



# Crypto's Tug-of-War: The Battle for Regulation and Decentralization



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## Introduction:

As the evolution of digital assets continues to shape the contours of the global financial ecosystem, the debate over its regulation is heating up. Tucked away in the digital realm, crypto assets, embodied by stalwarts like Bitcoin and Ethereum, are challenging conventional financial and legal paradigms. The potential for financial disruption has led to calls for tighter regulation of the crypto industry. The question that stands at the center of these deliberations is deceptively simple yet tantalizingly complex: Does the existence of crypto assets necessitate a comprehensive regulatory framework, or does regulation undermine the very essence of these digital assets?

This conundrum is further complicated by the classification of cryptocurrencies as either securities or commodities. This distinction determines whether the US Securities and Exchange Commission (SEC) or the Commodity Futures Trading Commission (CFTC) holds jurisdiction. However, the real game-changer in this narrative is Congress. With the power to redefine legal frameworks, Congress could redraw the boundaries between securities and

commodities, consequently altering the trajectory of digital-asset regulation.

In fact, both the Senate and the House of Representatives are currently working through parallel bills that seek to clarify the definition of crypto assets, and empower regulatory agencies to set boundaries on crypto investing, trading and marketing. The US Congress is late to the game in formalizing a set of rules, particularly compared to other developed countries. And, it is not clear whether or not Congress will succeed in converting these bills into actual legislation.

The complexities of this digital frontier raise serious doubts about the adequacy of the current regulatory landscape. Some voices argue for a more comprehensive and nuanced approach that can adapt to the rapidly changing dynamics of the digital world. Yet, the question remains: How should regulation be implemented without undermining the purpose of crypto assets?

A central conflict emerges when creating regulations on crypto. The “purpose” of cryptocurrency is to enable a decentralized payments system – one that

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bypasses both the banking system and higher authorities, such as a central bank. Crypto allows for peer-to-peer transactions, as two individuals experience when they are directly exchanging physical currency. But with crypto, this peer-to-peer transaction is done electronically. Bringing regulations into the equation is seen as anathema to the very purpose of crypto from some of the industry's strongest proponents. So, the question remains: does regulation defeat the very purpose of crypto, or can intelligent regulation enhance the growth in this industry.

This paper addresses this issue by exploring the state of regulation in the crypto industry. We aim to illuminate the path forward, probing the interplay between regulation and the essence of digital assets. However, rather than viewing these as opposing forces, we suggest a different perspective: that a well-designed regulatory framework, developed through thoughtful legislation, could actually foster the growth of the crypto industry. Congress should finish the work it has begun by clarifying which agencies carry jurisdiction over crypto, and Congress should create a set of rules that can enhance investor protections. The rules and regulations Congress creates should simplify, not complicate, investing in crypto assets.

By clarifying the rules to investors and encouraging market stability, regulation need not stifle the spirit of cryptocurrencies. Instead, it could serve as a catalyst for their potential, enhancing their appeal and legitimacy in the financial world. This perspective forms the basis of our thesis and shapes the exploration that follows.

## Overview of US Regulatory Bodies

To date, different regulatory bodies have claimed jurisdiction over various crypto assets. For example, in March 2023, the SEC filed lawsuits pertaining to the cryptocurrencies Tronix (TRX) and BitTorrent (BTT).<sup>1</sup>

In addition, initial coin offerings (ICOs) by cryptocurrency companies have faced closer scrutiny from the SEC. As a result, profound implications have arisen for both crypto

exchanges and ICO issuers, who now must adhere to registration, disclosure, and compliance requirements. Conversely, the CFTC used the Commodity Exchange Act (CEA) to classify Bitcoin as a commodity.<sup>2</sup>

The United States has not yet developed a comprehensive regulatory framework governing the crypto industry. Instead, we have a patchwork of rulings and de facto regulations developed by trial and error through various regulatory bodies and various court rulings. How we got to this point is showcased in the exhibit below, which covers key events by different regulatory bodies.

