



COUNSEL TO GREAT COMPANIES

# DC Blockchain Summit 2017

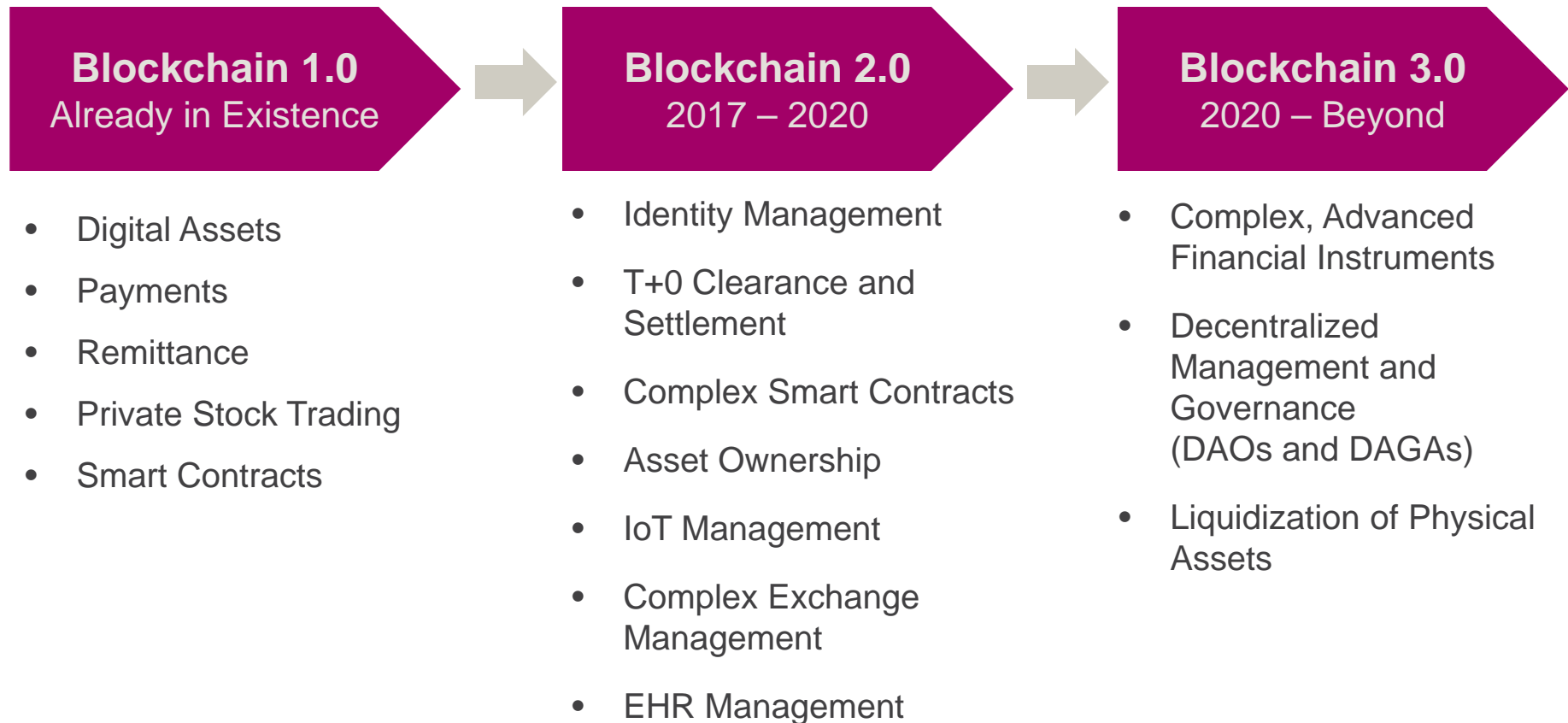
## Legal Update

March 16, 2017

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Perkins Coie LLP

# Potential Use Cases



# Use Cases for Blockchain Cut Across All Industries



## Technology & Communications

- Distributed Networking Platform Technology



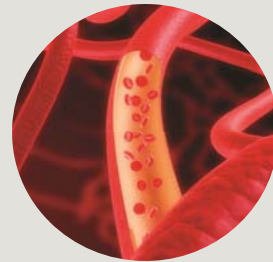
## Consumer Products & Services

- Digital Rights Management
- Supply Chain Management



## Financial Services & Real Estate

- Issuance and Settlement of Stock/Commodities
- Public and Private Stock Ledgers



## Life Sciences & Healthcare

- Recordkeeping and Auditing
- Payment Solutions
- Identity Management



## Energy & Natural Resources

- Tokenized Energy Credits
- Smart Grid
- Equipment Automation and Smart Contracts

