Financial Markets Association Legal & Legislative Conference
Webinar: Digital Asset Regulatory Development Panel
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I. Taxonomy of digital assets

- **Cryptocurrency** – Digital assets that exist on decentralized networks
- **Stablecoins** – Digital assets pegged to an underlying asset (e.g., USD) intended to maintain a stable value
- **Digital Asset Securities** – “Investment contracts” and traditional securities issued in digital form
- **CBDCs** – Digital forms of legal tender issued by central banks
- **Non-Fungible Tokens (NFTs)** – Cryptographically secured unique tokens stored on a digital ledger
II. Regulatory Overview - Framework of U.S. Digital Asset Regulation

Regulatory framework driven by status of a particular asset and the institution involved

Is it a security under Howie test?
- An investment of money in
  - a common enterprise
  - with a reasonable expectation of profits
  - to be derived from the efforts of others

Non-securities digital assets are commodities
- CFTC reg. and anti-fraud jurisdiction over derivatives (swaps, futures, actual delivery longer than 28 days, etc.).
- CFTC anti-fraud authority over spot markets
- BSA applies to issuers and exchangers of cryptocurrency
- Applicability of state money transmission law depends on specific activity

But . . .
- Federal bank regulators playing increased role as banks move into digital assets
- State supervision of trust companies
- And possibility of increased regulation coming
II. Regulatory Overview—FinCEN

FinCEN and OFAC set an important tone in regulation of cryptocurrency to combat financial crime and to enforce sanctions

— Administrators and exchangers of “value that substitutes for currency” are money transmitters subject to BSA

— Significant guidance and several enforcement actions since 2013 (esp. foreign located MSBs)

— FinCEN “Unhosted wallet” NPRM still pending
  • New reporting and recordkeeping requirements
  • Controversial counterparty identification requirement
II. Regulatory Overview—OFAC

Existing regulations apply to cryptocurrency activity with unique challenges in the context of the blockchain

- OFAC began adding wallet addresses for a number of different cryptocurrencies to SDN list entries in 2018

- First enforcement actions in 2021 against digital asset companies BitGo and BitPay for failure to use available customer data to detect transactions with customers in sanctioned jurisdictions
II. Regulatory Overview—OCC

Principal regulator of National Banks; significant role in the digital asset regulatory landscape as more established financial institutions enter cryptocurrency business

- **Interpretive Guidance**
  - Interpretive Letter 1170
    - Clarifies National Banks’ authority to custody digital assets (July 22, 2020)
  - Interpretive Letter 1172
    - Clarifies National Banks’ authority to custody reserves supporting stablecoins (Sept. 21, 2020)
  - Interpretive Letter 1174
    - Identifies “business of banking” authorities related to payment-related activities involving digital assets (Jan. 4, 2021)

- **Charters**
  - Three cryptocurrency firms received conditional approval for national bank charters within the first months in 2021 – Anchorage (Jan. 13, 2021), Protego (Feb. 4, 2021), Paxos (April 23, 2021)
II. Regulatory Overview—OCC

Michael Hsu named Acting Comptroller

- Hsu testified before the House Committee on Financial Svcs. (May 19, 2021)
  - “Concerned” that recent actions “were not done in full coordination with all stakeholders. Nor do they appear to have been part of a broader strategy related to the regulatory perimeter.”
  - “[W]e created an Office of Innovation, updated the framework for chartering national banks and trust companies, and interpreted crypto custody services as part of the business of banking. I have asked staff to review these actions.”
  - In September 2021, Saule Omarova was nominated by the President to lead the OCC

U.S. Sen. Sherrod Brown (D-OH), letter to Hsu (May 20, 2021)

- Questioned whether the OCC engaged in the “appropriate due diligence” before granting the charters
- Called on Hsu to “reassess any conditional national trust charters and halt the approval of any additional charters to nonbank entities”
II. Regulatory Overview—Federal Reserve & FDIC

Fed/FDIC taking more incremental steps toward openness to cryptocurrencies

**Federal Reserve**
- Seriously exploring CBDC – Federal Bank of Boston is involved in a project with MIT to develop and test use cases
  - Jerome Powell, Lael Brainard discuss advantages of digital dollar
    - Powell noted discussion paper to be released “soon”

**FDIC**
- Issued RFI about insured depository institutions’ digital asset activities in effort to explore future action
- According to recent press reports, FDIC is studying whether certain stablecoins might be eligible for pass-through FDIC insurance

**Inter-agency crypto “sprint” team**
- OCC, Federal Reserve and FDIC to consider ideas to try to catch up with the growth in crypto
Digital assets that are securities are required to comply with applicable registration requirements (or qualify for an exemption) and exchanges that deal in securities are subject to SEC regulation

- **DAO Report, June 2017**
  - The SEC confirmed that offers and sales of digital asset securities are subject to the requirements of the federal securities laws.
  - Confirmed application of Howey test to digital assets, regardless of the term used to describe the assets.
II. Regulatory Overview—SEC

Bill Hinman Speech on Digital Assets: When Howey Met Gary (Plastic), June 2018

- William Hinman, the director of the SEC’s Division of Corporate Finance at the time, gave a speech that discussed the potential for a digital asset that was originally classified as a security to be later sold in a manner that did not constitute a securities offering.

