmona case. That's pretty recent. That was in October of '22. Same kind of conduct though, defendants are alleged to have sold packages, what they called packages of crypto that they claim to be trading as well as what they called leases on mining machines. But the DOJ alleged that there was actually no trading and no mining.

Another case out of Southern District of New York is the Chastain case, which was in May of '22, and that one's actually a little different. That was an insider trading case, and I believe it may have been the first insider trading case involving a crypto exchange or a crypto marketplace. In that case, the defendant worked for a company that was a marketplace for crypto NFTs. And as a result of his employment, the defendant knew in advance, which NFTs non-fungible tokens would be featured on the website. And so, what he is charged with doing is he went out and bought them himself before they were featured, so that once they got featured, when the price went up, he sold them. The Southern District of New York charged him with insider trading based on that. And that's going to be an interesting case to watch. There's a case out of Brooklyn, Russell, which was the Eastern District of New York, recently filed in April of this year, another investment in fraud case.

Basically, the same kind of case I've been talking about over and over here. It's somebody who held themselves out as an investment advisor or ran an investment company and induced investors to contribute into what was called a cryptocurrency investment fund with a promise of large, such as 25%, guaranteed returns within three months. And that is just literally the standard fraud that you see. It's promise of big returns, give us your money, we'll invest it, and then the investment doesn't happen. So, it's a cryptocurrency fraud, but at the heart it's just a fraud. One more case I'll talk about, there's a case out of my old office in Los Angeles, it's the Saffron case, and that was from June of '22. Now that charges wire fraud and commodities fraud. And the reason I want to talk about this is because as I mentioned earlier, and as you know, Bitcoin basically the first cryptocurrency that hit the market that became big, that everyone knew about, and at the time before the battle lines were drawn between the SEC and the CFTC, the CFTC essentially just said, this is a commodity and it was unchallenged.

And so therefore, ever since then, Bitcoin is a commodity for all intents and purposes. So, what you'll see is that when fraud cases involve Bitcoin in some way, that's when you'll see commodities fraud charged in addition to wire fraud because it's a non-issue, it's not going to be litigated. And often the way that manifests itself is that the fraud proceeds are being used to buy Bitcoin. In the Saffron case, which was another investment fraud case, and the defendant was alleged to have created a crypto trading platform. He said, "Look, I've created this platform, and

if you invest in it, I have this AI trading bot that's going to execute crypto trades and you're going to make large returns." And then in fact, that's not what happened. That's the kind of evolution of crypto prosecutions, and I think it's going to keep heading in the same direction, which is to restate what I've said earlier, you'll rarely see anything other than wire fraud charged in a crypto prosecution.

Ethan Ostroff:

Very interesting. So, switching gears a little bit, another enforcement area that's been in the news recently, the SEC Civil Enforcement Actions, relying upon the anti-touting provisions of the Securities Act. What can you tell us about that recent trend?

Michael Lowe:

Well, I think it's a trend that you will see continue. In fact, I wrote about this and predicted after the Kardashian case that the SEC would continue utilizing that statute, and then we saw that that's exactly what happened. But one thing I want your listeners to be aware of is oftentimes when you read about this stuff in the news, you'll see the headlines, something like the SEC charges, so-and-so with unlawful touting, and just keep in mind that the SEC doesn't actually charge criminal cases, right? The SEC files civil complaints, and so these anti-touting cases are all civil cases. They're not criminal prosecutions. The anti-touting provision is essentially... There's a rule, it's section 17B of the Securities Act of 33, and it basically requires that anyone who is going to tout or push or recommend investment in a security has to disclose if they're being paid, if they're being compensated for doing that.

To date, we've seen a bunch of celebrity anti-touting violation enforcement actions by the SEC, Kim Kardashian, probably the most famous. Floyd Mayweather, DJ Khaled, Steven Seagal back a few years ago, and Paul Pierce all settled section 17B cases. And one thing, if you look at the trend of those settlements is that it seems that the SEC, each time they bring a new one of these, is demanding a larger penalty payment from the target of that enforcement action. For example, Kardashian and Pierce had to not only disgorge the amount of money they were paid to promote these crypto assets, but they also had to agree to pay a fine. That was four times the amount of money they were paid to tout. So, they disgorged the payment, and they paid a four-time fine. And when the SEC first started bringing these anti-touting actions against Floyd Mayweather, they didn't require that kind of a fine.

What that says to me is that the SEC is going to continue to make an example of celebrities who are using social media to promote crypto, and the amount that they're going to extract out of these celebrities to settle the actions is going to continue to grow. But keep in mind that I think it's unlikely you'll see criminal prosecution in this space because even though the anti-touting provision could be prosecuted by DOJ as a criminal charge, it hasn't been. And I think part of the reason for that is because it's the whole issue of is the crypto a security or is it a commodity. For the SEC to enforce the anti-touting provision, it has to be a security, so they bring a civil case. The target of that case is faced with the choice of, okay, I can just settle this, pay some money, and it goes away, and it's not a criminal matter. And so that's what I think you're going to see. I don't expect DOJ to start prosecuting anti-touting cases.

Ethan Ostroff:

Do you think there's any reason to believe that the threat of referral to DOJ for criminal prosecution is what's helping the SEC get increased amounts of money from people as part of settling?

Michael Lowe:

Well, I could speculate. Obviously, having been on the other side of this as a prosecutor, I know the power of the threat of criminal prosecution, and I know how strong a motivator that can be for someone who is looking at resolving a matter. Now, flipping sides in my current role, I also know as a defense attorney that if my client is faced with the ability to resolve a matter through the payment of a fine, and it goes away, particularly when you're talking about celebrities who have a strong incentive to just get this over and done with, get out of the news and avoid criminal prosecution, yes, I would speculate that the potential threat, whether it's stated or an implied threat, the potential that something can turn into a criminal matter is always a strong motivator, and I'm sure that it's in part, driving these large settlements

Ethan Ostroff:

Makes a lot of sense. Mike, this has been really interesting and really appreciate it bringing us full circle here. Do you have any final takeaways for our listeners regarding the enforcement actions we can expect from the DOJ and the SEC going forward?

Michael Lowe:

I do, and in fact, what I think we can expect is that DOJ will continue to increase its resource allocation to crypto oriented crimes. I think that what they will still utilize primarily will be the wire fraud statute. And I think most of the fraud you'll see prosecuted will continue to be Ponzi fraud type schemes because that's really where most of the fraud that involves crypto in some way, shape or form will lie. It will be in a Ponzi type scheme. I also expect that the SEC will continue to get very aggressive. I mean, we know Chairman Gensler has made it clear that crypto enforcement is a priority that he essentially views, to paraphrase, he views every crypto asset as a security.

So, I think there's a top-down push at the SEC to use the securities laws to go after the crypto space as much as possible. And I think the SEC has seen a good return on investment, so to speak, in the anti-touting push. So, I think we'll see more of that. And I think as a byproduct of that, what we'll see is that celebrities will increasingly face civil suits from investors who bought crypto that they touted and saw the crypto drop in price because this is everywhere in the news. And so, I think the more enforcement actions you get, the more corresponding civil actions from private litigants, you're going to see.

Ethan Ostroff:

Very interesting. So as part of this, we can also expect to see an increase in the civil side as well.

Michael Lowe:

Yes.

Ethan Ostroff:

Well, Mike, thank you so much for joining us today. This was really interesting. I certainly learned a lot and appreciate your time. Thank you to our audience for listening to today's episode. Final reminder, don't forget to visit our blog, consumerfinancialserviceslawmonitor.com and subscribe so you get the latest updates. And please make sure to also subscribe to this

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