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Stablecoins and Beyond: 2022 Digital Asset Legislation Landscape

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Will 2022 be the year of comprehensive digital asset legislation in the U.S.?

In 2021, Congress waded into the digital asset policy waters through its inclusion of expanded cryptocurrency and digital asset rules as part of the \$1 trillion Infrastructure Investment and Jobs Act (HR 3584), which was signed into law by President Joe Biden on November 15. That legislation expanded the definition of a broker to likely include US cryptocurrency asset exchanges and digital wallet providers, thereby requiring them to report certain information related to digital asset transactions. Although the text of the bill regarding the definition of a “broker” has generated controversy, the digital asset industry’s nascent influence in Washington was possibly a bigger story. Digital asset lobbyists and policy groups seemingly cemented their ability to influence Congress as it shapes digital asset legislation, which the industry will look to build upon this year.

Perhaps the most pressing policy issue facing Congress is stablecoin legislation. On November 1, the President’s Working Group on Financial Markets (PWG), along with the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) issued an Interagency Report on Stablecoins which recommended that “Congress act promptly to enact legislation to ensure that payment stablecoins and payment stablecoin arrangements are subject to a federal prudential framework on a consistent and comprehensive basis.” The next month, on December 17, the Financial Stability Oversight Council (Council) stated in its 2021 annual report that it will take steps to “address risks outlined in the PWG Report on Stablecoins in the event comprehensive legislation is not enacted.” Treasury Undersecretary for Domestic Finance Nellie Liang further emphasized the need for stablecoin legislation in a December 18 interview with Bloomberg News, in which she commented that government regulators need action from Congress to protect the financial system from risks posed by stablecoins. Liang referred to the Council’s intention to take steps on its own to address stablecoins if Congress fails to pass legislation as “not a good Plan B.”

On January 11, during the Senate Banking Committee hearing to consider his second nomination to serve as chair of the Board of Governors of the Federal Reserve System, Jerome Powell assured the committee that the Federal Reserve’s report on digital currency will be released in the coming weeks. Ranking Member Pat Toomey (R-PA) discussed the creation of a central bank digital currency, and asked if Congress were to authorize and the Federal Reserve were to pursue a digital dollar, whether anything should preclude well-regulated and privately issued stablecoins from coexisting with a central bank digital dollar (CBDC). Mr. Powell stated, “No. Not at all.”

The very next day, Rep. Tom Emmer (R-MN) introduced a bill prohibiting the Federal Reserve from issuing a CBDC directly to individuals. The bill contains a single amendment to the Federal Reserve Act, extending section

13 to ban the Federal Reserve from offering products or services directly to an individual, maintaining an account on behalf of an individual, or issuing a CBDC directly to an individual. In a press release issued by his office following the introduction of the bill, Rep. Emmer proclaimed that the Federal Reserve does not, and should not, have the authority to offer retail bank accounts. He also expressed his concerns about privacy, stating that the Federal Reserve could use a CBDC “as a surveillance tool” by collecting personal identifiable information on users and tracking their transactions “indefinitely.” Emmer’s bill is the latest development in his continued engagement with pro-cryptocurrency legislation. In November, Emmer joined a bipartisan group of representatives in introducing a bill to significantly amend the crypto-related provisions in the Infrastructure Investment and Jobs Act. That bill, titled the “Keep Innovation in America Act,” has not progressed since it was referred to the House Committee on Ways and Means on November 17.

Most recently, during his speech at the British-American Business Transatlantic Finance Forum, Michael J. Hsu, Acting Comptroller of the Currency, declared that “bank regulation would give credibility to the ‘stable’ part of stablecoins,” and that “regulating stablecoin issuers as banks could also enable more innovation in crypto....” Hsu’s statements came as a surprise to some considering his past comments, in which he expressed doubt about the reliability and safety of stablecoins. With his recent comments, Hsu might be signaling his desire for digital asset legislation that gives the OCC the authority to regulate national banks’ participation in the digital asset space.

Looking ahead to the rest of the year, below are three recent policy proposals introduced by members of Congress that aim to address stablecoins and further normalize the regulatory treatment of digital assets in the US.

