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CryptoLink



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As anticipated, digital assets legislation came to a head in Congress in late July. The House Financial Services Committee and House Agriculture Committee jointly considered market structure legislation, while the House Financial Service Committee marked up and reported their long developing stablecoin bill. Both pieces of legislation are now ready for consideration in the full House of Representatives, likely this fall. Both bills achieved bipartisan support, if not bipartisan consensus. Unexpectedly, the stablecoin legislation, which Chairman Patrick McHenry (R-NC) and Ranking Member Maxine Water (D-CA) had been working on since this time last year proved to be more controversial than the market structure bill designed to reign in, and strongly opposed by, SEC Chairman Gary Gensler. The stablecoin bill ultimately received substantial pushback from the White House National Economic Council, complicating what should have been a consensus product. Ultimately, we should expect that the House will pass these bills with some bipartisan support. Though the Senate is not likely to take either up on an individual basis, they will almost certainly enter discussions around any year-end legislation.

The Senate has not ignored digital assets, but has focused primarily on addressing their misuse rather than enabling and encouraging the sector. Sens. Jack Reed (D-RI); Mark Warner (D-VA); Mitt Romney (R-UT) and Mike Rounds (R-SD) introduced bipartisan legislation requiring decentralized finance services to meet the same anti-money laundering and economic sanctions compliance obligations as other companies. Meanwhile, Sens. Kirsten Gillibrand (D-NY); Cynthia Lummis (R-WY); Elizabeth Warren (D-MA) and Roger Marshall (R-KS) attached an amendment to the National Defense Authorization Act (NDAA) addressing the use of crypto assets in illicit financial transactions. Specifically, their proposal requires regulators to set examination standards for financial institutions engaged in crypto asset activities and requires the Treasury Department to give recommendations to Congress regarding crypto asset mixers and anonymity-enhancing crypto assets. The final resolution of the Gillibrand-Lummis proposal will have to await a negotiation between the House and the Senate on the NDAA.

Meanwhile, the industry is taking note of a split decision in *SEC v. Ripple*, which posed the question of whether or not Ripple's XRP token was an unregistered security. U.S. District Judge Analisa Torres ruled on cross-motions for summary judgment that the XRP token was a security when sold to institutional investors, but was not a security when it was sold on crypto exchanges in blind transactions. Less than three weeks later, in *SEC v. Terraform Labs*

*et. al.*, U.S. District Judge Jed Rakoff held that the U.S. Securities & Exchange Commission (SEC) had adequately pled that certain crypto-currency assets, such as the UST and LUNA coins, are securities, reflecting divergent approaches that courts are taking towards regulation of digital assets. These contrasting decisions further underscore the ongoing challenges and disagreements associated with fitting digital assets into the existing frameworks of U.S. law.

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## Key Developments

### Bitfinex Announces Return of Seized Property

On July 6, 2023, Bitfinex announced that it had received \$312,219.71 in cash and 6.917 BCH from the United States Department of Homeland Security as part of Bitfinex’s “ongoing efforts, working with law enforcement and other investigation agencies, to recover assets stolen from the exchange in August 2016.” According to Bitfinex’s press release, the seizure was carried out by U.S. Customs and Border Protection. Under the terms of Bitfinex’s contractual obligations to token holders, these amounts will be used to redeem Recovery Right Tokens (RRTs) issued by Bitfinex following the 2016 security breach.

Bitfinex’s press release can be found [here](#).

### U.K. Financial Conduct Authority Continues Crackdown on Unregistered Crypto ATMs

On July 11, 2023, the U.K. Financial Conduct Authority (FCA) announced that since the start of 2023 the FCA had visited and inspected 34 locations across the U.K. suspected of hosting illicit crypto ATMs. The FCA’s press release confirmed that it had disrupted 26 machines operating unlawfully across the country. Steve Smart, Joint Executive Director of Enforcement and Market Oversight at the FCA, warned those using a crypto ATM in the U.K. that they “are using a machine that is operating illegally and you may be handing your money over to criminals.”

The FCA’s press release can be found [here](#).

