

Protecting Cryptocurrency in Trusts

By Tom Olchon

The risks in investing in intangible and often relatively illiquid cryptocurrencies are well known. Less well known are the risks in managing and transferring these exciting but volatile assets.

Bitcoin, Ethereum and the like have no central or regulating authority. Instead issuance and transactions are managed by a decentralized system that relies on cryptography to prevent fraud. If that sounds like a circular – or cryptic – explanation, it may be helpful to think of cryptography as a modern form of secret writing. Instead of invisible ink, information is encoded and decoded by computers.

This security can work all too well. Matthew Mellon was a proponent and early investor in Ripple, a technology that acts as both a cryptocurrency and a digital payment network for financial transactions. At the time of his unexpected death in 2018 at age 54, his holding was reportedly worth about \$500 million. But it isn't worth a dime to his heirs, as no one seems to have the necessary passwords for his executor to access the assets. The passwords are held in a so-called cold wallet, a hardware device that is

not connected to the internet. Without the passwords, the wallet can't be opened.

The mysterious death of Gerald Cotton, also in 2018, caused more widespread trouble. As the co-founder of Quadriga CX, Canada's major cryptocurrency exchange, he appears to have had sole access to the exchange's wallets and related keys. Quadriga CX has since been declared bankrupt and its assets remain inaccessible.

Most exposures are smaller, of course, but the custodial risks are broadly the same. Cryptocurrency can also be stored online, in what are known as hot wallets. But once someone else has access to the key, that person can access the asset without the owner's knowledge or permission. That risk has to be balanced against the risks of incapacity and the certainties of death in determining who has access to the assets, along with when and how. Anyone considering taking on fiduciary responsibility for these assets will need to be very careful, as discussed on page 16.



In addition to security, storage and accessibility, investors in cryptocurrencies need to consider taxation, price volatility, valuation and illiquidity.

The IRS views cryptocurrencies as property, not currency. This is an important distinction, as it means the basis needs to be accurately tracked. The U.S. dollar-denominated basis is established when the asset is acquired, and the gain or loss may be realized at the disposal of the asset. This could be on conversion back to U.S. dollars, conversion to another cryptocurrency, or when the cryptocurrency is used to

purchase a good or service. As with other property, cryptocurrency assets receive a step-up in basis at the death of the owner.

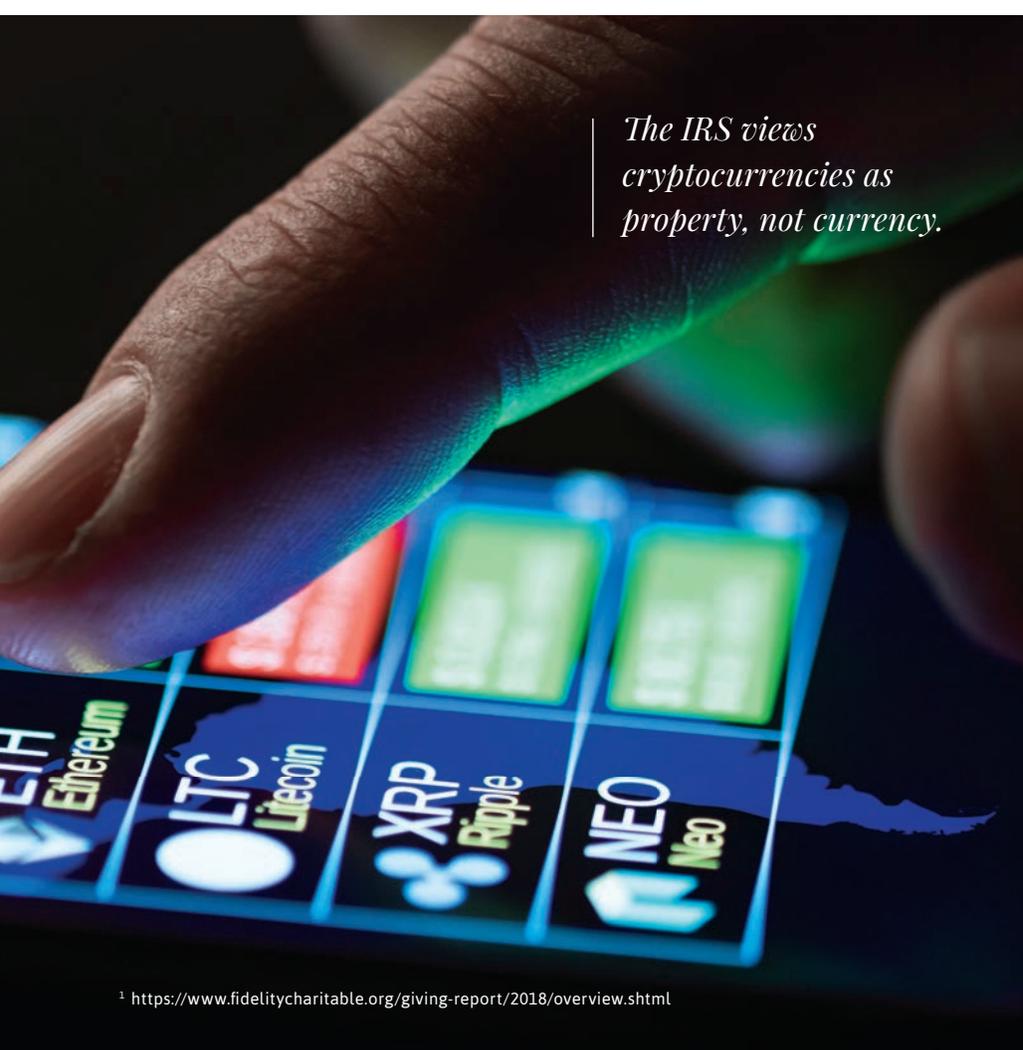
Many early investors in cryptocurrencies have substantial capital gains embedded in their holdings. This makes for an interesting planning opportunity for those who are philanthropically inclined. Funding a Charitable Remainder Trust with cryptocurrency can be a very efficient way to diversify the position, minimize capital gains, and reduce income taxes. Not surprisingly, there has been a notable increase in charitable contributions made

