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CFTC Head Urges Congressional Action on Crypto while SEC Leader Says Crypto Rulemaking is “Years Away”

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In congressional testimony on Thursday, September 15, U.S. Commodity Futures Trading Commission (CFTC) Chairman Rostin Behnam urged U.S. Senators to pass a bill that would explicitly grant the CFTC broad regulatory oversight over the cryptocurrency market. His remarks are the latest in a series from regulators who have struggled with questions over whether they have jurisdiction over the emerging, and rapidly growing, cryptocurrency market.

While he noted that the legislation was not perfect – saying that it was a “step in the right direction” – Chairman Behnam’s comments indicate that regulatory agencies would strongly prefer that their jurisdiction on this matter be made explicit via direct congressional action. Such an attitude is not a surprise, given that proposed rulemaking on crypto has resulted in significant backlash from the industry, with promises to tie up proposed regulations in administrative lawsuits if they are adopted and instead advocating for a new regulatory regime tailored to crypto. If Congress were to enact a statute granting the CFTC or the SEC authority to regulate the cryptocurrency market, however, regulators would be on far more solid ground.

Chairman Behnam's remarks largely echo the attitude of SEC Chair Gary Gensler. Though he has made some comments indicating he wants the SEC to engage in rulemaking to regulate crypto, to date, the SEC's jurisdiction has been slowly built through one-off enforcement actions. Gensler has consistently advocated, however, for new statutes to grant the SEC jurisdiction in this area. On Thursday, Chairman Gensler reiterated his position, highlighting his concern that many common crypto assets (such as stablecoins) and cryptocurrency transactions (including ICOs), as well as many aspects of the cryptocurrency market infrastructure (including trading, lending and decentralized finance (DeFi) platforms), all implicate Federal securities laws and SEC regulations, in addition to separately implicating Federal commodities laws; he also noted, however, that any future crypto rulemaking could be years away. In the interim, even if the Bill is passed as drafted, the lack of SEC rulemaking that addresses the "securities" aspects of crypto assets, transactions and market infrastructure would mean the full extent of the SEC's jurisdiction would continue to be built by iterative enforcement actions that are slowly building a body of precedent to guide both the regulators and cryptocurrency market actors.

The uncertain regulatory and statutory outlook present both problems and opportunities for the cryptocurrency market. On the one hand, the lack of rulemaking or congressional action means that the decentralized finance, or DeFi, market may continue to engage with and develop their products, at least for the time being, within a more lax regulatory picture than that of their centralized finance counterparts. On the other hand, without clear law on this issue, players in the cryptocurrency space may face major headaches, as they have far less legal guidance than those dealing in traditional securities. These circumstances underscore the vital role that outside counsel can play in helping companies and individuals continue to innovate and succeed in the cryptocurrency market while attempting to minimize litigation and regulatory risk.

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