### Senators Lummis and Gillibrand Reintroduce Comprehensive Legislation to Create Regulatory Framework for Crypto Assets

On July 12, 2023, U.S. Senators Cynthia Lummis (a member of the Senate Banking Committee) and Kirsten Gillibrand (a member of the Senate Agriculture Committee) reintroduced the Lummis-Gillibrand Responsible Financial Innovation Act to create a comprehensive regulatory framework for crypto assets. This legislation expands on the bill the senators introduced last year and adds strong new consumer protections and safeguards to further strengthen the industry against fraud and bad actors. According to the press

release, the legislation places crypto assets within the regulatory perimeter, requires all crypto asset exchanges to register, addresses decentralized finance, safeguards consumers through enhanced disclosures and limits on crypto asset lending, closes the wash sale loophole and codifies the criteria to determine which crypto assets are securities or commodities.

The senators' press release can be found [here](#) and the full text of the bill can be found [here](#).

### **U.K. High Court Refuses to Enforce Arbitral Award in Litigation Against Operator of Kraken**

On July 14, 2023, the U.K. High Court of Justice issued a judgment in which it found that an arbitral award issued in favor of Payward group entities, the operator of the global digital online cryptocurrency exchange Kraken, ran contrary to the public policy objectives of the U.K. Consumer Rights Act and would therefore not be enforced. The dispute arose after Maxim Chechetkin brought a claim against Payward on the basis that it was operating in violation of U.K. law following his loss of more than \$780,000 on the Kraken platform.

The judgment can be found [here](#).

### **Kuwait Capital Markets Authority Issues Circular Prohibiting Use of Virtual Assets and Mining Activities**

On July 17, 2023, the Kuwait Capital Markets Authority (CMA) issued Circular No. 10 of 2023 (the "Circular") in which it confirmed the absolute prohibition on the use of virtual assets as a payment method and/or recognition of it as a decentralized currency in the State of Kuwait. The Circular further confirmed that it is prohibited to deal with virtual assets as a means of investment (and it is thus necessary to refrain from providing this type of service to any clients), it is prohibited to issue or grant any natural or legal person within the State of Kuwait with a license to provide virtual asset services as a commercial business, and there is an absolute prohibition on all virtual currency/asset mining activities. The CMA noted that the penalties and measures set out in Law No. 106 of 2013 regarding combating money laundering and terrorism financing shall apply to any person who violates the Circular.

The Circular (available only in Arabic) can be found [here](#).

### **Senators Gillibrand, Lummis, Warren and Marshall Introduce Amendment to NDAA to Prevent Use of Crypto Assets in Illicit Financial Transactions**

On July 19, 2023, U.S. Senators Kirsten Gillibrand, Cynthia Lummis, Elizabeth Warren and Roger Marshall introduced an amendment to the FY24 NDAA that would help prevent the use of crypto assets in illicit financial transactions. If enacted, the amendment would require regulators to set examination standards for financial institutions engaged in crypto asset activities and require the Treasury Department to give recommendations to Congress regarding crypto asset mixers and anonymity-enhancing crypto assets. Sen. Gillibrand stated that the "amendment will require federal regulators to enact strong examination standards that will help prevent the utilization of cryptocurrencies in illegal activities," while Sen. Warren noted that too "many actors in the crypto ecosystem fail to comply with basic anti-money laundering standards."

The senators' press release can be found [here](#).

### **Bipartisan U.S. Senators Unveil Crypto Anti-Money Laundering Bill to Stop**

## Illicit Transfers

On July 19, 2023, U.S. Sens. Jack Reed, Mike Rounds, Mark Warner and Mitt Romney unveiled the Crypto-Asset National Security Enhancement and Enforcement (**CANSEE**) Act, bipartisan legislation that targets money laundering and sanctions evasion involving decentralized finance (**DeFi**) services. According to the press release, the CANSEE Act would end special treatment for DeFi by applying the same national security laws that apply to banks and securities brokers, casinos and pawn shops, and even other cryptocurrency companies like centralized trading platforms. This means DeFi services would be forced to meet basic obligations, most notably to maintain anti-money laundering programs, conduct due diligence on their customers and report suspicious transactions to Financial Crimes Enforcement Network (**FinCEN**).

Sen. Warner's press release can be found [here](#).

