

Article Information

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Blockchain Bites: Senate to review 'Bitcoin tax' bill, Tornado Cash prosecution lifts off, SEC sues Wyoming registered DAO, BlockFiles for Chapter 11

Michael Bacina, Steven Pettigrove, Luke Misthos, Jake Huang and Lola Hickey of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

Senate to review 'Bitcoin tax' bill

The Federal Government has introduced into Parliament the [Treasury Laws Amendment \(2022 Measures No. 4\) Bill 2022](#) aimed at, among other things, clarifying the tax treatment of digital currencies and CBDCs.

This latest step follows, Australian Treasurer, Jim Chalmers's [announcement in June](#) that the Labour government planned to introduce new tax legislation into Parliament in response to [El Salvador's decision to recognize Bitcoin as legal tender](#).

Following a [short consultation conducted in September](#), the Government has now introduced the legislation incorporating the proposed changes and the bill has been referred to the Senate Economics Legislation Committee for review. It appears the draft bill itself is largely unchanged from the version that went out for consultation in September.

The proposed amendments are intended to ensure that Bitcoin, which has been recognized as legal tender in El Salvador, continues to be treated as a digital currency (and not foreign currency) under tax legislation. This means that tax payers will not be able to benefit from any preferential tax elections for foreign currency in relation to Bitcoin. Interestingly, the [explanatory memorandum](#) to the bill asserts the need for such a change in circumstances where Bitcoin might now be considered a form of money.

A less well published aspect of the bill is the Government's decision to exclude CBDCs from the definition of digital currencies. As a consequence of this change, CBDCs issued by foreign governments will be considered a form of foreign currency, whereas private digital currencies and stablecoins will not be.

The stated intention of the new bill is to preserve the existing tax treatment of Bitcoin for the 2022 financial year given a potential risk to government revenue. This is underlined by the retrospective nature of the bill.

The Government's decision to move ahead with the 'Bitcoin tax' bill is perhaps precipitous in circumstances where the [Board of Taxation's broader review](#) of the tax treatment of digital assets and transactions remains pending. The Government's narrow policy objective reflects a perception that digital currencies remain a form of speculative investment. It is perhaps a missed opportunity to consider the emerging use and promotion of digital currencies, including stablecoins, as a means of payment in the digital economy.

Tornado Cash prosecution lifts off

The prosecution of Alexey Pertsev, a blockchain developer allegedly involved in the development of the infamous crypto-mixer, [Tornado Cash](#), kicked off last week with a hearing in the Netherlands.

The trial follows Pertsev's arrest in the Netherlands in August, days after the U.S. Department of the Treasury's Office of Foreign Assets Control (**OFAC**) sanctioned Tornado Cash in connection with the alleged laundering of illicit funds by North

Korean hackers.

The sanctioning of Tornado Cash has been highly controversial, sparking [debate](#) over whether Tornado Cash itself was a form of technology or an entity which could properly be the subject of US sanctions. Coin Centre, a US-based industry group, [commenced proceedings](#) in the United States alleging that OFAC had exceeded its authority by sanctioning Tornado Cash and flagging concerns over digital privacy.

In November, OFAC doubled down on its decision by [redesignating](#) Tornado Cash as a person or entity subject to US sanctions and clarifying its previous guidance on how to comply with the sanctions.

The Pertsev hearing [offered](#), for the first time, a clear understanding of the charges against the developer. The prosecution asserts that Tornado Cash was used to place almost 75% of all crime-related cryptocurrency on the Ethereum blockchain, hence violating Dutch law which makes it illegal to conceal or disguise the origin and movement of funds.

The prosecution further alleges that records of internal conversations show Pertsev and two co-developers ran Tornado Cash like a business, discussing management and operational decisions, and that they could outvote other holders of the protocol's [TORN](#) tokens. The prosecution nevertheless conceded that they are still trying to decipher how Tornado Cash's governance works, and to prove that Pertsev profited from funds that passed through the protocol. The prosecution claims to have found large sums of money and cryptocurrency in Pertsev's name in various places around the world and have also alleged that Pertsev couldn't have "afforded his rented house and expensive Porsche" relying on income from his employment at a cybersecurity firm alone.

Pertsev has denied the charges against him and his lawyers appear to be positioning his defence on the basis that Pertsev himself was only a developer and not a party to the concealment of any funds:

It's clear to us that these judges are not as familiar with the subject matter [of how crypto works] as they should be.

