

***THE CONSUMER FINANCE PODCAST: CURRENT LANDSCAPE OF CRYPTOCURRENCY
REGULATION AND ENFORCEMENT***

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Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Group, and I'm really happy you've joined us for today's episode, which is going to be about all things related to cryptocurrency regulation and legislation. But before we dive into that topic, let me remind you to visit our blogs, troutmanpepperfinancialservices.com and consumerfinancialserviceslawmonitor.com, where you'll see all of our thought leadership content that spans the entirety of the financial services industry. And don't forget about our other podcasts. We have the [FCRA Focus](#), all about credit reporting. We have [The Crypto Exchange](#), which we're doing the crossover episode with today with the people who run that podcast. We have [Unauthorized Access](#), which is our privacy and data security podcast and our newest podcast, [Payments Pros](#), which is all about the payments industry. All of those podcasts are available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing.

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Now, as I said, we're doing a crossover episode today with my friends from *The Crypto Exchange*, and in particular, we're going to be talking about the current environment for crypto regulation and legislation, but with a particular emphasis on what's going on at the state level with state regulators. And I'm joined for this conversation by Ethan Ostroff, who's a partner in our Consumer Financial Services Group, as well as Trey Smith, who's an associate in our Regulatory, Investigation, Strategy and Enforcement or RISE Group, which contains our nation leading state attorney general practice. So, Ethan, Trey, thanks a lot for being on the podcast and doing this crossover episode with me today.

Ethan Ostroff:

Happy to join you, Chris. Thanks for having us.

Trey Smith:

Yeah, Chris, Ethan, thank you for having me. I'm looking forward to digging into it and discussing the current state of regulations.

Chris Willis:

So, gentlemen, let's talk about cryptocurrency regulation and enforcement. First, Ethan, can you just describe the current regulatory landscape at the federal level just to level set us?

Ethan Ostroff:

Sure. I think the high-level takeaway is it's a hodgepodge. There is no comprehensive framework at the federal level governing digital assets. And so that's led to a regulatory environment where you have a lot of different federal regulators with some piece of jurisdiction over some aspect of digital assets or the underpinning technology, and they have an opportunity to weigh in in some way. Some have promulgated rules or established formal guidance to regulate various aspects of the ecosystem. You have the SEC, however, taking the position that nothing new is needed because of the current regulations being applicable to the digital asset ecosystem in a way that's not anything different from traditional finance. Often this isn't overlapping in conflicting ways. The SEC, everyone who's following this at all has a sense that they have a very overarching view about pretty much every type of cryptocurrencies is a security.

You have the CFTC not necessarily agreeing with them and believing that some cryptocurrencies are commodities, and also recently indicating that it can be a fluid type situation where something that might have been a security at one point is no longer at a later point in time. You've got the Department of Treasury with FinCEN requiring various types of companies touching cryptocurrency in different ways to register as money services businesses and to undertake compliance obligations with respect to anti-money laundering, know your customer type regulations. You have the IRS making statements about how to deal with cryptocurrencies for tax purposes. You have the OCC and the FDIC and the Federal Reserve Board making statements in particular about how banks and other types of financial institutions can and cannot interact with various players in the digital asset ecosystem.

And so, I think overarching point here is the challenge on the federal level is that there's an absence of comprehensive law and comprehensive regulation, and there's a lot of uncertainty for businesses, which is leading, the regulators don't always agree with each other, more and more companies to either make the decision to go offshore or to start thinking more seriously about going offshore and leaving the United States.

Chris Willis:

It sounds really confusing and challenging, Ethan. And it also sounds like a situation where if there's not unity at the federal level that you might see some state regulators or legislatures getting impatient and trying to jump into the action. Trey, can you tell us about regulations at the state level? How are the states approaching cryptocurrency issues?

