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Two-lane Highway Takes Shape for U.S. Crypto Regulation: Digital Securities Regulation by SEC, “Digital Commodities” Regulated By CFTC

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The new Administration has a clear mandate to provide a securities regulatory pathway for crypto, but it had been unclear whether the SEC would take the initiative in building a framework for crypto regulation, or whether legislation making its way through Congress would steal the momentum. What is taking shape is a blend of the two, where the SEC would regulate “digital investment assets,” and the CFTC would regulate “digital commodities,” and the two agencies would share regulation of market intermediaries that engage in trading of digital assets.

Just last week, Congress almost passed the Clarity Act, which the House had passed last Summer. The Act had been mired in disputes over technical and commercial issues, but had been expected to pass last week. According to the New York Times, passage was held up only by disagreement over whether issuers of stablecoins could pay interest, which could compete with the banking industry. The sponsors have postponed the mark-up of the bill, but it appears likely to pass in the not-too-distant future. (The Genius Act, which passed last year, would permit “payment stablecoins” but prohibited the payment of any interest or yield, and its effectiveness awaits the adoption of rules by relevant agencies.)

Significantly, the Clarity Act would create a two-track approach, with the SEC regulating digital securities, and the CFTC digital commodities. The Howey “investment contract” test would survive in evaluating digital securities, but its scope of application would be limited. At least the initial version of the Act provided that digital securities would become digital commodities in the secondary market following issuance. The agencies would share regulatory authority over financial intermediaries that engage in digital asset trading.

At the end of last year, SEC Chairman Paul Atkins made a speech affirming his support for legislation, echoing the distinction between digital securities and digital commodities, and promising a clear “taxonomy” to evaluate and regulate the former.

Webinar

These developments, and others discussed above, will be explored in greater detail during our webinar on **Wednesday, January 21st**, 12:00 PM – 1:00 PM ET.

Hosted by Proskauer’s Capital Markets Practice Group, this CLE program will cover timely issues and provide practical, best-practice guidance tailored to U.S. securities regulation.

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