Cryptocurrency as Commodities? Bipartisan Senate Bill Proposes Comprehensive Legislation to Regulate Digital Assets

Insights
6.08.22

Policymakers introduced bipartisan legislation in the Senate on June 7 seeking to provide a comprehensive regulatory framework for cryptocurrency in the United States. The drafters of the legislation tout it as the first major bipartisan bill aiming to regulate cryptocurrency. And the bill could get traction over time since it is viewed by many key players in both the crypto and regulatory worlds as a key starting point for a dialogue about the framework for the future of crypto. Critically, the crypto bill, called the Responsible Financial Innovation Act, would classify cryptocurrency as "commodities" — like copper, coffee, and wheat – under the jurisdiction of the Commodity Futures Trading Commission (CFTC) and not as a security under the jurisdiction of the Securities and Exchange Commission (SEC). What do employers need to know about this development?

The Responsible Financial Innovation Act

Senators Cynthia Lummis (R-Wyo.) and Kirsten Gillibrand (D-N.Y.) recently introduced the Responsible Financial Innovation Act to regulate cryptocurrency as commodities under the CFTC. The sponsors stated in a press release that the bill "will create a complete regulatory framework for digital assets that encourages responsible financial innovation, flexibility, transparency, and robust consumer protections while integrating digital assets into existing law. To date, the Lummis-Gillibrand bill is the most substantial and comprehensive bipartisan effort to provide certainty and clarity to the growing digital asset and blockchain industries."

Among other things, the sponsors further state that the legislation would do the following:

- Create a clear standard for determining which digital assets are commodities and what types are securities, providing clarity and structure for businesses and regulators;
- Create clear definitions for digital assets;
- Assign regulatory authority over digital asset spot markets to the CFTC;
- Define and create requirements for "stablecoins" that will protect consumers and markets and promote faster payments;
- Create an advisory committee to develop guiding principles, empower regulatory agencies and advise lawmakers on fast-developing technology;

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

- Impose disclosure requirements on digital asset service providers to ensure that consumers understand the product and can make informed decisions when engaging with digital assets;
- Direct the CFTC and the SEC to study and report on the development of a self-regulatory organization (SRO) and develop a proposal for its creation;
- Direct the CFTC and SEC to consult with Treasury and the National Institute of Standards and Technology to develop comprehensive, principles-based guidance relating to cybersecurity for digital asset intermediaries;
- Provide a regulatory sandbox for state and federal regulators to collaborate on innovative financial technologies; and
- Create a workable structure for the taxation of digital assets.

Commodity vs. SEC Regulation

Likely the biggest headline item, and a linchpin of the bill, is that this legislation would generally regulate cryptocurrency as "commodities" under the CFTC rather than as "securities" under the SEC. According to media coverage of the proposal, cryptocurrencies generally would be designated as "ancillary assets" and treated like commodities under the jurisdiction of the CFTC. They wouldn't be regulated like a traditional security under the SEC unless the holder is entitled to certain privileges that usually attach to corporate securities, like dividends, liquidation rights, and the like.

Some commentators have stated that this distinction is important and a positive development. In general, many cryptocurrency investors believe that SEC regulation is not the "right fit" for regulation of decentralized digital assets. Whereas the SEC focuses on technical regulation of securities law, many believe regulating cryptocurrency under the CFTC would be better-suited and would focus on important issues like investor and consumer protection, fraud, and market manipulation.

Key Takeaways for Employers

This bill is not expected to be passed in the near future given several macro issues that are of current concern to U.S. lawmakers (including the Ukraine war and gun safety issues). However, the proposal could prompt an extensive legislative process that will likely extend into next year. If this proposal gains traction, either in its current form, or more likely a revised or piecemeal form, it could help bring about the clarity needed for widespread acceptance of cryptocurrency and mainstream use by the employer community.

Should Congress develop a system for regulating and bringing stability to the cryptocurrency market, employers may feel more comfortable incorporating digital assets into the conversation about how to compensate employees and evaluating other innovative use cases of blockchain technology in the workplace. This could even lead to eventual changes to federal and state wage and

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

hour law as it relates to paying employee wages in crypto. The U.S. Department of Labor has not yet definitively waded into this issue other than from the Crypto 401k perspective.

Some employers are already exploring options like including cryptocurrency in executive contracts and as deferred compensation or compensation above minimum wage and overtime. If this legislation is enacted and brings a level of regulatory clarity about the rules, we could see further acceptance and a substantial increase in the use of cryptocurrency by employers over time, particularly since more employees and job applicants are asking for access to crypto products.

Conclusion

We'll continue to monitor developments in this area, so make sure you are subscribed to the Fisher Phillips' Insight System to get the most up-to-date information. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Cryptocurrency and Blockchain Practice Group.

Related People

Phillip C. Bauknight
Partner
908.516.1059
Email

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Benjamin M. Ebbink
Partner
916.210.0400
Email

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.