Trey Smith:

Absolutely. Like Ethan pointed out, the federal regulators, especially this year, have really started to increase their jurisdiction and how much jurisdiction they assert over cryptocurrencies. The SEC yesterday or a couple days ago, saying that it now viewed 67 cryptocurrencies as securities. That hasn't always been the case. They've adopted a little bit more of a wait and see approach historically. And so, in the absence of any kind of comprehensive federal legislation or agency guidance like you indicated, Chris, the states and particularly state securities regulators and state attorneys general, they stepped in to fill that regulatory gap. We really saw them get proactive around 2018. Before then, the state enforcement and the environment of the regulatory space was relatively focused on minor consumer scams and remedying those issues.

But in 2018, the North American Securities Administrators Association initiated Operation Cryptosweep. That was a group of 40 securities regulators across North America and

coordinate enforcement actions against various cryptocurrency companies for a wide variety of perceived security violations. Once that task force was organized and operationalized, you then saw the states come out swinging. In particular, the New York Attorney General launched an investigation of 13 large cryptocurrency platforms in the period immediately after the formation of the task force. And now three and a half years later, state securities regulators have issued well over 50 cease and desist orders to currency related investment products relating to ICOs — initial coin offerings — and their failure to register with securities laws or provide statements to investors.

Chris Willis:

Got it. And it makes sense to me, Trey, I guess while the state securities regulators are in the mix here, they're in it for the same reasons as the federal SEC is and taking the position about whether cryptos are a security. But can you give the audience some insight into how and why state attorneys general are involved in cryptocurrency regulation and enforcement?

Trey Smith:

At the outset, state attorneys general, they play a very crucial role in consumer protection within the states. They're the chief legal officers of the jurisdictions, so they have the authority to enforce and interpret state law, including laws that cover cryptocurrencies. So, state AGs do end up approaching cryptocurrencies from a wide variety of angles. You might see them initiate investigations and take legal action using UDAAP statutes. Those are unfair, deceptive and abusive acts and practices, that just happen to be done and perpetrated in the context of cryptocurrency. You might have stated you're involved from the scam standpoint or from the Ponzi scheme standpoint, investigating and prosecuting schemes that are operating as harms on consumers.

And then of course, you've got the unregistered securities offerings or misleading advertising as they relate to cryptocurrencies. And getting involved in these actions, state AGs are often working in collaboration with other state regulators. So that's where they might be working with the State Securities Commission or division bringing in enforcement action together. Or you might see the state AGs working in a multi-state with other state AGs or even with federal agencies or both. So, the state AGs play a pretty multifaceted role when it comes to enforcement in the cryptocurrency arena.

Ethan Ostroff:

Just to chime in on that, they're the chief legal officer within each particular state, so they play an important role as an enforcement ally to federal agencies and neighboring states. And because of that, when you think about the current patchwork of the cryptocurrency regulatory landscape, the state AGs are going to play a multifaceted role in the regulation and enforcement of the digital asset space. And Chris, as I think you're well aware, they had a recent statement, I believe by the CFPB or request for comment, was it, about working with state AGs and further cooperation?

Chris Willis:

That's right. The CFPB has been doing a lot of that, as well as the Federal Trade Commission recently released a request for information on that same subject as well. So, both the CFPB and

the FTC have been really teaming up with the state attorneys general in a way that we haven't seen in recent years.

Ethan Ostroff:

Yeah, and I think that's also consistent with what we expect in this space at a federal level in the digital asset space, is that you're going to see an increasing amount of activity by the FTC and the CFPB. Whereas in the past, the FTC has been focused on things like romance scams and other traditional types of scams that impact cryptocurrency, but we foresee those roles expanding by both the FTC and the CFPB and to them to get significantly more involved over the next year or so.

Chris Willis:

Thanks, Ethan. Continuing on the theme of state attorneys general Trey, you're one of the best people to answer this because you're a member of our state attorney general group, which I've always considered to be the best in the country even before I was here. What makes regulation and enforcement by the state AGs unique as compared to what we might experience with other regulators?

Trey Smith:

I think generally speaking, the states have shown they're far more willing to issue CIDs and investigate enforcement targets than their federal counterparts might be. Who they decide to investigate, the scope of their investigations, they're all part of a calculus that the states do in deciding to bring an enforcement action or to launch an investigation. Some common triggers for a state AG action might be the receipt of consumer complaints. They might be targeting a specific industry. There might be some self-reporting, whether that's from a whistleblower, some disgruntled employee, some entity that alerts the office of potential consumer harms or wrongdoing or legal violations and those complaints can again come from not just whistleblowers, but competitors, investors, auditors, attorneys, or even the news media. So, the state AGs, they're very proactive and a little bit more aggressive than other regulators when it comes to consumer harm.

