

Digital Assets: What to Expect from the Incoming Administration and Congress

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The Trump Administration and the new Republican-led Congress are expected to create a friendlier governmental approach to crypto assets. Among other things, key nominees to serve as senior administration officials are known to favor a friendlier approach, including Paul Atkins, who has been tapped to become Chairman of the Securities & Exchange Commission. In Congress, a crypto advocate is set to become the next chair of the House Financial Services Committee, and House Majority Leader Steve Scalise reportedly intends to prioritize crypto legislation in the first 100 days of the new Congress.

What does this all mean? Let's look at the SEC first, then Congress.

The SEC

The SEC has some latitude to facilitate public offerings and trading of digital assets, particularly if it adopts rules specifically tailored to such assets. One could imagine, for example, special rules for registering token offerings, or special rules for the regulation of trading markets for digital assets.

The SEC has applied its traditional "Howey" investment company analysis to whether digital assets are "securities" subject to its regulation. This is not surprising, because it has applied this analysis to other types of assets that are not traditional shares of common or preferred stock. Examples include condominiums and interests in fruit orchards. What's more, the Supreme Court has repeatedly put its stamp of approval on the SEC's approach, which limits the SEC's latitude in the absence of new legislation.

Does the Supreme Court precedent mean that the SEC lacks the ability to ease its regulations that govern digital assets? The SEC may still have latitude to adopt new rules and interpretations that facilitate digital offerings and trading in digital assets, but largely within the existing framework of the Securities Act and Exchange Act. That means, for example, that new rules and interpretations might tailor current registration and exemption requirements for token offerings and related trading markets. Legislation, however, could allow for more fundamental change.

Legislation

Last May, the House passed H.R. 4763, the Financial Information for Technology for the 21st Century Act, which is commonly referred to as “FIT 21.” Although the legislation ran into anticipated resistance in the Senate, it could foreshadow the SEC’s path without legislation, or legislation that the incoming Congress could adopt.

FIT 21 would create a specialized regulatory framework for digital assets that the SEC and CFTC would oversee. In substance, it would remove the “investment contract” (or “Howey”) analysis upon which the SEC has relied in bringing numerous crypto enforcement cases, from the determination of whether a digital asset is a “restricted digital asset” subject to the agency’s jurisdiction. Fit 21 would furthermore establish that digital assets associated with decentralized blockchains would be considered commodities subject to CFTC jurisdiction. If the legislation were to become law, much would have to be fleshed out in the ensuing adoption of rules to implement it. The legislation would call for certain public disclosures, regulation of trading intermediaries, and include anti-fraud provisions, but it would seemingly treat digital assets in a more categorical manner, and potentially eliminate the SEC’s current case-by-case inquiries into whether a digital asset involves the regulated sale of an investment.

The Next Step

What will come next depends on several variables, and the testimony provided by the nominee for SEC Chairman may provide some hints.

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