

# Fintech Focus: What to Expect of Crypto Asset Regulation in the 118th Congress

## Publications

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In 2022, the failures of prominent crypto companies overshadowed broader discussions in Congress about how crypto assets should be regulated. This Congress, both chambers are likely to continue to investigate, hold hearings, and propose legislation regarding the crypto asset industry and adjacent financial sectors. Now is the time for responsible industry participants to decide whether and how to engage with Congress to proactively and positively impact legislation.

## Where We Were: Crypto in the 117th Congress

Regulating the crypto industry is top of mind for Congress and presents one of few areas of the economy that Republicans and Democrats agree needs reform.<sup>[1]</sup> The 2022 “crypto winter” and the accompanying spate of bankruptcies and allegations of financial crime have prompted the introduction of legislation and investigative hearings, along with increasing enforcement and regulatory scrutiny by the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), Financial Crimes Enforcement Network (FinCEN), Federal Trade Commission (FTC), and the Department of Justice (DOJ), among other agencies.

Recent attention has focused on FTX, which filed for bankruptcy on November 11, 2022, after having been valued at over \$30 billion.<sup>[2]</sup> Five days later, the House Committee for Financial Services announced an investigative hearing into FTX’s collapse. FTX founder and CEO Sam Bankman-Fried (SBF) was scheduled to testify on December 13, 2022,<sup>[3]</sup> before US authorities charged him with wire fraud, securities fraud, and money laundering, and then sought extradition from his home in the Bahamas. The focus on FTX overshadowed prior efforts by members in both chambers during the 117th Congress to hold hearings and introduce legislation addressing the crypto industry.

Prior to FTX, hearings and legislative proposals focused largely on which agencies should regulate the crypto industry and to what extent, including with respect to transparency, market integrity, consumer protection, know-your-customer requirements, and innovation. Republicans’ and Democrats’ views may diverge on how much regulation is needed, but many members of both

parties agree that the authority of competing regulators should be clarified. The key proposals put forth by each party define the current Congressional landscape and are described below:

## **Proposed Legislation**

### ***The Senate***

- **Responsible Financial Innovation Act**: On June 7, 2022, Senators Cynthia Lummis (R-WY) and Kristen Gillibrand (D-NY) introduced the bipartisan Lummis-Gillibrand Responsible Financial Innovation Act (RFIA), which sought to clarify the line between SEC and CFTC authority over crypto assets and to provide enhanced authority for the CFTC to regulate spot markets in digital asset commodities (an expansion of CFTC's existing regulation of derivatives markets). Specifically, the RFIA distinguished between US *offers* and *sales* that might be "investment contract" transactions subject to SEC regulation, and the underlying tokens themselves, which were defined as "ancillary assets" to be treated as non-security commodities subject to CFTC regulation. Thus, the RFIA sought to impose securities-law disclosure obligations on companies that offered and sold tokens in investment contract transactions, while granting the CFTC authority to regulate spot trading of the tokens as ancillary assets in secondary markets.
- **Digital Commodities Consumer Protection Act**: On August 3, 2022, Chairwoman of the Senate Committee on Agriculture, Nutrition, and Forestry, Senator Debbie Stabenow (D-MI),<sup>[4]</sup> and Ranking Member John Boozman (R-AR), along with Senators Cory Booker (D-NJ) and John Thune (R-SD), introduced the Digital Commodities Consumer Protection Act of 2022. Like the RFIA, the Digital Commodities Consumer Protection Act would expand the CFTC's authority to regulate spot markets for digital asset commodities, but unlike the RFIA, it did not clarify the line between SEC and CFTC authority. The SEC would remain the regulator for digital asset securities, while the CFTC would regulate digital asset commodities. This proposal left it to the SEC and the courts to sort out which assets fell in which category.<sup>[5]</sup> Nevertheless, because at least some digital assets are commonly viewed as commodities (including Bitcoin, and potentially Ether), the bill would have required registration with the CFTC for most crypto asset trading platforms. Collectively, the sponsors attest that "this mandatory framework will safeguard customers and [America's] markets"<sup>[6]</sup> by closing regulatory gaps, increasing transparency about investment risks, and authorizing the CFTC to impose user fees on digital commodity platforms to fund its oversight of the digital platform market.<sup>[7]</sup>
- **Digital Asset Anti-Money Laundering Act**: On December 14, 2022, the same day the Senate Committee on Banking, Housing and Urban Affairs held a hearing on the collapse of FTX, Senator Elizabeth Warren (D-MA) and Senator Roger Marshall (R-KS) introduced a bipartisan bill entitled the Digital Asset Anti-Money Laundering Act of 2022.<sup>[8]</sup> The bill would "extend Bank Secrecy Act (BSA) responsibilities, including Know-Your-Customer requirements, address a major gap with respect to 'unhosted' digital wallet, prohibit financial institutions from using or transacting with