Chris Willis:

So, we know what regulators are on the playing field here, thanks to the two of you answering that first set of questions. But Ethan, let me turn to you now and ask on the substance, what aspects of the cryptocurrency industry have regulators been most focused on in terms of their enforcement efforts?

Ethan Ostroff:

Since about 2018, the states have moved pretty much in lockstep with the SEC. After the NAS identified ICOs or initial coin offerings to be an emerging investor threat, we saw the SEC and states begin to target ICOs and unregistered securities offerings, in addition to run-of-the-mill crypto scams. Then we moved forward to about 2021. We saw regulators begin targeting interest-bearing products with a coalition of states issuing cease and desist or show cause orders, for example, at the Celsius Networks earn rewards program. Then we most recently saw the SEC send a Wells Notice to Coinbase about its lend program violating securities laws. Both of those products allowed consumers to deposit their cryptocurrency to a platform and receive

interest from the platform's use of the deposited funds, whether it resulted from the platform's training or from loan making. And in 2023, we've seen a lot of this early enforcement action against earn products result in multimillion dollar settlements.

Chris Willis:

Okay. And what about more recently, Ethan?

Ethan Ostroff:

From an enforcement perspective, state and federal regulators are still focused on cryptocurrency firms offering what regulators view as unregistered securities, but rather than offering these through an earn type product, which more closely resembles the traditional security, regulators are now instead targeting staking services.

Chris Willis:

Okay. So that's something I'm not familiar with. Do me a favor and probably our audience a favor too, and tell me what are staking services, Ethan?

Ethan Ostroff:

Many decentralized networks validate transactions through proof of stake mechanisms as opposed to proof of work, which uses a vast amount of computing power and resources and energy to prove transactions are valid. So, where a decentralized network uses proof of stake, network validators instead deposit their crypto to the network and get chosen at random to validate transactions. And if a validator actually validates a fraudulent transaction, then the state funds are forfeited and that is intended to disincentivize bad behavior and to incentivize people to stake their crypto, the network pays the validated rewards. Bringing things back to that original question, in the first week of June, the SEC sued Coinbase alleging that since 2019, Coinbase has been gauging in an unregistered securities offering through its staking as a service program and specifically claiming that through its staking program, Coinbase commingled deposited funds, unlawfully offered exchange services, broker dealer and clearinghouse functions and ignored the SEC's registration requirements.

Chris Willis:

Got it. Trey, now back to you. We've heard Ethan talk about the federal sort of focus on staking. Is that something the states are also targeting?

Trey Smith:

The states are also targeting staking. True to form, like I said earlier, the state AGs have somewhat been moving together with the federal agencies on the cryptocurrency front. So just a couple of days later, after Coinbase was sued by the SEC, a multi-state task force filed charges against Coinbase as well, alleging similar violations of state securities laws. In their show cause orders, they gave Coinbase 28 days to show why they should not be directed to cease and desist from selling crypto in those states, which essentially means that Coinbase has to prove that its staking services are not securities. Coinbase has been making the argument for a few months now that its staking services do not constitute unregistered securities. They concede that some staking services might be securities but not all. And the rationale is that there's no investment of money and in these cases what investors are giving up is the opportunity cost of

the use of their funds to validate transactions. So, I'm sure that we'll see them making that argument in the days to come in response to the show cause orders issued by the states.

Chris Willis:

So, let's shift gears here for a second, Ethan, and talk about legislation. You mentioned the fact that there isn't really any comprehensive crypto legislation at the federal level in the earlier part of the episode, but has any progress been towards some sort of comprehensive legislation?