through Bitcoin over the past few years. Donors must be very careful to adhere to the IRS' substantiation rules, appraisal requirements, and filing obligations (for both the donor and the charity).

When funding a Charitable Remainder Trust structure with cryptocurrency, it is important to consider the potential volatility and illiquidity inherent in the underlying assets. It often makes sense to consider funding a more flexible NIMCRUT (Net Income with Makeup Charitable Remainder Unitrust) or NICRUT (Net Income with Charitable Remainder Unitrust), rather than more traditional structures. They allow more flexibility for the trustee/s, an important consideration with such volatile assets. Traditional Charitable Remainder Annuity Trusts, or CRATs, and Charitable Remainder Unitrusts, or CRUTs, are less attractive structures in this context. The potential fluctuations in asset valuations and/or the possibility of an illiquid market could inhibit distributions.

These are obviously complicated strategies that should only be considered in the context of broader wealth goals and in close consultation with experienced advisors. We expect this area of planning to develop rapidly as the market for these assets continues to evolve.

Cryptocurrencies, in some form or another, are here to stay. But it appears that we can still lose our keys and wallets. Ensuring that these assets are properly managed and transferred will be an important focus for investors and their advisors.



*The IRS views
cryptocurrencies as
property, not currency.*

¹ <https://www.fidelitycharitable.org/giving-report/2018/overview.shtml>

Tom Olchon is a Managing Director and Wealth & Fiduciary Advisor at Evercore Wealth Management and Evercore Trust Company, N.A. He can be contacted at thomas.olchon@evercore.com.

An Important Message for Fiduciaries

By Darlene Marchesani

Individuals considering accepting fiduciary responsibility as a co-trustee for a trust holding cryptocurrency should first consider the potentially significant pitfalls.

Illiquidity and volatility issues of cryptocurrency held in trust can cause problems for the trustee in satisfying its investment responsibilities. In addition, a lack of available funds could delay distributions, which may cause underpayment to the present beneficiary or underpayment to the charity or remainder beneficiary at the end of the term. Either or both events could result in litigation and negative tax consequences.

Delaware presents a unique opportunity for trusts looking to expand their investments into cryptocurrency. A trustee is authorized to acquire every kind of property, with the investments to be considered as part of an overall investment strategy. Performance of an advisor is measured with a view toward the entire portfolio, rather than on an asset-by-asset basis.

In addition, the use of a Delaware directed trust can provide great flexibility. If a trust instrument requires a trustee to follow the direction of an advisor, and the trustee follows such directions (say, acquiring a legal/authorized investment such as Bitcoin as part of a portfolio), the trustee will not be liable for any loss resulting directly or indirectly from the investment.

An administrative trustee directed to hold cryptocurrency in a trust account will, of course, require detailed current and regularly updated information regarding the assets, to protect all the parties involved. It is the trustee's responsibility to ensure the safety and soundness – and the security, as discussed on page 14 – of trust assets.

Evercore Trust Company, N.A. can act as executor, personal representative, directed trustee, sole trustee, co-trustee, successor trustee and agent for trustee.

Darlene Marchesani is Trust Counsel and the Managing Director of Delaware Trust Services at Evercore Trust Company, N.A. She can be contacted at darlene.marchesani@evercore.com.