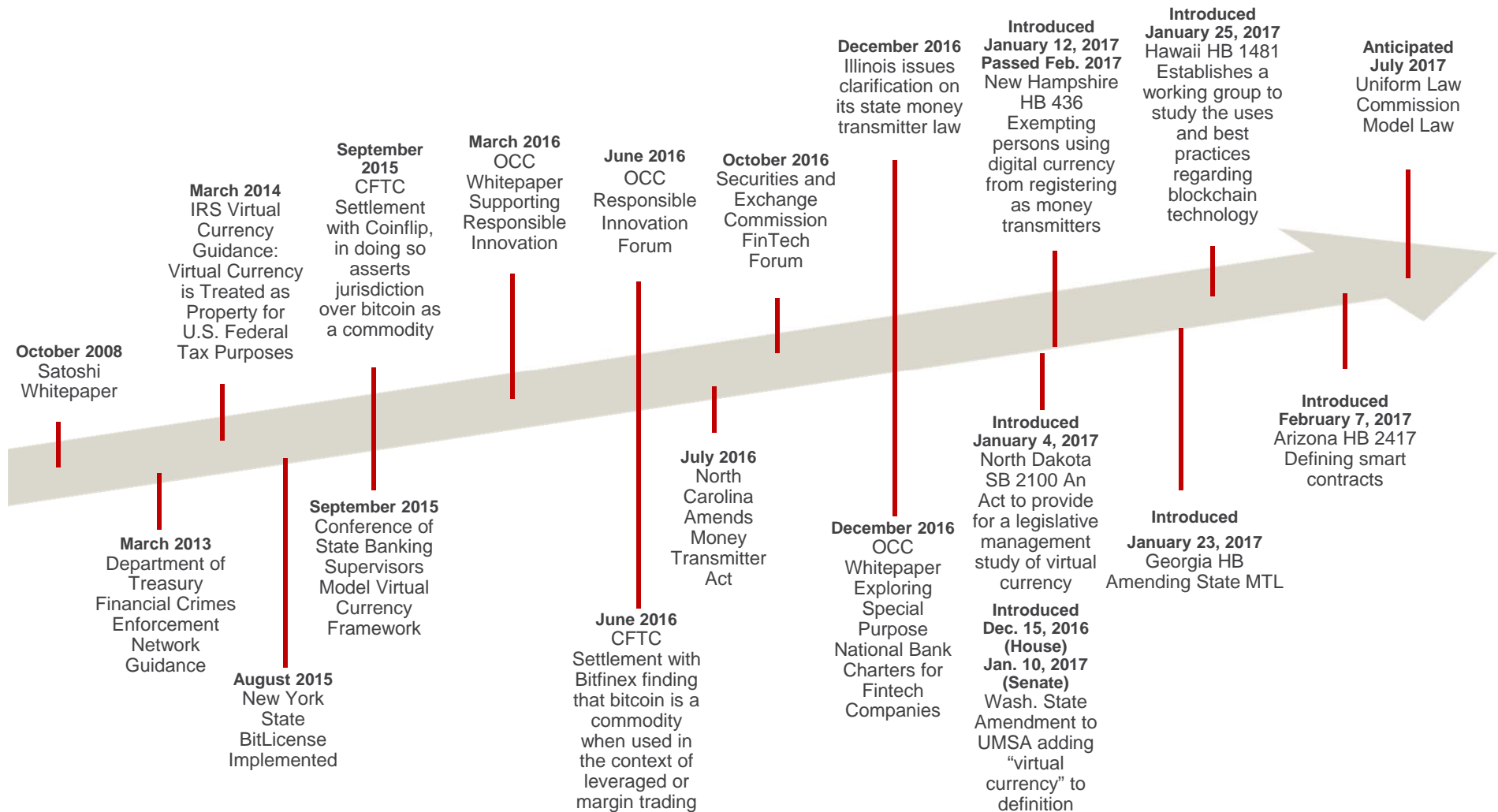


## Aerospace & Transportation

- Supply Chain Management
- Inventory Management

**DISRUPTIVE TECHNOLOGY THAT CUTS ACROSS INDUSTRIES**

# Regulatory Developments



# The States – Digital Currency Specific



## **New York State BitLicense**

Regulates: Transmitters; Issuers; Exchanges; Custodians; Administrators



## **North Carolina Amends MTA**

“Money transmission” – to engage in the business of any of the following:

- a) Sale or issuance of payment instruments or stored value primarily for personal, family, or household purposes; or
- b) Receiving money or monetary value for transmission or holding funds incidental to transmission... by any and all means...

This includes maintaining control of virtual currency on behalf of others.