Ethan Ostroff:

With respect to comprehensive legislation, there's been a draft bill that's been released, the Digital Asset Market Structure Discussion Draft, and that was released by the House Financial Services Committee and that's intended to be a comprehensive regulatory framework at the federal level. I think at a high level following what many people refer to as the crypto winter and the collapse of TerraUSD and the FTX bankruptcy and the criminal prosecution involving that and a number of other high profile bankruptcies and the resulting impacts on consumers from that and in the investing public, both regulators and lawmakers have a renewed focus on this space and I think at least some type of renewed urgency to try to provide some type of clarity to industry participants. At the state level, the New York Attorney General actually introduced something called the Crypto Regulation Protection Transparency and Oversight Act. And today, on June 13th as we're recording this, there's a financial services committee hearing going on that's called The Future of Digital Assets: Providing Clarity for the Digital Asset Ecosystem.

Just a few days ago in advance of that hearing, the Republican chair of the House Financial Services Committee released another draft of the leading legislative proposal for overseeing stablecoins. So, we are seeing some progress and we are seeing the use of time and resources both in the Senate and in the House to try to get something done, preferably with bipartisan support, at the very least to cover Stablecoins, which has been a priority since last year when Representative Patrick McHenry took over the House of Financial Services Committee as the chairman. It's unclear whether or not there's going to be bipartisan support at the end of the day with respect to any of this, but I think there is a renewed hope that members of both parties on the Hill are interested in trying to get some type of legislation done this year during Congress's current session.

Chris Willis:

Okay. Let's talk about the pieces of legislation that have been introduced and what they would do. So let me stay with you, Ethan. How would the New York bill that was introduced by the New York Attorney General, as well as the Digital Asset Market Structured Discussion Draft in the U.S. Congress address cryptocurrency regulation?

Ethan Ostroff:

So, the Discussion Draft on the Hill is geared towards resolving the question of whether cryptocurrencies are securities or commodities, at least that's one big aspect of it. The Crypto Act proposed by AG James sidesteps that question completely. The Crypto Act that's been proposed by the New York AG broadly defines digital assets as any type of digital unit, whether labeled as a cryptocurrency, coin, token, virtual currency, or otherwise, that can be used as a medium of exchange. So, it's intended that the Crypto Act in New York would cover anything

resembling a cryptocurrency and that would implement many of the safeguards you traditionally see in the securities context.

Chris Willis:

Okay. And on the federal level, you mentioned that the House draft is supposed to put crypto in either the securities bucket or the commodities bucket, which would tell us which regulator has jurisdiction, the SEC or the CFTC. So how does it come down on that question?

Trey Smith:

I can jump in here, Chris. The Discussion Draft, it pretty much gives the CFTC broad jurisdiction over digital asset commodities, but it leaves the SEC involved where the digital assets are issued pursuant to what might be construed as a digital asset investment contract. The Act also provides an exemption for offers and sales of digital investment contracts if the issuer is able to demonstrate that the digital assets operate on a decentralized and functional network. In that case, the asset becomes a digital commodity subject to the CFTC's regulations, and the bill also provides a certification process under which a digital asset issuer can certify to the SEC that the network, that the asset is operating on is sufficiently decentralized, such that it can be a digital commodity instead of a digital asset issued pursuant to an investment contract.

Chris Willis:

Well, I'm learning all kinds of new terms today and I'm sure our audience is as well. So can you just tell me, Ethan, what does it mean for the network to be decentralized and functional, as Trey was just mentioning?

Ethan Ostroff:

Well, under the bill, there's really three conditions that have to be met to be considered decentralized. The first two have to be true with respect to the 12-month period before the digital asset is considered decentralized. And during that period, no one can have beneficial ownership of more than 20% of the outstanding units, and no one can have unilateral control over the network. The last requirements that in the three months prior to a finding of decentralization, no material changes to the network can be made by the issuer or any of its affiliates. And if those conditions are met, the network would then be considered decentralized and could qualify for an exemption. And a network is functional where the network is capable of transmitting value on a blockchain.

Chris Willis:

Okay, got it. So, what other provisions do these proposed pieces of legislation address?