digital asset mixers, strengthen enforcement of BSA compliance, extend BSA rules regarding reporting of foreign bank accounts to include digital assets, [and] mitigate the illicit finance risks of digital asset ATMs.”<sup>[9]</sup> Senator Warren has said that regulation is key to protecting consumers from the volatile cryptocurrency industry.<sup>[10]</sup> Critics argue that the proposal was dramatically over-broad and unconstitutional,<sup>[11]</sup> with the proposed regulation of “unhosted” wallet providers akin to subjecting the makers of leather wallets and purses to BSA responsibilities, among other failings.

- **Stablecoin Trust Act:** Shortly before he retired, then-Senate Banking Committee Ranking Member Pat Toomey (R-PA), a longtime vocal supporter of crypto asset regulation, introduced the Stablecoin Trust Act of 2022 on December 21, 2022.<sup>[12]</sup> Prior to introducing it, Senator Toomey proposed this idea in April 2022 as the first Senate bill to establish a comprehensive regulatory framework for stablecoins. He asserted that the bill would serve as

a regulatory model that won’t undermine competition by favoring entrenched incumbents—for example, by limiting payment stablecoin issuance to insured depository institutions. This bill will also ensure the Federal Reserve, which has displayed significant skepticism about stablecoins, won’t be in a position to stop this activity.” By digitizing the U.S. dollar and making it available on a global, instant, and nearly cost-free basis, stablecoins could be widely used across the physical economy in a variety of ways.<sup>[13]</sup>

The authors suggest that the bill would “provide the regulatory flexibility for both state-and federally chartered entities to engage in this activity [and would] recognize[] the wide range of payments innovation occurring at the state level and avoids the regulatory conflict of interest that could emerge if the Federal Reserve, which may be authorized to issue a central bank digital currency, were to have unchecked power over stablecoins.”<sup>[14]</sup>

### ***The House***

- **Keep Your Coins Act:** On February 17, 2022, Congressman Warren Davidson (R-OH) introduced the Keep Your Coins Act, which focuses on preserving Americans’ right to privacy in transacting with crypto assets. This legislation would prevent federal agencies from constructing a rule “that would impair a person’s ability to act as self-custodian.”<sup>[15]</sup>
- **Crypto Exchange Disclosure Act and the Crypto Consumer Investor Protection Act:** On December 5, 2022, Congressman Ritchie Torres (D-NY) introduced the Crypto Exchange Disclosure Act and the Crypto Consumer Investor Protection Act. Both pieces of legislation focus on providing transparency regulation to the crypto industry by requiring exchanges to publish their liabilities and assets to consumers.<sup>[16]</sup>

## **Hearings**

- There were a few notable hearings before FTX collapsed:
  - On December 8, 2021, the House Financial Services Committee held a hearing on Financial Innovation and Digital Currency. That hearing featured testimony from CEOs of several cryptocurrency and financial technology companies, including FTX.
  - On January 20, 2022, the House Committee on Energy and Commerce held a hearing on “Cleaning Up Cryptocurrency: The Energy Impacts of Blockchains.”
- The tenor and interest level changed markedly after FTX collapsed:
  - In the House, one of the most notable hearings on cryptocurrency occurred in December 2022 when the collapse of FTX was discussed before the Financial Services Committee.
  - The Senate Agricultural Committee held the first hearing on the FTX collapse on December 1, 2022. The Committee heard from CFTC Chairman Rostin Behnam and did not invite FTX officials.<sup>[17]</sup> Chairman Behnam noted “that legislation could have prevented [FTX’s] collapse.”<sup>[18]</sup>
  - On December 14, 2022, the Senate Banking Committee also held a hearing entitled, “Crypto Crash: Why the FTX Bubble Burst and the Harm to Consumers,” to further investigate the FTX Crash.

While there have been several legislative proposals and investigative hearings, Congress has not reached a consensus on the path forward.

## **Where We Are Going: Crypto in the 118th Congress**

Actions in the 117th Congress—which often showcased criticism of the crypto industry—indicate that more hearings and legislative proposals are forthcoming. Members on both sides of the aisle have expressed a desire to increase regulatory scrutiny of the industry, while at the same time many notable lawmakers, including many Republicans, have extolled virtues of crypto assets for increasing transparency and decentralization in the financial industry.

