

Regulations to the Moon! Campaign Finance in the Age of Cryptocurrencies

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On April 18, the Republic of Ireland announced plans to ban contributions made through cryptocurrencies as part of a broader package of campaign finance reforms designed to prevent undue foreign, and especially Russian, influence in Irish elections. The concern that cryptocurrencies might be used to facilitate foreign interference with elections is a new wrinkle that combines two of the hottest topics in campaign finance in recent years, and may herald future developments in the regulation of cryptocurrencies for political contributions. Cryptocurrencies, or digital currencies supported by a decentralized digital ledger (usually using blockchain technology), have been creating regulatory conundrums for over a decade. In the United States, the Federal Election Commission (FEC) has taken a more permissive approach than that espoused by the Irish government, allowing the contribution of blockchain-based, bitcoin-style cryptocurrencies since 2014, while prohibiting the use of cryptocurrencies to pay for campaign expenditures. While neither of the largest online contribution platforms, ActBlue and WinRed, currently accept contributions made via cryptocurrencies, interest in the use of cryptocurrencies to make political contributions has steadily grown as candidates and donors increasingly incorporate cryptocurrencies into their personal financial portfolios and policy platforms. As interest in the use of cryptocurrencies for political contributions has increased, states have begun to fashion their own sets of laws and regulations governing the use of cryptocurrencies in campaign finance. The approaches taken at the state level fall on a spectrum from a total ban on the contribution or use of cryptocurrencies to the explicit approval of contributions made via cryptocurrency.

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Practice Areas

Digital Assets, Cryptocurrencies, and
Blockchain
Election Law & Government Ethics

Regimes that expressly permit contributions via cryptocurrency. Contributions made via cryptocurrency are currently expressly permitted by law or official guidance in at least six states (Arizona, Colorado, Iowa, Ohio, Tennessee, and Washington). Additionally, the FEC has advised that contributions made via cryptocurrency are permissible as an in-kind contribution at the federal level.

The ability to give and receive cryptocurrency as a political contribution necessarily raises questions regarding the valuation of the contribution and the permitted uses of the cryptocurrency by the candidate or political committee once it has been received. Most regulatory regimes that expressly allow the contribution of cryptocurrency treat cryptocurrency as an asset, analogous to a publicly traded stock or commodity. Colorado, Iowa, Ohio, and Tennessee have followed the FEC's approach that the value of a contribution made in cryptocurrency is the cryptocurrency's fair market value at the time the contribution is made. The candidate or committee then reports subsequent increases or decreases in the value of the contributed cryptocurrency as either "other income" or an expenditure. Likewise, in these regimes, while contributions of cryptocurrencies are permitted as an in-kind contribution subject to any applicable contribution limits, the use of cryptocurrencies to pay campaign expenses is prohibited. Candidates and committees must first liquidate the cryptocurrency before using the proceeds to pay for any expenses in traditional U.S. currency.

In contrast to this asset-style approach, Washington and Arizona treat cryptocurrencies as more closely analogous to traditional forms of currency. This shared conceptual grounding has, however, led Washington and Arizona to take very different approaches in their regulation of political contributions made via cryptocurrency. Washington has taken a fairly restrictive approach, providing that contributions made via cryptocurrency should be treated as the equivalent of cash contributions and limited to a cap of \$100. RCW 42.17A.475. Additionally, Washington requires committees receiving a contribution via cryptocurrency to convert the cryptocurrency to traditional U.S. currency within five business days of its receipt. RCW 42.17A.220.

Arizona, on the other hand, has taken a more permissive approach. Arizona's Secretary of State has recognized that "committee[s] may accept an in-kind contribution in the form of cryptocurrency . . . and such contributions are generally subject to the same rules applicable to traditional contributions in U.S. currency" In keeping with this treatment of cryptocurrency as analogous to "traditional" U.S. currency rather than a commodity, Arizona has neither expressly approved nor expressly foreclosed the use of cryptocurrency by political committees to purchase goods or services. "This Secretary of State's Office takes no position on the legality of a committee purchasing goods and services or making expenditures using cryptocurrency."

Regimes that expressly prohibit contributions via cryptocurrency. Contributions made via cryptocurrency are currently expressly prohibited by law or official guidance in four states (California, Michigan, North Carolina, and Oregon). In Michigan and North Carolina, the decision to ban contributions via cryptocurrency was driven not by concerns over foreign influence, but by the notorious volatility of cryptocurrency markets. Regulators in both states pointed to the daily fluctuations in the value of cryptocurrency to prohibit contributions of cryptocurrency because regulators could not ascertain the value of such a contribution with any certainty.

Regimes that neither expressly permit nor expressly prohibit contributions via cryptocurrency. In most states, contributions made via cryptocurrency remain in a gray area – neither expressly permitted nor expressly prohibited by law or official guidance. In Illinois and Georgia, campaigns have been accepting contributions via cryptocurrency despite the lack of express official permission to do so. In Georgia, the executive secretary of the Georgia Government Transparency and Campaign Finance Commission has informally advised that candidates and committees may accept contributions in cryptocurrency if the recipient candidate or committee then immediately converts the cryptocurrency to traditional U.S. currency.

The bottom line. The use of cryptocurrencies to make political contributions creates both risks and opportunities for donors and recipient candidates or committees. Candidates and committees may be able to access a new and growing base of unconventional political donors by moving to accept contributions made via cryptocurrency. Accepting contributions via cryptocurrency can also serve as a kind of ideological or aesthetic signaling to like-minded voters – the campaign finance equivalent of a cool set of shades. The fluctuating value of cryptocurrencies also poses both an opportunity and a risk for candidates and committees. Smaller campaigns or campaigns facing harsh contribution limits may attempt to maximize the value of early contributions by receiving and holding contributions made via cryptocurrencies with the hopes that the cryptocurrency will appreciate in value between the date of the contribution and Election Day. More established campaigns, on the other hand, may prefer the stability of traditional U.S. currency, eschewing the increased compliance work associated with contributions made via cryptocurrency and the risk that the cryptocurrency will depreciate in value before it can be converted to U.S. currency. What is certain is that the use of cryptocurrencies in campaign finance remains a developing and complex regulatory environment. Both prospective donors and candidates or committees should consult with counsel before making or accepting any contributions via cryptocurrency.