May 9, 2022

Crypto Enforcement Is Here, and Always Has Been

There are those in the crypto sphere who, despite the strong warnings of several federal agencies, believe there can be no enforcement without crypto specific regulation. This is not the case. There are also those who believe that just because a federal agency has not yet commenced an enforcement action against a particular practice, that practice is permissible. This is not the case either. While cryptocurrency, and digital assets more broadly, are so far-reaching and innovative as to necessitate the continued development of more specific regulations and legislation, digital assets are already governed by various existing regulations and acts.

For example, over the past several years the SEC, CFTC, and OCC have brought numerous enforcement actions against cryptocurrency entities for violations of the Anti-Money Laundering Act (which amended the Bank Secrecy Act), the Securities Act, the Securities Exchange Act, and the Commodity Exchange Act. Enforcement actions have also expanded to involve additional regulations. For example, in February of 2022, the SEC, in a “first-of-its-kind action,” charged a cryptocurrency entity with violations of the Investment Company Act of 1940. In a related press release, SEC Chairman Gary Gensler warned that “crypto markets must comply with time-tested securities laws, such as the Securities Act of 1933 and the Investment Company Act of 1940.”

More recently, in a May 3, 2022, press release, the SEC announced that it had nearly doubled the size of its “Crypto Assets and Cyber Unit,” which is “responsible for protecting investors in crypto markets and from cyber-related threats.” To date, the Crypto Assets and Cyber Unit “has brought more than 80 enforcement actions related to fraudulent and unregistered crypto asset offerings and platforms, resulting in monetary relief totaling more than $2 billion.” In the press release, the SEC also affirmed that “the expanded Crypto Assets and Cyber Unit will leverage the agency’s expertise to ensure investors are protected in the crypto markets, with a focus on investigating securities law violations related to: Crypto asset offerings; Crypto asset exchanges; Crypto asset lending and staking products; Decentralized finance ("DeFi") platforms; Non-fungible tokens ("NFTs"); and Stablecoins.” SEC Chairman Gensler said of the expansion that “the U.S. has the greatest capital markets because investors have faith in them, and as more investors access the crypto markets, it is increasingly important to dedicate more resources to protecting them."

Despite the applicability of certain existing regulations, there are significant “gaps” in the current U.S. digital assets regulatory framework. As SEC Chair Gensler noted in remarks in late 2021, “there are some gaps in this space. We need additional Congressional authorities to prevent transactions, products, and platforms from falling between regulatory cracks. We also need more resources to protect investors in this growing and volatile sector. We stand ready to work closely with Congress, the Administration, our fellow regulators, and our partners around the world to close some of these gaps.”

Some Congressional policymakers are already working to pass legislation to further regulate digital assets, including Senator Lummis (R-WY), Senator Gillibrand (D-NY), and Representative Gottheimer (D-NJ). Additionally, as has been discussed in our prior articles, in March 2022 President Biden signed an Executive Order on Ensuring Responsible Development of Digital Assets, which requires relevant federal agencies to submit reports and evaluations on various aspects of digital assets administration and regulation. Going forward, digital assets companies and those working in, or affected by, the digital assets space should be cognizant of existing applicable regulations, increased agency enforcement, ongoing efforts to further clarify the applicability of existing regulation, and legislative efforts to pass new legislation governing the digital assets sphere.

You can also learn about this topic by watching the video on our YouTube channel.

If of interest, please find our previous alerts on the development of digital assets regulation:

- Treasury Secretary Delivers Key Remarks on Digital Assets Regulation - Three Takeaways – April 11, 2022
- Forthcoming Bipartisan Legislation Regulating Digital Assets – March 28, 2022
- Congressional and Federal Agency Action Following Executive Order on Digital Assets Policy and Regulation – March 14, 2022
- Announced Cryptocurrency Executive Order Will Shape Federal Regulations for the $3 Trillion Digital Assets Market – March 9, 2022

If you have any questions concerning federal agency or Congressional action regarding the development of digital assets regulation and policy, please do not hesitate to reach out to me Stephen Anstey at sanstey@kilpatricktownsend.com or John Loving at jloving@kilpatricktownsend.com.

Kilpatrick Townsend's Government and Regulatory Practice

Kilpatrick Townsend's Government and Regulatory practice offers policy, legislative, and regulatory advocacy services and legal guidance on both broad and industry-specific matters. For more information, please visit our website at https://www.kilpatricktownsend.com/Services/GovernmentRegulatory.