Ethan Ostroff:

Both bills require a digital asset issuer to publish significant amounts of information about the digital asset prior to issuance. The draft discussion bill that's circulating on the Hill provides that an issuer is required to disclose the network source code, transaction history and tokenomics, including information on the launch and supply process, as well as the consensus and governance mechanisms, and a list of individuals interested in the issuance, the risks and more. AG James's bill requires an issuer to publish and distribute a prospectus prior to issuance, and

that prospectus also has to have a lot of the same material information, but with more of a focus on the issuer's identity.

Chris Willis:

Okay, got it. Are there some other things, Trey, that these pieces of legislation also address in addition to what Ethan just told us?

Trey Smith:

Yeah. In addition to addressing the issuers, the bills both address exchanges or marketplaces as they're called in the crypto bill in New York and the way they decide to list certain digital assets, both bills are going to limit the types of digital assets that can be offered, but in different ways. So, in the Discussion Draft that's being circulated on the Hill, digital assets that are not subject to any exemptions cannot be sold on a digital commodity exchange or a DCE, and they're essentially considered restricted securities such that they can only be sold in pretty limited circumstances. In contrast, or by contrast, under the proposed New York bill, an exchange is only required to adopt and publish listing standards for the digital assets it lists. So as long as the digital asset that goes up on the marketplace meets those requirements that it sets for itself and for the assets it lists, the exchange could permissibly list that digital asset without concern to whether it's a digital asset security or a digital asset commodity. So, in a sense, it's a little bit more straightforward.

Another similarity we see is in the market protections that the bills both afford to prospective customers. In the wake of a lot of the harms that we've seen over the past year in the industry, regulators have begun to allege that these exchanges and these market makers are engaging in different types of abusive trading practices. So, both bills seek to curb that practice. On the discussion draft side, you have that bill emphasizing the importance of open and competitive markets in trading on digital commodity exchanges, and it requires the exchange to put safeguards into place to protect against the market manipulation. And then the crypto act over in New York, it just comes out the gate. Then they criminalize an enumerated list of practices, wash trading, pre-arrange trading, insider trading, and market manipulation more broadly. So, you have both bills there trying to implement some basic consumer protections that they're technically illegal under current law, but specifically extending that illegality to the crypto context.

Chris Willis:

Okay, thanks. And Ethan, I have a feeling there's even more coming with this legislation. Can you tell us some other provisions of the two bills?

Ethan Ostroff:

So, a couple more things to take note of, custody of customer assets. So, one of the areas the Crypto Act significantly differs from the Discussion Draft is on permitted crypto custody activities. The Crypto Act would prevent digital asset marketplaces from custody and digital assets entirely except for when affecting a specific transaction. In contrast, the Draft Discussion bill would require DCEs to hold customer assets and digital commodity custodians, which are separate entities subject to minimum standards for supervision and comprehensive regulation. And then you've also got, with respect to exchanges and customer funds, both bills prohibit commingling of investor funds for exchanges. And it seems like most regulators want to see this type of provision in any version of approved legislation with respect to preventing commingling.

Chris Willis:

And Trey, let's round out the review of these proposed pieces of legislation with you on the subject of conflicts of interest.

Trey Smith:

On the conflicts of interest piece in both of these bills, commingling of funds and conflicts of interest are some of the most common rallying cries by regulators as to some of the regulation that's needed. And so under both of these draft bills, you see the regulators beginning to implement those measures, specifically with regard to conflicts of interest. You have the digital commodity exchanges, brokers, and dealers. When we're talking about the Draft Discussion bill on the Hill, the legislation requires them to implement systems and procedures that are designed to prevent conflicts arising out of transactions or arrangements with any of their affiliates. New York's bill, it goes a little bit further. It prevents any one issuer, marketplace, broker, advisor, influencer, any of those parties from being under common ownership. So, you can't occupy more than one of those roles. You have to be siloed within your specific role. And then on top of that, it prevents each actor from engaging in more than one of those activities. So again, it's just designed to make sure that there's no conflicting transactions, that everyone is separate and dealing at arm's length without profiting at the consumer's expense.

Chris Willis:

Okay. So, Ethan, we've talked a lot about the past, the present and even a glimpse of the potential future of crypto's regulatory landscape. Do you have any insights to offer to the industry about how to adapt to this situation?

