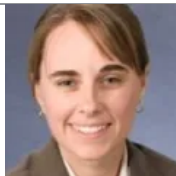


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Skadden Discusses New Senate Crypto Bill Limiting SEC Regulatory Role

By David Meister, Chad E. Silverman and Daniel Merzel July 25, 2023

Comment

A [bipartisan bill](#) introduced in the U.S. Senate two weeks ago seeks “to bring crypto assets within the regulatory perimeter” by granting oversight responsibility to the Commodity Futures Trading Commission (CFTC) for most forms of cryptocurrency.

The new bill, sponsored by Sens. Cynthia Lummis and Kirsten Gillibrand, builds on draft legislation that the pair introduced in the last session of Congress, but now comes in the wake of the collapse of cryptocurrency exchange FTX and amid a significant enforcement push by the Securities and Exchange Commission (SEC), which, in the absence of clear direction from Congress, has taken the position that nearly all digital assets are securities and thus within its jurisdiction. The Lummis–Gillibrand proposal envisions a much-reduced role for the SEC in regulating this asset class.

At the core of the bill is the grant of exclusive jurisdiction to the CFTC to regulate transactions involving “crypto assets,” which are defined as electronic assets that confer economic rights or rights of access that are recorded on a distributed ledger technology or a similar analogue. “Crypto assets” also include “ancillary assets,” which are assets such as crypto tokens that are sold in the context of investment contracts and often used to finance crypto projects at their early stages. Under the bill, even where the issuer of an ancillary asset “engaged in entrepreneurial or managerial efforts that primarily determined the value” of the token — which, under the test established by the Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) and its progeny, is a factor that weighs in favor of treating an asset as a security — the token would be presumed to be a commodity and fall within the CFTC’s jurisdiction, as long as the issuer follows certain SEC disclosure requirements.

However, the SEC would still retain some jurisdiction over digital assets under the bill. To the extent that a digital asset confers “any [] financial interest” in a “business entity,” including “a debt or equity interest,” “liquidation rights” or “an entitlement to an interest or dividend payment,” the asset would not be treated as a “crypto asset” or “ancillary asset” and would instead be subject to the SEC’s jurisdiction, as traditional securities are.

The bill also contemplates the formation of a self-regulatory organization (SRO) — a “customer protection and market integrity authority” — for the digital asset space. The SRO’s responsibilities would extend to fraud prevention and discipline, consumer protection, promotion of free trade and facilitation of cooperation between regulators. The bill further details the contours of the SEC and CFTC’s joint oversight authority over the SRO.

Other notable aspects of the bill include:

- CFTC registration requirements for “crypto asset exchanges,” *i.e.*, trading facilities that list one or more “crypto assets” (but not for “decentralized crypto asset exchanges,” recognizing the role of decentralized finance (DeFi) in the digital asset space).
- Segregation requirements for customer assets and restrictions on lending, including a ban on the rehypothecation of “crypto assets” by intermediaries.
- Separate treatment of “payment stablecoins” (digital assets pegged one-to-one to the value of the U.S. dollar), which could be issued only by depository institutions regulated by federal and state banking authorities — but with exclusive CFTC jurisdiction over any activity conducted by a CFTC registrant in relation to a payment stablecoin.
- A pathway to registration for prospective depository institutions that would be engaged solely in issuing payment stablecoins and related services.
- Extension of the wash-sale tax rule to purchases and sales of digital assets.

It remains to be seen whether the relevant Senate committees will take up the bill, and whether there will be political appetite for bipartisan regulatory overhaul in the lead-up to the 2024 election. If the bill does progress in the Senate, the text will undergo potentially significant modifications in the committee process before facing further uncertainty in the House of Representatives, where Republican representatives introduced a competing bill last month. In any case, the Lummis–Gillibrand bill represents an ambitious proposal to fit the emerging digital asset industry into the existing regulatory framework, though pointedly not the framework that the SEC is pressing in its enforcement actions.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "New Senate Crypto Bill Would Limit SEC Regulatory Role in Favor of CFTC," dated July 20, 2023, and available [here](#).