Senator Cynthia Lummis (R-WY)

Sen. Lummis, a member of the Senate Banking Committee, is reportedly planning to introduce a comprehensive bill in 2022 that would cover everything from consumer protection provisions to updated digital asset taxation guidance. The sweeping policy bill would also establish how different types of digital assets are classified for regulatory purposes and outline regulations for stablecoin providers. The bill would also create a new self-regulatory organization under the joint jurisdiction of the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) to oversee the digital asset market.

Senator Pat Toomey (R-PA)

At the December 14 Senate Committee on Banking, Housing, and Urban Affairs hearing on stablecoins, Sen. Toomey released a set of principles that will guide his reportedly forthcoming legislative framework for stablecoins. Sen. Toomey’s principles are as follows:

- Stablecoin issuance should not be limited to insured depository institutions.
- Stablecoin issuers would choose from at least three regulatory regimes based on their business models:
 - Operate under a conventional bank charter;
 - Acquire a special-purpose banking charter designed for stablecoin providers in accordance with new

legislation; or

- Register as a money transmitter under an existing state regime and as a money services business under FinCEN’s federal regime.
- All stablecoin issuers should have to adopt clear redemption policies and disclosure requirements regarding the assets backing the stablecoin, and potentially meet liquidity and asset quality requirements.
- Commercial entities should be eligible to issue stablecoins, provided they choose one of the three regimes listed above.
- Non-interest bearing stablecoins should not necessarily be regulated like securities.
- Regulation should protect the privacy, security, and confidentiality of individuals utilizing stablecoins, including allowing customers to opt out of sharing any information with third parties.
- Financial surveillance requirements under the Bank Secrecy Act (BSA) should be modernized, including for existing financial institutions, in light of emerging technologies like stablecoins.

Representative Don Beyer (D-VA)

On July 28, 2021, Rep. Beyer, the chairman of Congress’ Joint Economic Committee, introduced the Digital Asset Market Structure and Investor Protection Act, which attempts to clarify a wide range of issues currently impacting digital asset market participants. Specifically, the bill would:

- Create statutory definitions for digital assets and digital asset securities, and provide the SEC with authority over digital asset securities and the CFTC with authority over digital assets;
- Provide legal certainty as to the regulatory status for the top 90% of the digital asset market (by market capitalization and trading volume) through a joint SEC/CFTC rulemaking;
- Require digital asset transactions that are not recorded on the publicly distributed ledger to be reported to a registered Digital Asset Trade Repository within 24 hours to minimize the potential for fraud and promote transparency;
- Explicitly add digital assets and digital asset securities to the statutory definition of “monetary instruments,” under the BSA, formalizing the regulatory requirements for digital assets and digital asset securities to comply with anti-money laundering, recordkeeping, and reporting requirements;
- Provide the Federal Reserve with explicit authority to issue a digital version of the U.S. Dollar, clarify that digital assets, digital asset securities, and fiat-based stablecoins are not U.S. legal tender, and provide the U.S. Treasury Secretary with authority to permit or prohibit U.S. dollar and other fiat-based stablecoins;

- Direct the Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), and Securities Investor Protection Corporation (SIPC) to issue consumer advisories on “non coverage” of digital assets or digital asset securities to ensure that consumers are aware that they are not insured or protected in the same way as bank deposits or securities; and,
- Require legislative recommendations from FinCEN, SEC and CFTC to provide clarity on dividing lines between who must register as a money services business versus who must register as a securities or commodities exchange.

Like all things on the Hill, it remains to be seen whether partisan politics will prevent digital asset legislation from progressing this year. Lummis's bill, once introduced, will likely be sent for consideration to the Senate Banking Committee, where Toomey is the ranking Republican. It will be interesting to see whether Lummis incorporates elements of Toomey's stablecoin legislative framework into her comprehensive bill in an effort to cement his support. However, any bill put forth by the Republicans on the Senate Banking Committee will have to receive the blessing of Sen. Sherrod Brown (D-OH), the committee chair, who, in his opening statement at a December stablecoin hearing, stated “[s]tablecoins and crypto markets aren't actually an alternative to our banking system. They're a mirror of the same broken system – with even less accountability, and no rules at all.”

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