The core focus of last week's hearing was whether and how long Pertsev should stay detained with the Dutch Court ordering that he should remain in detention at least until February. The substantive merits of the criminal charges and defenses remains to be considered.

The Pertsev prosecution will continue to attract attention from the DeFi community given that the outcome of the case could have important ramifications for the liability of developers involved in the development of DeFi applications.

SEC sues Wyoming registered DAO

On 18 November the US SEC [announced](#) that it has initiated administrative proceedings against [American CryptoFed DAO LLC](#) (CryptoFed), a Wyoming based decentralised autonomous organisation. The proceedings are to determine whether a stop order should be issued to suspend the registration of the offer and sale of two crypto assets, the Ducat token and the Locke token.

David Hirsch, Chief of the Enforcement Division's Crypto Assets and Cyber Unit, [said](#) that:

An issuer seeking to register the offer and sale of crypto assets as securities transactions must furnish the required disclosure information to the SEC.

The SEC [alleges](#) that on 17 September 2021, [CryptoFed](#) filed a Form S-1 registration statement that did not contain information required about their business, management, and financial condition, such as audited financial statements.

David Hirsch, [noted](#) that:

American CryptoFed not only failed to comply with the disclosure requirements of the federal securities laws, but it also claimed that the securities transactions they seek to register are not in fact securities transactions at all.

[The SEC allege](#), the Form S-1 registration statement contained materially misleading statements and omissions, including inconsistent statements about whether the tokens are in fact securities under US law. The SEC further [alleges](#) that when

examined about their registration statement, [CryptoFed](#) failed to cooperate.

The COO of [CryptoFed](#), Xiaomeng Zhou, [said](#) he rejected the SEC's claims, arguing that:

Section 8(b) of the Securities Act of 1933 only allows the SEC to issue a Refusal Order to provide further clear guidance for American CryptoFed DAO to complete the Form S-1 registration (not Stop Order)... As a result, the SEC abused the Securities Act of 1933 to unlawfully delay, stop and obstruct American CryptoFed DAO's legitimate disclosure through the Form S-1 Registration Statement.

In July 2021, [CryptoFed](#) claimed to be the first ever DAO to be characterised as a legal entity in the US. In [September this year](#), the Commodity Futures Trading Commission (CFTC) sued [OoKi DAO](#) for allegedly offering margined and leveraged trading products without first registering as a futures commission merchant or having any sufficient KYC processes. The CFTC had [previously](#) settled with bZeroX, the DAO's predecessor, and the company's directors.

These proceeding against [CryptoFed](#), is the [first ever action](#) by a regulator against a registered decentralised autonomous organisation registered in Wyoming under their world leading company DAO laws.

BlockFiles for Chapter 11

Embattled cryptocurrency lender BlockFi and eight of its affiliate entities have filed for Chapter 11 bankruptcy protection under the United States Bankruptcy Code. [An announcement](#) made earlier this week details the struggles of the lender and reaffirms its focus is on restructuring to provide value for clients and stakeholders.

The news comes as crypto winter deepens, with extremely volatile market conditions and major companies like [FTX](#), [Celsius](#) and [Three Arrows](#) all suffering collapses in 2022.

BlockFi is now focusing on recovering all obligations owed to it, including from FTX, who brokered a deal with an option to buy BlockFi for USD240 million in July this year. Far removed from any potential deal, BlockFi now expects that any recovery from FTX will be delayed.

In the press release, [posted by Businesswire](#), BlockFi said:

Due to the recent collapse of FTX and its ensuing bankruptcy process, which remains ongoing, the Company [BlockFi] expects that recoveries from FTX will be delayed.

According to a [court filing](#), BlockFi has over 100,000 creditors with between USD1 billion to 10 billion worth of assets and liabilities each. The SEC is listed on the bankruptcy filing as BlockFi's fourth-largest creditor, with \$30 million owed to the agency in relation to a [\\$100 million settlement](#) which BlockFi struck with the regulator last year in relation to its yield offerings.

While platform activities are still paused at the time of writing, BlockFi has USD256.9 million in cash reserves which is expected to provide liquidity to support operations during the restructuring.

There has been no mention of how BlockFi plans to pay its creditors, or how the restructuring of the business will take shape, but the company is filing a series of customary motions to continue the operation of its business, pay employee wages and continue employee benefits without disruption.

BlockFi International Ltd, a company incorporated in Bermuda, has filed a petition with the Supreme Court of Bermuda for the appointment of joint provisional liquidators. Clients' claims will be addressed through the Chapter 11 process.