

INSIGHTS

Caging the Crypto Beast

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On this episode of Bracewell Sidebar, we continue their conversation with Anne Termine about cryptocurrency, including how different regulators are trying to create order in the hard to regulate cryptocurrency markets.

Anne joined the firm in June 2021, with over 20 years of experience representing clients in investigations, enforcement actions, and litigation involving commodities, derivatives and more recently, cryptocurrency markets. She brings an insider's perspective to these issues, having served as a chief trial lawyer in the US Commodity Futures Trading Commission's (CFTC) Division of Enforcement from 2003 to 2016.

There seems to be some turf war going on about how cryptocurrency is going to be regulated, whether it's going to be regulated and then who gets to regulate it. Can you wrap all of that up for us?

Cryptocurrencies are already regulated by the alphabet soup of government agencies inside the Beltway. Right now some of those alphabets are trying to do a capture the flag land grab in the regulatory space, starting with the SEC.

Talk a little bit about what current regulation there is and what the discussion generally is about whether and how it's going to be regulated going forward.

There is a lot of misconception about the cryptocurrency industry as to whether or not it is even regulated. The fact is, it is. They already face a whole host of regulations across a number of regulators. Start with FinCEN and OFAC with their anti-money laundering regulations. These companies, because they engage in some level of currency back and forth, have to have customer policies and monitor their accounts for suspicious activity. Separately, because they are in fact receiving money from customers, these companies face state by state regulations as a money transmitter. There are federal alternatives to that offered by the Office of the Comptroller of the Currency, special purpose charters for payments and for FinTech. Very few of them being granted by the OCC, and they are under battle from the states that have sued the OCC for their right to bring these special charters.

This was all put in place under the prior administration, so under the Biden administration, the current acting comptroller of the currency and the current nominee for that same position have been outspoken critics of digital assets. On top of that, you've got other regulators who come in play like the CFTC, who says, if you want to offer a product to retail customers that's margined or leveraged or financed, then you need to be registered with the CFTC. If you offer a token for services, that might be a security under the SEC. And if you do anything in any way, shape or form that could possibly harm customers, then you're facing the enforcement jurisdiction of a

whole host of agencies, including the CFTC, the SEC and the FTC has looked at this. The CFPB is now looking at this. But the long and short of it is, at the end of the day, there is a level of regulation out there, it's just not organized under one single regulator.

Is there anything in the works to form this overall regulatory scheme so that there is maybe a little bit less uncertainty?

There are a whole host of suggestions out there, and I think they're all being explored at various levels. The SEC under Chairman Gensler has been pretty proactive in addressing the issue with the Hill. And not coming right out with a full policy or suggestions on what regulation should be there, but taking a pretty strong stance at, at least as far as these things stand, the Howey test, which is the test that the SEC uses to determine whether our product is a security or not, is applicable for now.

I think the long and short of it is, the development of the industry has become so fast and so quick that it's not clear that the current state of regulations under the agencies like the CFTC and SEC, can remain completely applicable. That's why the Hill becomes an option. There have been suggestions out there by the industry itself, should there be a single regulator? Coinbase, for example, put out its own paper on that. Others have said, to rethink current regulations. When you look at the SEC and the CFTC regulations, they're 30-, 80-years old. They're trying to employ very old structures to very new things, things that were designed to be completely different than the way the financial industry currently works. Is it fair to put that old traditional regulatory structure on top of something completely new? Are we dealing with a square peg, round hole kind of situation?

Have questions about cryptocurrency and other digital assets? Email your questions to Anne Termine or [Matthew Nielsen](#).

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