## **New Hampshire**

Passed house vote on March 8, seeks exempt persons using virtual currency from registering as money transmitters



## **Washington State**

Amendment to existing law seeks to define virtual currency and regulate under that state’s Uniform Money Services Act

# The States

- Some state money transmission laws cover only “money,” i.e. fiat currency
- Others cover “monetary value,” and therefore may reach bitcoin and similar digital currencies
- Therefore, where a particular business activity requires a money transmission license will vary from state to state and requires an analysis of whether a state’s statute covers solely the transmission of money or the transmission of money and monetary value

# International Activity

- PBOC conducts inspections of several Chinese exchanges (Jan. 2017)
- Central Bank of UAE bans all digital currencies (and transactions thereof) (Jan. 2017)
- Britain's Royal Mint announces plan to use blockchain to operate a gold trading system (Dec. 2016)
- France's Central Bank discusses use of blockchain tech for identification (Dec. 2016)
- Hong Kong Monetary Authority whitepaper on use of blockchain (Nov. 2016)
- Swiss Federal Department of Finance outlines plan to regulate fintech (Nov. 2017)
- Central bank of Canada publishes working paper concerning digital currencies (August 2016)
- Poland announces plan to promote digital public services and cashless solutions (June 2016)
- ESMA issues report on DLT applications to securities markets (June 2016)
- Japan promulgates law regulating digital currencies (June 2016, to be enacted 2017)
- Australia begins drafting legislative proposals to regulate digital currencies (April 2016)

# SEC – Virtual Currency as a Security

## The *Howey* Test of an Investment Contract

1. Reasonable Expectation of Profits
2. Common Enterprise
3. Derived Mainly from the Efforts of Others

## Exchange Traded Funds

- Three applications, one denial to date
- Winklevoss Bitcoin Trust
  - › Sought rule change to would permit the first exchange traded fund to track digital currency
  - › Would have permitted the Bats BZX Exchange, Inc. to list and trade shares issued by the Winklevoss Bitcoin Trust
  - › Application denied because: a) many exchanges remain unregulated; b) the Bats Exchange would therefore not be able to enter into the necessary surveillance sharing agreements
  - › Denial was not related to the specifics of the filing but rather the largely unregulated ecosystem



# Office of the Comptroller of the Currency

## Responsible Innovation Initiative

- March 2016: White paper outlining principles that would guide a FinTech charter framework.
- October 2016: Released “Recommendations and Decisions for Implementing a Responsible Innovation Framework,” and announces the creation of an Office of Innovation.
- December 2016: OCC issues a white paper entitled “Exploring Special Purpose National Charters for FinTech Companies,” setting forth criteria for the Charter.

## Special Purpose National Bank Charter (the “FinTech Charter”)

- Entities must be a fiduciary or engaged in one of the three core banking functions: 1) receiving deposits; 2) paying checks; and 3) lending money.
- Application will include a thorough review of the applicant’s: business plan; governance structure; capital; liquidity; compliance and risk management; and plan for an orderly wind down. The OCC will also consider applicant’s likelihood of success.
- Application process will include four stages: 1) pre-filing; 2) filing; 3) review and evaluation; and 4) decision.

# CFTC – Digital Currency as a Commodity

## Commodities Exchange Act, 7 U.S.C. §§1-27

- Regulation of commodity based futures, options, and derivative transactions

## CFTC Enforcement Actions

- In re BFXNA Inc. d/b/a BITFINEX ([Order](#), June 2, 2016)
  - › Commodity transactions conducted on a leveraged or margined basis, or financed will be regulated by the CFTC and subject to CEA.
  - › CEA exempts transactions from regulation where there is actual delivery within 28 days.
  - › Book entry recordation is not actual delivery where: 1) there is no actual delivery of the commodity to a) the buyer or b) a depository other than the seller and its parent company, partners, agents, and other affiliates, or 2) there is no transfer of title of the commodity to the buyer.
  - › “Actual delivery” will not occur if a digital currency exchange controls a customer’s wallet by either 1) maintaining an omnibus wallet, or 2) uses multi-sig but maintains control over the keys.

# Legal Questions Remain



## Bitfinex

- CFTC enforcement action (June 2016) – questions functional control of funds in margin trading
- Bitfinex hacked - \$66 million in bitcoin stolen from exchange (August 2016)
- BFX Tokens – tokens issued to those who lost funds in hack. Convertible into equity (August 2016)



## OCC

- Legal authority to expand the scope of permissible bank activities?



## DAO

- DAO hacked - \$60 million in ether stolen (May 2016)
- Ethereum hard fork – ether and ether classic

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Questions?  
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Thank You