

August 4, 2022

New Bipartisan Bill Adds Momentum for Cryptoasset Regulatory Clarity

Yesterday, a new [bipartisan bill](#) was introduced by Senators Stabenow, Boozman, Booker and Thune that would provide the Commodity Futures Trading Commission with expanded authority over fungible cryptoassets, other than those constituting securities (full bill summarized [here](#)). As with the Lummis-Gillibrand bill promulgated in June (which we addressed [here](#)), it is uncertain whether the Stabenow bill will gain broader traction and there remain some important open questions to be resolved. Nevertheless, it represents another sophisticated attempt to clarify the regulatory framework governing cryptoassets. Following are a few key observations:

- *CFTC Spot Market Regulatory Authority.* Like the Lummis-Gillibrand bill and another [bipartisan bill](#) introduced in the House of Representatives earlier this year, the Stabenow bill would give the CFTC supervisory authority over spot digital commodity markets; *i.e.*, trading of fungible cryptoassets not constituting securities. Among other measures, the bill would: amend the Commodity Exchange Act to require digital commodity platforms to register with the CFTC and to abide by core market integrity principles; establish a regimented listing process for digital commodity contracts; and require digital commodity brokers, custodians, and dealers to become members of a registered futures association. Under prevailing law, the CFTC only regulates derivatives markets, so markets in digital commodities have not been subject to comprehensive supervision. There is now clear legislative momentum for closing this gap, which would make considerable progress in enhancing market integrity.
- *Treatment of Bitcoin and Ether.* The Stabenow bill defines “digital commodity” to include Bitcoin and Ether, which, as of this writing, together represent roughly 60% of the aggregate market capitalization of all cryptoassets. Although the SEC has long concurred that Bitcoin is not a security and in recent years one senior SEC official publicly expressed that [view](#) with respect to Ether as well, the SEC has not taken a definitive position on Ether. And Ether is a key element in the cryptoasset ecosystem, given that a preponderance of cryptoassets (including NFTs) are built and depend on the Ethereum network, for which Ether is the native network currency. Clarity with respect to Ether’s legal status would be a manifest boon for the industry. In characterizing Ether as a commodity, it is unclear

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to what extent the bill’s sponsors took into account the impending Ethereum network “[merge](#),” which would entail a shift from “proof-of-work” (*i.e.*, energy-intensive mathematical computations as the means of securing the network) to “proof-of-stake,” a consensus mechanism by which validators responsible for securing the network deposit Ether into a smart contract and receive yield in the form of Ether.

- *Exclusion of Securities.* The Stabenow bill explicitly excludes any security from its definition of “digital commodity” and therefore from the scope of the bill, as unquestionably whatever constitutes a security remains the purview of the SEC and not the CFTC. But unlike the Lummis-Gillibrand bill, the Stabenow bill does not address the continuing [lack of market and regulatory clarity](#) with respect to *which* particular cryptoassets constitute securities — an issue that urgently needs regulatory clarification.

Like prior legislative proposals, the Stabenow bill has a long and uncertain legislative road ahead, and aspects of the bill (*e.g.*, the breadth of some of its definitions) are garnering some industry criticism. But the bill represents additional momentum toward providing the weathered cryptoasset market with needed regulatory clarity, which is critical for the continued market leadership of the United States, industry growth, and investor protection.

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