NEW YORK
55 East 52nd Street
New York, NY 10055
212.822.7620

Jay Springer
Partner
212.822.7621
springer@evercore.com

TAMPA
4030 Boy Scout Boulevard, Suite 475
Tampa, FL 33607
813.313.1190

Julio Castro
Partner
813.313.1192
julio.castro@evercore.com

MINNEAPOLIS
150 S. Fifth Street, Suite 1330
Minneapolis, MN 55402
612.656.2820

Martha Pomerantz
Partner
612.656.2821
martha.pomerantz@evercore.com

WILMINGTON
Evercore Trust Company, N.A.
300 Delaware Avenue, Suite 1225
Wilmington, DE 19801
302.304.7362

Darlene Marchesani
Managing Director and Trust Counsel
302.304.7361
darlene.marchesani@evercore.com

PALM BEACH
515 North Flagler Drive, Suite 702
West Palm Beach, FL 33401
561.812.1010

Michael Cozene
Partner
561.812.1010
michael.cozene@evercore.com

EDITORIAL AND MEDIA
Aline Sullivan
Editor
203.918.3389
aline.sullivan@evercore.com

SAN FRANCISCO
425 California Street
Suite 1500
San Francisco, CA 94104
415.288.3000

Keith McWilliams
Partner
415.288.3010
keith.mcwilliams@evercore.com

Evercore Wealth Management, LLC (“EWM”) is an investment adviser registered with the U.S. Securities and Exchange Commission under the Investment Advisers Act of 1940. EWM prepared this material for informational purposes only and should not be viewed as advice or recommendations with respect to asset allocation or any particular investment. It is not our intention to state or imply in any manner that past results are an indication of future performance. Future results cannot be guaranteed and a loss of principal may occur. This material does not constitute financial, investment, accounting, tax or legal advice. It does not constitute an offer to buy or sell or a solicitation of any offer to buy or sell any security/instrument, or to participate in any trading strategy. The securities/instruments discussed in this material may not be suitable for all investors. The appropriateness of a particular investment or strategy will depend on an investor’s individual circumstances and objectives. Specific needs of a client must be reviewed and assessed before determining the proper investment objective and asset allocation, which may be adjusted to market circumstances. EWM may make investment decisions for its clients that are different from or inconsistent with the analysis in this report. EWM clients may invest in categories of securities or other instruments not covered in this report. Descriptions provided in this material are not substitutes for disclosure in offering documents for particular investment products. Any specific holdings discussed do not represent all of the securities purchased, sold or recommended by EWM, and the reader should not assume that investments in the companies identified and discussed were or will be profitable. Upon request, we will furnish a list of all securities recommended to clients during the past year. Performance results for individual accounts may vary due to the timing of investments, additions/withdrawals, length of relationship, and size of positions, among other reasons. Prospective investors should perform their own investigation and evaluation of investment options, should ask EWM for additional information if needed, and should consult their own attorney and other advisors. Indices are unmanaged and do not reflect fees or transaction expenses. You cannot invest directly in an index. References to benchmarks or indices are provided for information only. The securities discussed herein were holdings during the quarter. They will not always be the highest performing securities in the portfolio, but rather will have some characteristic of significance relevant to the article (e.g., reported news or event, a new contract, acquisition/divestiture, financing/refinancing, revenue or earnings, changes to management, change in relative valuation, plant strike, product recall, court ruling). EWM obtained this information from multiple sources believed to be reliable as of the date of publication; EWM, however, makes no representations as to the accuracy or completeness of such third party information. Unless otherwise noted, any recommendations, opinions and analysis herein reflect our judgment at the date of this report and are subject to change. EWM has no obligation to update, modify or amend this information or to otherwise notify a reader thereof in the event that any such information becomes outdated, inaccurate, or incomplete. EWM’s Privacy Policy is available upon request. EWM is compensated for the investment advisory services it provides, generally based on a percentage of assets under management. In addition to the investment management fees charged, clients may be responsible for additional expenses, such as brokerage fees, custody fees, and fees and expenses charged by third-party mutual funds, pooled investment vehicles, and third-party managers that may be recommended to clients. A complete description of EWM’s advisory fees is available in Part 2A of EWM’s Form ADV. Trust and custody services are provided by Evercore Trust Company, N.A., a national trust bank regulated by the Office of the Comptroller of the Currency and an affiliate of EWM. The use of any word or phrase contained herein that could be considered superlative is not intended to imply that EWM is the only firm capable of providing adequate advisory services. This document is prepared for the use of EWM clients and prospective clients and may not be redistributed, retransmitted or disclosed, in whole or in part, or in any form or manner, without the express written consent of EWM. This document includes projections or other forward-looking statements regarding future events, targets, intentions or expectations. Due to various risks and uncertainties, actual events or results may differ materially from those reflected or contemplated in such forward-looking statements. There is no guarantee that projected returns or risk assumptions will be realized or that an investment strategy will be successful.

EWM and its affiliates engage in a wide range of activities for their own account, and for their clients and the accounts of their clients, including corporate finance, mergers and acquisitions, equity sales, trading and research, private equity, and asset management and related activities. The observations and views expressed herein have been prepared by the individual author and, unless otherwise specifically stated, are solely those of the individual author and not EWM or any of its affiliates or any of their respective personnel. Other professionals of EWM and its affiliates may provide oral or written advice, services, market commentary, trading strategies and other material to clients that reflect observations and views that are contrary to those expressed herein. The author of this material may have discussed the information contained herein with others within or outside EWM and the author, EWM and/or such other persons may have already acted on the basis of this information (including by communicating the information contained herein to other customers of EWM and its affiliates).