## U.K. Treasury Committee publishes Government's response to Regulating Crypto Report

On July 20, 2023, the U.K. Treasury Committee published the U.K. government's response to its report on Regulating Crypto. In the report, the cross-party committee of members of parliament called for consumer trading in unbacked crypto to be regulated as gambling. The government disagreed with the Treasury Committee's recommendation on gambling and re-affirmed its intention to regulate retail trading in unbacked crypto assets as a financial service.

The Treasury Committee's press release can be found [here](#), the government's response can be found [here](#) and the report can be found [here](#).

## U.S. Committees Introduce the Financial Innovation and Technology for the 21st Century Act

On July 20, 2023, Glenn "GT" Thompson, Chairman of the House Committee on Agriculture, and French Hill, Chairman of the Subcommittee on Digital Assets, Financial Technology and Inclusion, and Dusty Johnson, Chairman of the Subcommittee on Commodity Markets, Digital Assets and Rural Development, introduced the Financial Innovation and Technology for the 21st Century Act. Chairman Hill stated that "the House Committees on Financial Services and Agriculture are introducing landmark legislation today to establish a functional regulatory framework that will protect consumers and keep innovation in the United States." They claimed this "legislation would not only have prevented FTX from stealing billions of customer funds, but also establishes robust consumer protections and clear rules of the road for market participants." Chairman McHenry added that the Act will "finally provide clear rules of the road so the digital asset ecosystem can thrive in the U.S."

Chairman Thompson's press release can be found [here](#).

## Key Enforcement Actions

### Federal Court Orders Ohio Man to Pay Over \$50 Million for Fraudulent Digital Asset Trading Scheme

On June 28, 2023, the Commodity Futures Trading Commission (**CFTC**) announced that a U.S. District Court in the Southern District of New York (**SDNY**) issued a default judgment granting a permanent injunction against Michael Ackerman in connection with a fraudulent

digital asset trading scheme. The order (i) bans Ackerman from trading in any CFTC-regulated markets and registering with the CFTC and (ii) requires him to pay \$27 million in restitution to defrauded victims and a \$27 million civil monetary penalty. The order resolves the CFTC's enforcement action against Ackerman. The CFTC complaint alleged that from August 2017 through December 2019, Ackerman operated a fraudulent scheme that solicited and misappropriated funds to purportedly trade digital commodity assets. The complaint further alleged that based on Ackerman's fraudulent misrepresentations, more than 150 individuals and entities deposited at least \$33 million with him, but less than \$10 million was used to trade digital commodity assets and the remaining funds were misappropriated for personal use or to prolong the fraudulent trading scheme. On February 15, 2022, Ackerman was sentenced, in a related criminal case in the SDNY, to five years of probation with a year of home confinement, and on August 22, 2022, Ackerman was ordered to pay \$31 million in restitution.

The CFTC's press release can be found [here](#).

### **SEC Secures Judgment in Enforcement Action Against Crypto Platform Coinseed**

On July 5, 2023, a court in the U.S. District Court for the SDNY issued an order following the SEC's enforcement action against Coinseed, Inc. and its CEO Delgerdalai Davaasambuu. The SEC complaint involves the alleged offer and sale of approximately \$141,000 worth of digital assets called CSD tokens without first registering the CSD tokens as a security or providing material information to the public alongside the solicitation of CSD tokens (in violation of the U.S. Securities Act). The Court adopted the Report and Recommendation filed by Judge Netburn in January 2023 that the defendants be held jointly and severally liable for disgorgement of \$141,410 plus pre-judgment interest and that each defendant be ordered to pay a civil monetary penalty of \$141,410.

The order can be found [here](#).

