CFTC Chairman States Ether is a Commodity

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In remarks made at the Yahoo! All Markets Summit in New York, Heath Tarbert, Chairman of the U.S. Commodity Futures Trading Commission (CFTC), said that he believed the Ether cryptocurrency was a "commodity" and should be regulated under the Commodity Exchange Act (CEA). This statement follows the agency's December 2018 announcement that it was seeking public comment to better understand the technology, mechanics and markets for virtual currencies beyond Bitcoin, namely Ether and the Ethereum network. The "commodity" issue has come up previously in court proceedings regarding virtual currency offerings, with some courts finding that the virtual currencies at issue were commodities subject to CFTC jurisdiction. However, this was the first announcement by the CFTC Chairman regarding Ether's characterization as a commodity.

> "A commodity has a very broad definition. […] We've been very clear on Bitcoin. Bitcoin is a commodity under the CEA. We haven't said anything about Ether…until now. It is my view as Chairman of the CFTC that Ether is a commodity and therefore it will be regulated under the CEA. And my guess is that you will see in the near future Ether-related futures contracts and other derivatives potentially traded."

The Chairman also responded to what the interviewer characterized as "murky" regulation surrounding cryptocurrency (and related securities law issues) and explained how the nature of a virtual asset might even change over time:

> "The analysis can be somewhat challenging, but ultimately the question is: Is it a security, first and foremost? And if it's not a security, it is most likely a commodity. So that is the initial test. Unlike other kinds of investment contracts, a digital asset can transform itself throughout time. You can have a situation where something in an initial coin offering is a security, but over time, the system becomes more and more decentralized, the enterprise that originally sponsored the currency is no longer in the fore and there's an intangible value there, so you can have things that switch back and forth. [One could imagine another potential scenario] where something is decentralized but then all of a sudden, the company gets more involved in it, it starts to look more like a common enterprise, where profits are derived from the activities of others, thereby meeting the Howey test."

The CFTC Chairman also offered an opinion on forked digital assets, such as Bitcoin Gold, that have "spun off" from the original cryptocurrency, and how such forked currencies might be treated by the agency:

> "It stands to reason that similar assets should be treated similarly. If the underlying asset, the original digital asset, hasn't been determined to be a security and is therefore a commodity, most likely the forked asset will be the same. Unless the fork itself raises some securities law issues under that classic Howey Test."

While the remarks by the CFTC Chairman are not officially binding as a regulatory matter, they are important to understanding the evolving regulatory environment (note, last year's statement by SEC Director William Hinman at the All Markets Summit regarding offers and sales of Ether not being securities transactions). We will continue to follow the regulatory developments surrounding cryptocurrencies, including Libra, the stablecoin being developed by Facebook, which Chairman Tarbert commented the agency was still studying.

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