- According to Hinman, the key factor in determining if a digital asset is a security is whether the actions of a third party are a key factor for determining the enterprise’s success. If a network is fully decentralized, then the task of identifying a single issuer or promoter to make the disclosures required for a securities offering is difficult and not particularly meaningful for investors. At that point, the asset is no longer a security.

- Hinman also confirmed bitcoin and ether are not securities.
Joint SEC and FINRA Staff Statement on Broker-Dealer Custody of Digital Asset Securities, July 2019

- Custodying digital asset securities must comply with the requirements of the Customer Protection Rule. The Customer Protection Rule requires broker-dealers to safeguard customer assets and to keep customer assets separate from the firm’s assets, thus increasing the likelihood that customers’ securities and cash can be returned to them in the event of the broker-dealer’s failure.

- Staffs note that the specific circumstances under which a broker-dealer could custody digital asset securities in a manner that the Staffs believe complies with the Customer Protection Rule remains under discussion.

- Clarifies that noncustodial digital asset activities do not raise the same level of concerns by the Staffs, provided that applicable laws, SRO rules and other regulatory requirements are followed.
II. Regulatory Overview—SEC

Commissioner Peirce’s Safe Harbor Proposal, February 2020

- SEC Commissioner Peirce gave a speech in which she outlined a proposal for a potential safe harbor within the regulatory system for individuals seeking to build functional or decentralized token networks. Although the safe harbor is only a proposal and would need to be passed by all the SEC commissioners to move forward, it is a good example of a potential future regulatory scheme for the development of cryptocurrency networks.

- Under Peirce’s proposed safe harbor, a team developing a token network would have a three-year period—beginning at the time of the first token sale—to build a functional or decentralized network. The safe harbor would also be available for tokens that were previously sold in a registered or exempt offering.
II. Regulatory Overview—SEC

- Peirce’s Token Safe Harbor Proposal 2.0 (Apr. 13, 2021)
  - The SEC’s Commissioner Peirce reproposed an updated version of a token safe harbor originally proposed in February 2020
  - The safe harbor seeks to provide network developers with a three-year grace period within which, under certain conditions, they can facilitate participation in and the development of a functional or decentralized network, exempted from the registration provisions of the federal securities laws

- SEC Statement Regarding the Custody of Digital Asset Securities by Special Purpose Broker-Dealers (Dec. 23, 2020)
  - The SEC issued a statement regarding the custody of digital assets that are “securities” under the federal securities laws
  - The Statement sets forth the Commission’s position that, for a five-year period, certain special purpose broker-dealers that maintain custody of digital asset securities in compliance with certain conditions will not be subject to a SEC enforcement action
III. Legislation – Proposed

The “Eliminate Barriers to Innovation Act of 2021” passed the House in April 2021

- The bill instructs the SEC and CFTC to create a working group of stakeholders to evaluate a range of issues related to digital assets, e.g., standards concerning custody and cybersecurity; best practices to reduce fraud and assist in compliance with anti-money laundering and countering the financing of terrorism

The “Token Taxonomy Act of 2021” introduced March 9, 2021

- Bipartisan bill to clarify the categorization of digital assets and preserve U.S. innovation leadership
- Would exclude “digital token” from the definition of security under the securities laws—broad definition

House Financial Services Committee authorized the Financial Technology Task Force

- Chairman Stephen Lynch (D-MA) has suggested continued focus on consumer protection and “opportunities and challenges posed by these technologies.” (April 21, 2021)
III. Legislation – Proposed

Clarity for Digital Tokens Act of 2021

- Proposed in October 2021 by Rep. Patrick McHenry (R-NC), the ranking member on the House Financial Services Committee

- Would effectively codify SEC Commissioner Peirce’s Token Safe Harbor proposal, which proposes to create a pathway for crypto startups to launch token sales to fund their projects without being subject to SEC enforcement action for failing to register the offering

- The bill, like Commissioner Peirce’s safe harbor, includes provisions addressing when startups would have to register, or how they can verify that their projects no longer meet the federal definition of a “security”
President’s Working Group on Financial Markets to Issue Recommendations on Stablecoins

- Recent press reports indicate that the Biden administration is preparing to impose bank-like regulation on cryptocurrency companies that issue stablecoins. The administration is also expected to ask Congress to propose legislation to create a special-purpose charter for such firms that would be tailored to their business models.
- Regulators are worried that stablecoins could be vulnerable to “bank runs” if large numbers of investors suddenly rush to redeem them.
- The administration’s recommendations are still being negotiated and will be included in a forthcoming report from the President’s Working Group on Financial Markets, expected in late October.
Speaker Bios
Tiffany J. Smith – Program Planning Committee Member & Moderator