Both chambers are likely to prioritize legislation that addresses stablecoins, as well as legislation that addresses the differing roles of the SEC and CFTC for crypto assets more broadly. The House recently announced a subcommittee to focus on cryptocurrency regulation. On January 12, 2023, Chairman of the House Financial Services Committee Patrick McHenry announced that Congressman French Hill (AR-02) will chair the Financial Services Committee’s Subcommittee on Digital Assets, Financial Technology and Inclusion.<sup>[19]</sup> Congressman Warren Davidson will serve as Vice Chair of the Subcommittee.<sup>[20]</sup> As Chairman of the first-ever subcommittee focused on crypto

policy, Congressman Hill has suggested that shifts<sup>[21]</sup> in Senate Banking Committee leadership could secure a regulatory deal between both chambers. Chairman Hill recently suggested that he hopes to work with and receive guidance from Treasury Secretary Janet Yellen on how to best regulate crypto assets. The Subcommittee will focus on:

1. Providing clear rules of the road among federal regulators for the digital asset ecosystem.<sup>[22]</sup>
2. Developing policies that promote financial technology to reach underserved communities; and
3. Identifying best practices and policies that continue to strengthen diversity and inclusion in the digital asset ecosystem.

Furthermore, Congresswoman Maxine Waters (CA-43), the ranking member on the House Financial Services Committee, has articulated that she wants Congress to find “real regulations to deal with crypto” following the collapse of FTX.<sup>[23]</sup> Recently, she expressed, “[w]hat’s on my mind is, if crypto continues to advance in the world and we’re not anywhere there, what does that mean? Do we need to have a way by which we look at what we’re going to do ... to be able to manage our economy and protect our dollar?”<sup>[24]</sup> The Congresswoman’s statements suggest that she does not want to regulate the crypto-asset industry out of existence.

Regardless of whether any proposed legislation passes, the crypto industry remains in the political and regulatory spotlight. Industry participants should be vigilant, look for ways to help shape the evolving political narrative, and consult with counsel if they are responding to, or interested in proactively contributing to, Congressional action. To move the industry forward, it is time for the good actors to take the stage.

## Footnotes

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[3] Evers-Hillstrom, Karl, *House Committee Announces Hearing into FTX Collapse Featuring Bankman-Fried*, The Hill (Nov. 16, 2022), <https://thehill.com/homenews/house/3738075-house-committee-announces-hearing-into-ftx-collapse-featuring-bankman-fried/>.

[4] Of potential note, on January 5, 2023, Senator Debbie Stabenow announced that she will not seek re-election. See News | Press | U.S. Senator Debbie Stabenow of Michigan ([senate.gov](https://www.senate.gov)).

- [5] Boozman, John, *Boozman, Stabenow, Booker and Thune Introduce Legislation to Regulate Digital Commodities*, Senator John Boozman Press Release (Aug. 3, 2022), <https://www.boozman.senate.gov/public/index.cfm/2022/8/boozman-stabenow-booker-and-thune-introduce-legislation-to-regulate-digital-commodities>.
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- [11] <https://www.coincenter.org/the-digital-asset-anti-money-laundering-act-is-an-opportunistic-unconstitutional-assault-on-cryptocurrency-self-custody-developers-and-node-operators/>
- [12] U.S. Senate Committee on Banking, Housing, and Urban Affairs, *Toomey Introduces Legislation to Guide Future Stablecoin Regulation*, U.S. Senate Committee on Banking, Housing, and Urban Affairs Minority Press Releases(Dec. 21, 2022), <https://www.banking.senate.gov/newsroom/minority/toomey-introduces-legislation-to-guide-future-stablecoin-regulation>.
- [13] *Id.*
- [14] *Id.*
- [15] Davidson, Warren, *Congressman Warren Davidson Introduces Bill to Protect Transaction Privacy*, Congressman Warren Davidson Press Release (Feb.17, 2022), [https://davidson.house.gov/2022/2/congressman-warren-davidson-introduces-bill-to-protect-transaction-privacy#:~:text=Warren%20Davidson%20\(OH%2DR\),to%20act%20as%20self%2Dcustodian](https://davidson.house.gov/2022/2/congressman-warren-davidson-introduces-bill-to-protect-transaction-privacy#:~:text=Warren%20Davidson%20(OH%2DR),to%20act%20as%20self%2Dcustodian).
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[21] Senator Sherrod Brown (D-Ohio) will chair the Senate Banking Committee while Senator Tim Scott (R-South Carolina) will serve as ranking member.

[22] *Id.*

[23] Punch Bowl Daily Newsletter on Feb. 10, 2023, <https://punchbowl.news/archive/21023-punchbowl-news-am/>.

[24] *Id.*

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