### **CFTC Charges Alleged Bitcoin Seller and Former Attorney with Multi-Million Dollar Bitcoin Fraud, Imposing Over \$5 Million in Restitution**

On July 6, 2023, the CFTC issued two orders simultaneously filing and settling charges against Randy Craig Levine and Philip Reichenthal for perpetrating a multimillion-dollar bitcoin fraud. The orders charge Levine and Reichenthal with engaging in a deceptive and fraudulent scheme where they knowingly or recklessly made false representations to investors inducing them to send over \$5 million to Reichenthal to buy bitcoin from Levine. After receiving the investors' funds, Reichenthal and Levine failed to deliver the bitcoin as promised and failed to return the investors' funds. In the orders, the CFTC imposed full restitution for the victims of the fraud and permanent trading and registration bans against Levine and Reichenthal. In a related criminal action, a court in the U.S. District Court for the SDNY accepted guilty a plea from Reichenthal, on February 11, 2022, and Levine on November 9, 2022; the court sentenced Reichenthal to time served on November 28, 2022, and Levine to 70 months in prison on March 21, 2023. The court also ordered forfeiture commensurate with the amount of restitution in the CFTC's orders.

The CFTC's press release can be found [here](#).

### **Former Security Engineer Arrested for Defrauding Decentralized Cryptocurrency Exchange**

On July 11, 2023, the U.S. Attorney's Office for the SDNY unsealed an indictment charging Shakeeb Ahmed with wire fraud and money laundering in connection with his attack on a decentralized cryptocurrency exchange. As alleged in the indictment, Ahmed, who was a

senior security engineer at an international technology company, used his expertise to defraud the exchange and its users and stole approximately \$9 million in cryptocurrency. The indictment further alleged that he then laundered the stolen funds through a series of complex transfers on the blockchain where he “swapped cryptocurrencies, hopped across different crypto blockchains, and used overseas crypto exchanges.”

The SDNY’s press release can be found [here](#) and the indictment can be found [here](#).

### **Defendant Charged with Theft of Cryptocurrency and NFTs Through Spoofing of OpenSea Marketplace**

On July 12, 2023, the U.S. Attorney’s Office for the SDNY unsealed a four-count indictment charging Soufiane Oulahyane for a scheme to impersonate the OpenSea marketplace in order to obtain unauthorized access to cryptocurrency and non-fungible tokens (NFTs). In September 2021, Oulahyane is alleged to have stolen approximately \$450,000 worth of cryptocurrency and NFTs from a victim in Manhattan through engaging in a scheme to “spoof” the login page to the OpenSea marketplace (the first and largest NFT marketplace). Oulahyane is currently in custody in Morocco for domestic Moroccan charges. U.S. Attorney Damian Williams noted that “[t]he charges unsealed today should serve as a reminder that digital assets, such as cryptocurrency and NFTs, are not immune from cyber fraudsters and that my Office is committed to prosecuting these fraudsters both here and abroad.”

The SDNY’s press release can be found [here](#).

### **Federal Court Orders Digital Asset Derivatives Platform and Adam Todd to Pay More than \$15 Million for Multiple Violations of the Commodity Exchange Act**

On July 12, 2023, the CFTC announced that the U.S. District Court for the Southern District of Florida issued a default judgment granting a permanent injunction against Adam Todd and four companies he controlled—Digitex LLC, Digitex Limited, Digitex Software Limited and Blockster Holdings Limited Corporation. According to the press release, Todd and his companies attempted to manipulate the price of the Digitex Futures native token DGTX (a commodity in interstate commerce), illegally offered futures transactions on a platform other than a designated contract market, failed to register with the CFTC and failed to implement a customer information program, know your customer policies and anti-money laundering procedures. The order bans Todd and his companies from trading in any CFTC-regulated markets or registering with the CFTC, and requires him to pay \$3,912,220 in disgorgement and a \$11,736,660 civil monetary penalty. The order resolves the CFTC’s enforcement action against Todd and Digitex Futures.

The CFTC’s press release can be found [here](#) and the final judgment can be found [here](#).

### **Father and Son Charged in Manhattan Federal Court with Multimillion-Dollar Cryptocurrency-Related Crimes**

On July 12, 2023, the U.S. Attorney’s Office for the SDNY announced the arrest of Eugene William Austin, Jr. (also known as Hugh Austin) for charges in connection with a scheme to steal money from investors and other victims by offering a variety of fraudulent cryptocurrency-related investment services, including sales of multimillion-dollar batches of cryptocurrency, marketing and advertising services, and short-term investments and loans. Austin was arrested on July 5, 2023, and was presented that same day before U.S. Magistrate Judge Jennifer E. Willis. In addition, the U.S. Attorney for the SDNY also announced the guilty plea of Austin’s son, Brandon P. Austin, who pled guilty on April 13, 2023, before U.S. District Judge P. Kevin Castel to participating in a money laundering conspiracy with his father relating to his involvement in conducting financial transactions with the intent to conceal proceeds of fraud.

