

The Legal Intelligencer

Congressional Cryptocurrency Reform Targets Regulators Rather Than the Industry Itself

By John Moon and Daniel Stone

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For the last century, major statutory overhauls of the American financial system have followed a boringly predictable pattern: a major, systemic financial crisis reveals structural risks while costing many consumers their savings and, in response, Congress implements a new statutory regime to address those newly revealed risks. For example, the Securities Act of 1933 and the Securities and Exchange Act of 1934 were both enacted to prevent another Great Depression. Likewise, after the Enron and WorldCom accounting scandals, Congress passed the Sarbanes-Oxley Act of 2002 to implement necessary accounting reforms. More recently, in the wake of the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act to reduce real estate financing risk and limit the need for public bailouts of banks deemed “too big to fail.”

Given this historical trend, when the cryptocurrency market suffered from a severe panic in 2022, it would have been unsurprising if Congress had acted swiftly to address the causes. As a reminder, in May 2022, the supposedly stablecoin pair of Terra-Luna unpegged from \$1. This started a chain reaction of market failures that ultimately climaxed in the collapse of cryptocurrency behemoths like Voyager, Celsius and FTX. Before 2022 was finished, FTX’s founder and CEO, Sam Bankman-Fried, had been



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John Moon, left, and Daniel Stone, right, of Olshan Frome Wolosky.

indicted. Alexander Mashinsky, the founder and CEO of Celsius was also indicted in July 2023. In a matter of months, roughly \$2 trillion worth of crypto-assets were wiped out as the price of Bitcoin fell from its 2022 high of approximately \$47,000 to approximately \$16,000. Yet the Congressional response appeared nonexistent.

A crisis like this abhors a vacuum, so the Securities and Exchange Commission (SEC) stepped up its enforcement in the crypto-asset market. In 2022, the SEC brought a total of 30 cryptocurrency-related enforcement actions, up 50% from 2021.

That rose to 46 in 2023, the highest number of crypto-asset enforcement actions since 2013. These enforcement actions were based on the SEC's expansive views of its own enforcement jurisdiction, which generated substantial controversy, including within the commission itself.

For example, on Feb. 9, 2023, the SEC sued Kraken for failing to register the offer and sale of their "staking-as-a-service" program—a novel product in which Kraken had pooled certain assets and staked them on behalf of investors to generate crypto-asset returns for those investors. In response to the SEC's enforcement action, SEC Commissioner Hester Peirce publicly criticized the SEC's heavy-handed approach of "choosing to speak through an enforcement action" rather than "taking the path of thinking through staking programs and issuing guidance."

In 2025, with the inauguration of the second Trump administration, the SEC's Enforcement Division has "pulled in its claws" with respect to prosecuting crypto fraud. Since the inauguration, the SEC has settled or otherwise abandoned many of its crypto-asset enforcement actions and investigations, including the multiyear action against Ripple Labs and its investigation into Uniswap. Likewise, the 2022 "crypto winter" appears to be a faded, unpleasant memory, as Bitcoin prices are riding an all-time high of around \$120,000. Both Sam Bankman-Fried and Alexander Mashinsky, serving long prison sentences, have disappeared from public view. From this, one might reasonably conclude that the time for Congressional action had passed.

Instead, this month the House passed the Digital Asset Market Clarity Act, commonly known as the CLARITY Act, with bipartisan support. The CLARITY Act provides cryptocurrencies with a way to replace the SEC's formerly potent oversight with that of the Commodity Futures Trading Commission (CFTC) in the event that the digital asset and its related

blockchain are sufficiently "mature." A digital asset is mature if the blockchain system upon which it is based is not controlled by any person or group of persons. In other words, the major statutory overhaul of the digital asset space following the 2022 "crypto winter" is focused on reforming cryptocurrency *regulators*, not the industry itself.

Many industry insiders are cheering the act. For example, Kraken, Coinbase, and Anchorage Digital, all major digital asset institutions, each praised the CLARITY Act as advancing crypto policy and providing needed regulatory clarity.

Yet questions remain whether the CFTC's jurisdiction will prove more favorable to the industry. The CLARITY Act still requires digital commodity exchanges, digital commodity brokers and dealers, and commodity pool operators to register with the CFTC, a costly endeavor. And the CFTC has not been a wallflower when it comes to enforcement actions in the cryptocurrency space. For example, in December 2023 the SEC settled charges against Binance and two executives for over \$2.7 billion. Similarly, in August 2024 the CFTC received a judgment against FTX and Alameda Research for over \$12.7 billion.

As a result, although the CLARITY Act would bring much-needed jurisdictional clarity over which regulator oversees which digital assets, it may not meaningfully reduce the regulatory burden digital assets and their related providers face. While providing jurisdictional clarity is certainly helpful, it does little to protect consumers or prevent the next "crypto winter."

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