Tiffany J. Smith is a partner at WilmerHale in the Securities & Financial Services Department. Her practice focuses on broker-dealer and cryptocurrency regulatory matters, and she often works on cutting edge matters involving the intersection between technology and the securities laws. Tiffany started her career in compliance at M&T Securities and has interned at both the Securities and Exchange Commission and the Financial Industry Regulatory Authority during law school. Tiffany has a J.D. from The George Washington University Law School and has a BBA in Finance and International Affairs The George Washington University.
Conway S. Ekpo – Panelist

Conway Ekpo is a Director and Associate General Counsel at Brex. Brex is a unicorn B2B fintech startup that uses innovative technology to provide an all-in-one financial solution for other venture-backed startups, small businesses and medium-sized businesses. In this role, Conway is responsible for managing the legal issues that impact all of Brex’s new products which range from software-as-a-service to corporate credit cards to venture debt financing. In addition, he is also an adjunct law professor at Rutgers School of Law and a member of its Fintech and Blockchain Collaboratory which provides a forum for industry leaders and academics to come together and propose policy to fintech and cryptocurrency regulators. Prior to joining the fintech industry, Conway was a Wall Street lawyer. He began his legal career as a BigLaw associate in New York City before transitioning in-house, first as regulatory counsel to Bank of America Merrill Lynch and then as an Executive Director in the legal department at Morgan Stanley. While at Morgan Stanley, he obtained his certification in data privacy and data protection and specialized in providing legal advice regarding the bank’s digital wealth management products and services. Combining his financial background with his passion for diversity, equity and inclusion (“DEI”), Conway co-founded a venture capital fund which invests in minority owned fintech startups, and he sits on the Advisory Board for Wellthi Tech, an innovative Black female owned B2B fintech startup. A firm believer in creating opportunities for others, Conway has founded a number of DEI-focused organizations including the Black BigLaw Pipeline, Inc., a non-profit which provides substantive and soft skills training and support to Black law students and BigLaw associates, and 1844, a group of 60 Black male lawyers practicing primarily in BigLaw and in-house legal departments in New York. Conway is the recipient of numerous awards for his leadership within the legal community and was also selected as a 2016 Fellow in the Council of Urban Professionals. He is a proud member of Kappa Alpha Psi Fraternity, Inc., and the Prince Hall Masonic Lodge. Conway earned his B.S. in architectural engineering at the University of Kansas and his J.D. at Rutgers School of Law where he was Managing Editor of the Rutgers Law Review.
**Speaker Bios**

**Christopher Matta – Panelist**

Chris Matta is the President of 3iQ Digital Assets (US). 3iQ is a pioneer in crypto asset management, having launched the first exchange traded product for Bitcoin in Canada. Chris also serves as the President and Founder of the Blockchain Association of New Jersey, which advocates for innovative regulatory leadership and enterprise collaboration for the cryptocurrency space. Prior to joining 3iQ, Chris was the Co-Founder of Crescent Crypto, an asset management firm focused on creating innovative investment solutions to bring the cryptocurrency asset class to institutional and mainstream investors. Previously, Chris was a Vice President at Goldman Sachs where he managed assets for the Goldman Sachs Philanthropy Fund and Trust Company.
Speaker Bios

Annemarie Tierney – Panelist

Annemarie Tierney is the Founder and Principal of Liquid Advisors, a consulting firm offering strategic advisory services around private placements and secondary liquidity structuring, including for digital asset securities and private crypto investment funds. Annemarie also serves as Senior Strategic Advisor to the Chamber of Digital Commerce. Annemarie is a seasoned financial services lawyer/strategist with substantial SEC, law firm, and in-house legal experience, as well as experienced in broker dealer regulation, blockchain legal and regulatory issues, securities transactional work, SEC rules and regulations, corporate governance, and international expansion. Annemarie has led a broad range of regulatory and legislative thought leadership initiatives in the private issuer space and is a frequent speaker on a range of private market topics. Previously, Annemarie was the Chief Strategy Officer and General Counsel of Templum, Inc., a registered broker dealer/alternative trading system approved to conduct primary offerings and secondary trading in unregistered digital securities. She also served as Head of Strategy at Nasdaq Private Market and as the General Counsel of SecondMarket, Inc., now Digital Currency Group, where she led the efforts to structure, launch and obtain OTC QX approval to publicly trade the Grayscale Bitcoin Investment Trust (GBTC). Annemarie has also worked at the Securities and Exchange Commission, Skadden Arps Slate Meagher & Flom, the NYSE and NYFIX. She is a member of the Board of Directors of the Association of SEC Alumni and a former member of the SEC’s Advisory Committee on Small and Emerging Companies. She earned her BA/BS in Finance and International Relations from the Alfred Lerner College of Business and Economics at the University of Delaware and her JD from the Catholic University of America. Annemarie is also FINRA series 7, 63 and 24 licensed.