The SDNY's press release can be found [here](#).

## **Split Court Decision on Whether a Token is a Security**

On July 13, 2023, the Honorable Analisa Torres of the SDNY issued a split decision on the question of whether a token is a security. The ruling pertained to the SEC's litigation against Ripple Labs Inc., an entity which promotes a blockchain payment protocol to process international money transfers using the XRP cryptocurrency. In 2020, the SEC sued Ripple and two of its most senior executives for offering XRP as an unregistered security in violation of the Securities Act of 1933. Both sides moved for summary judgment, and on July 13, 2023, Judge Torres ruled on both motions. Applying the Howey test, the court held: (i) According to the SEC's complaint, Ripple sold approximately \$728.9 million of XRP directly to institutional buyers (including hedge funds) pursuant to written contracts. For these sales, the court found that all three prongs of the Howey test were satisfied, citing "horizontal commonality" and an expectation that investors would "derive profits from Ripple's efforts" to market and promote XRP; (ii) the court, however, reached a different conclusion on the alleged sales of \$757.6 million of XRP through "programmatic sales," which were sales of XRP tokens on digital asset exchanges and through trading algorithms, finding that the third prong of Howey was not satisfied; and (iii) the court concluded that the defendants' alleged distributions of XRP to employees and third parties as compensation did not satisfy the third prong of Howey because the recipients did not pay money to Ripple.

Akin's client alert providing further detail and key takeaways can be found [here](#) and the ruling can be found [here](#).

## **Pre-Motion Hearing in Litigation Against Coinbase**

On July 13, 2023, in a pre-motion hearing in the SEC's litigation against Coinbase, the SEC argued that "simply because the SEC allows a company to go public does not mean that the SEC is blessing the underlying business or the underlying business structure or saying that the underlying business structure is not in violation of the law." The SEC further argued that the S-1 filing is about disclosures and "there is no way" that an approval of a S-1 is a blessing of the company's entire business. U.S. District Judge Katherine Polk Failla responded that she "would have thought the [SEC] was doing diligence into what Coinbase was doing and [...] would say, you know, you really shouldn't do this." She went on to question whether the SEC could have said to Coinbase that they needed to register as a securities exchange and added that it was not "crazy" for Coinbase to "think that what they were doing was OK because it was exactly what you let them do when they issued the S-1", a point with which the SEC disagreed.

The pre-motion hearing transcript can be found [here](#).

## **Insurer Reaches Settlement Regarding Crypto Asset Cyberattack Coverage**

On July 13, 2023, Wesco Insurance company (the plaintiff) and IRA Financial Group, LLC and IRA Financial Trust Company (the defendants) filed a joint notice of settlement with the U.S. District Court for the Southern District of Florida confirming that the parties had reached an agreement in principle to settle the civil action and were preparing a settlement agreement. The dispute pertains to a lawsuit following a cyberattack that resulted in at least \$36 million in stolen crypto assets. In October 2022, Wesco filed a complaint against IRA Financial on the basis that its insurance policy did not cover claims in various arbitration demands and a suit stemming from a cyberattack on IRA Financial.

The joint notice can be found [here](#) and the October complaint can be found [here](#).

## **U.S. Secret Service Seeks to Seize \$58 Million in Crypto Investigation**

On July 18, 2023, the U.S. District Court for the Eastern District of Virginia unsealed a seizure warrant and supporting affidavit in respect of the seizure of \$58,465,480 funds held at Mitsubishi Bank UFJ Trust and Banking in an account in the name of Deltec Bank and Trust. The affidavit stated, “law enforcement has been investigating organized, international criminal money laundering syndicates operating cryptocurrency investment and other wire fraud scams” in which victims have been fraudulently induced to transfer money into shell companies. The results of the investigation found that the scammers promoted spoofed domains and websites purporting to look like legitimate cryptocurrency trading platforms and misled their victims into “investing” in cryptocurrency through these fraudulent investment platforms, which instead allowed the scammers to steal their money. On June 13, law enforcement seized approximately \$31 million from the account, followed by a June 15 seizure of approximately \$8 million. A request of June 28, 2023 sought approval to seize the remaining amount (approximately \$19 million).