Ethan Ostroff:

I think one thing, and I don't think this is really anything new, there's going to be an overlapping regulatory regime that involves numerous federal regulators and state regulators. And that's not going to go away. When you talk about federal regulators, you have to put the SEC to its own silo because they seem at present content with the current regulatory landscape and also relatively content with regulation by enforcement. If you separate and bracket off the SEC, I think other federal regulators seem to recognize that there is something to the technology, to the distributed literature, technology that is beneficial to the American public and has a place within our financial system. And it's really not a question of if, but more a question of when and scope as to what's coming with respect to both legislation and additional regulations. It's nothing unusual for federal and state regulators to be concerned about the risks of harms to consumers and investors, the investor public, and for there to be UDAAP, traditional UDAAP concerns that come into play as well.

And so there is some hope that there will be some type of comprehensive federal legislation, but that does not seem like it's got a path to getting passed in the near term. Lawmakers seem to be more and more interested in trying to understand. I think as a threshold level, you have some members of Congress who are very well versed with respect to digital assets and distributed ledger technology and others who are not. And there's a real struggle to provide those who do not have a baseline understanding of the type of technology involved and understanding of how it functions so that they can get comfortable with various aspects of it and how decentralized finance works. And that's important in the context of not every digital asset is a cryptocurrency. We have seen draft bills that exclude non-fungible tokens and other things from virtual

currencies because they recognize that a cryptocurrency is just one application of decentralized technology.

On the one hand, obviously companies need to make sure they understand the current state of play, and that state of play is not just the laws and the regulations on the book, but what the regulators are doing by way of enforcement. And they can also look at some consistent themes across the activities by federal and state regulators, as well as lawmakers with respect to avoiding certain types of conduct like commingling depositor funds or having conflicts of interest.

Chris Willis:

It sounds, Ethan, to me, at least for the time being, the crypto industry is really in a situation of trying to anticipate what regulators may object to and structure their operations around that judgment, which sounds probably pretty familiar to listeners of this podcast because we do the same thing with the other regulators under their UDAAP jurisdiction. Do you agree that's a parallel situation?

Ethan Ostroff:

Completely agree, and I think it's not just a parallel situation. I think you're going to see an increased activity by both the CFPB and the FTC in this space using those traditional UDAAP powers.

Chris Willis:

Got it. So Trey, I'm going to give you the last question, and it's kind of a interesting one, but it's important because if we're trying to anticipate the attitudes and actions, particularly enforcement behavior of regulators, we need to know who's going to be the regulator. So, who do you think will ultimately regulate cryptocurrencies?

Trey Smith:

I think at the federal level, what we're going to end up seeing is something that's pretty consistent with the Draft Discussion bill that's circulating right now. I think that jurisdiction is going to have to be split between the SEC and the CFTC just considering those agencies mandates. If you look at the financial regulators in the UK, they don't have to make decisions around that line and neither do the states. I think at the federal level, clear lines are going to have to be drawn as to who is going to be the final regulator and to what degree. I think given that cryptocurrencies do have and can have some aspects that look like securities, you're going to see the SEC retain a little bit of control. But I think that once a comprehensive cryptocurrency framework has been passed, it'll be clear how to regulate the technology at the federal level.

And then in turn, from the state perspective, it's going to be a lot clearer for all parties as to what conduct is actionable and thus clarify these current regulation by enforcement approach that we're seeing. Even with the additional clarity, I do believe that state securities divisions and state AGs and even the SEC will continue to be involved in cryptocurrency enforcement. And just like we talked about earlier in the episode, given the increased collaboration between the CFPB, the FTC and the states, this is just part of that continuing trend where we're going to continue to see joint enforcement and information sharing between those two levels of government to clap down on perceived consumer harm.

Chris Willis:

It sounds to me like that's a situation that calls for companies in the crypto industry to have advice from outside counsel who are well-informed about the priorities of all of these regulators, which I can't imagine anybody more informed than the two of you. So, I want to thank both of you for being on the podcast today and sharing your insights with our audience. And of course, thanks to the audience for listening to today's episode as well.

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