Congressional and Government Agency Action on Digital Assets, Including Cryptocurrency: Proposed Bipartisan Digital Asset Legislation

The growth in the size and prominence of the digital asset industry, including $3 trillion in cryptocurrencies alone, has raised significant questions about the need for a more formal regulatory framework. Both supporters and critics of the digital asset industry in government agencies and the U.S. Congress are concerned by the lack of significant and clear regulations that would protect consumers and financial markets, and enable the industry to grow smartly and securely. Additionally, concerns have been raised about the lack of coordination among the numerous government agencies involved in regulating the industry, including the Securities and Exchange Commission (SEC), Commodity Future Trading Commission (CFTC), Office of the Comptroller of the Currency, Federal Reserve and others.

In early March 2022, President Biden issued an Executive Order on Ensuring Responsible Development of Digital Assets. The Executive Order established a governmental coordination process and directed efforts to: (i) protect consumers, investors and businesses; (ii) ensure the financial stability of the U.S. markets; and (iii) protect against the use of cryptocurrency for illegal purposes, including money laundering and funding terrorism. To that end, federal agencies regulating our financial system have taken steps to increase the regulation and oversight of cryptocurrency and other digital assets and the retail digital asset investor industry. This includes the SEC's decision to increase its enforcement efforts by doubling the size of its Crypto Assets and Cyber Unit and the CFTC's recent roundtable on non-intermediation. Enforcement actions will be another way for agencies to regulate the industry in the short term.

Congress has also held hearings and proposed legislation. Notably, in early June 2022, Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) introduced the bipartisan Responsible Financial Innovation Act. The proposed bill, which is the most prominent and comprehensive to date, seeks to establish standards and regulations for digital assets and clarify responsibilities among relevant regulatory agencies. This includes codifying the current Howey Test for whether an asset, including a digital asset, qualifies as an investment contract and is thus subject to SEC regulation, carving out a space for digital assets that are commodities regulated by the CFTC, including on their spot market, and creating a framework and requirements for the issuance of payment stablecoins as neither a commodity nor a security. The proposed bill also addresses digital asset taxation, the definition of a broker-dealer, disclosures for digital assets, the Federal Reserve's role in banking, federal interagency and state-federal coordination and a number of other issues.

While this is the first step in what is likely to be a lengthy legislative process, as the most comprehensive, bipartisan proposed bill to date, the Responsible Financial Innovation Act is a strong starting point for congressional discussions. It will also influence government agency actions as regulatory agencies will continue to use and stretch their existing authority to regulate the digital asset industry.

Institutions and individuals in the banking and digital asset industry should remain aware and vigilant as regulations, enforcement actions and legislation evolve.

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