The affidavit can be found [here](#) and the court order can be found [here](#).

## **CEO of Cryptocurrency and Forex Trading Platform Sentenced to Nine Years in Prison for \$240 Million Scheme to Defraud Investors**

On July 18, 2023, U.S. Attorney’s Office for the SDNY announced that Eddy Alexandre was sentenced by U.S. District Judge John P. Cronan to nine years in prison for engaging in commodities fraud. According to the press release, Alexandre was the leader of a purported cryptocurrency and foreign exchange (**forex**) trading platform called EminiFX, and he defrauded over 25,000 investors in the EminiFX trading platform of more than \$248 million. Alexandre was alleged to have defrauded tens of thousands of investors of almost a quarter-billion dollars in his cryptocurrency investment scam, including through fabricating weekly investment returns of at least 5% and falsely claiming to use artificial intelligence trading technology that did not exist. In addition to his prison term, Alexandre was sentenced to three years of supervised release and ordered to pay forfeiture in the amount of \$248,829,276.73 and restitution in the amount of \$213,639,133.53.

The SDNY’s press release can be found [here](#).

## **CFTC Charges Husband and Wife Realtors for Operating a \$6 Million Digital Assets Commodity Pool Scheme**

On July 25, 2023, the CFTC announced it filed a complaint in the U.S. District Court for the Middle District of Tennessee against Michael and Amanda Griffis. The complaint charges the defendants with defrauding over 100 people across the U.S. and failing to register with the CFTC in connection with a multimillion-dollar commodity pool scheme they operated from approximately July 2022 through January 2023. Director of Enforcement Ian McGinley stated that the filing “reinforces the CFTC’s long-standing commitment to hold accountable those who take advantage of victims.” The complaint alleges the defendants, owners of a Clarksville, Tennessee, real estate company, contacted colleagues and customers of their real estate business and offered them the opportunity to pool funds with others to trade digital asset commodity futures contracts; the defendants successfully convinced over 100 people to send them over \$6 million to participate in a commodity pool and falsely represented that pool funds would be safe and under their control, that pool participants could expect high gains and that the defendants would use pool funds to trade “crypto futures” on the “Apex Trading Platform.” As alleged in the complaint, the defendants leveraged their personal and professional relationships, developed through their real estate business, to convince victims the pool scheme was legitimate.

The CFTC’s press release can be found [here](#).



## Federal Court Finds SEC Adequately Pled that Digital Assets Qualify as Securities in *Terraform Labs*

On July 31, 2023, the Honorable Jed Rakoff of the SDNY denied defendants' motion to dismiss in *SEC v. Terraform Labs et. al.* In this action, the SEC alleges that Terraform Labs and its founder were involved in a multibillion dollar fraud involving the development, marketing and sale of digital assets. The SEC further alleges that the defendants violated laws prohibiting the unregistered sale of securities. In the opinion, Judge Rakoff acknowledged that tokens, particularly stablecoins designed exclusively to maintain a one-to-one peg with another asset, might not qualify as securities. However, Judge Rakoff held that the SEC had adequately pled that the defendants promoted the digital assets as profitable investments and, as such, the sale and offering of the assets qualified as securities requiring registration. Judge Rakoff opined that, if the SEC's allegations are true, "the defendants' embarked on a public campaign to encourage both retail and institutional investors to buy their crypto-assets by touting the profitability of the crypto-assets and the managerial and technical skills that would allow the defendants to maximize returns on the investors' coins."

Akin's client alert providing further detail and key takeaways can be found [here](#) and the opinion can be found [here](#).

## Akin Alerts & Podcast Episodes

[Split Court Decision on Whether a Token Is a Security in SEC v. Ripple Labs](#) (July 17, 2023)

[Judges in the Southern District of New York Divided on Whether a Token Is a Security: SEC v. Terraform Labs and SEC v. Ripple Labs](#) (August 3, 2023)



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