### Exhibit 1. Timeline of Key Regulatory Actions Impacting the Crypto Industry

Date	Action
July 2013	First Bitcoin ETF application is filed - Winklevoss Bitcoin Trust
September 2015	CFTC categorizes Bitcoin as a commodity
March 2017	SEC rejects Winklevoss Bitcoin Trust ETF
March 2021	SEC approves Coinbase IPO listing
March 2023	CFTC files lawsuit against Binance
June 2023	SEC sues Coinbase for operating as an "unregistered securities exchange"
June 2023	BlackRock files for a spot Bitcoin ETF
July 2023	Judge rules that XRP is not a security, overruling the SEC
July 2023	US House of Representatives pass the first crypto regulatory bill out of committee

The lack of formalized regulations creates a number of challenges for investors in the crypto industry. First, individual investors lack some of the protections afforded to investors in other asset classes. For example, there are no disclosures of potential risks to investors. Additionally, there are no specific rules on anti-money laundering compliance. Clarifying some of these risks and erecting other protections could open the door for larger institutions, such as pension funds and asset managers to invest in crypto assets. Finally, effective regulation could clarify which agency – the SEC or CFTC – has enforcement jurisdiction. In the current state, it is not clear which agency is in charge, and this creates a risk that neither agency will issue rulings creating protections. Another risk,

is that both agencies will issue rulings, and the rulings themselves could be contradictory. This uncertainty creates a “deer in the headlights” situation where investors and business leaders remain paralyzed, leaving the industry stagnant and leaving investors at risk.

The SEC is charged with regulating securities. But there is a debate over whether or not crypto assets are securities, commodities, or something else altogether. Whether or not an asset is defined as a security has important implications as to regulatory governance. All securities must be registered with the SEC, requiring an outline of the properties of the business, the management of the business (or security), and key business risks. These disclosures often run in the dozens, if not hundreds, of pages and can be very expensive for the management company issuing the security. Of course, with some versions of crypto assets, there often isn’t a formalized management company, which complicates the registration process and calls into question whether or not these assets are, in fact, securities. Many industry participants believe that crypto assets are more similar to commodities than securities.

The SEC uses the “Howey Test” to determine whether an asset is a security. This test categorizes an asset as a security if it meets the following four criteria: the money must be invested, there is an expectation the investor will earn a profit, the investment is in a common enterprise, and profits are generated through the effort of others.<sup>3</sup> We believe that many crypto assets, especially Bitcoin, fail the Howey Test, since many of these assets have no claim on profits generated by the actions of others. As such, Bitcoin and other assets should be deemed commodities and regulated by the CFTC. But the Howey Test isn’t always straightforward, and regulatory bodies may arrive at different conclusions. These differences create confusion as to whether a particular crypto asset is classified as a commodity or a security. As highlighted by SEC Commissioner Hester Peirce, there are questions about who has the authority to make rules about digital assets, an issue that she believes requires a determination from Congress.<sup>4</sup> We concur with this sentiment and believe that the responsibility for making

this distinction should be Congress. To ensure efficiency and clarity, we suggest that a more streamlined process could be achieved through legislative action, establishing comprehensive guidelines for differentiating commodities from securities in the crypto space.<sup>5</sup>

Without clear direction from Congress, the current regulatory framework creates market confusion. For example, on July 13, 2023,<sup>6</sup> in a landmark victory ruling for the crypto world, US District Judge Analisa Torres overruled the SEC. The judge ruled that the cryptocurrency XRP was a security when sold directly to institutional investors in accordance with written contracts but not when offered to the public on exchanges.<sup>7</sup> Under these guidelines, Judge Torres said that the SEC’s rulings did not apply to sales of XRP. This is an important ruling, because it shows the limitation of regulations being developed by regulators. If other courts follow the opinion of Judge Torres, this will become a significant barrier to the SEC’s ability to regulate crypto. And while the crypto industry may celebrate this ruling, the back-and-forth between the executive and judicial branches of government creates confusion.

The SEC remains dedicated to safeguarding investors while encouraging innovation within the cryptocurrency market. In line with this objective, the SEC charged crypto asset entrepreneur Justin Sun and his companies, Tron Foundation Limited, BitTorrent Foundation Ltd., and Rainberry. Inc. (formerly BitTorrent), for the unregistered offer and sale of crypto asset securities Tronix (TRX) and BitTorrent (BTT) on March 22, 2023.<sup>8</sup> The SEC emphasizes that ICOs that meet the criteria of securities are subject to registration with the agency unless they qualify for specific exemptions. However, the identification of ICOs genuinely falling under the category of securities can be challenging for investors, and this challenge sometimes creates confusion for investors.<sup>9</sup> The lawsuit by the SEC highlights the confusion over whether or not crypto assets are securities. If they are deemed commodities, or something else, the SEC would not have jurisdiction, and selling the assets without registration would be acceptable.

In another notable case, Binance, the world’s

largest crypto asset exchange, faced accusations from the SEC of operating a “web of deception” and engaging in 13 offenses. The SEC also sued Coinbase, a prominent US-based crypto platform, for allegedly operating as an unregistered broker, exchange, and clearing agency, which could have put its customers at risk. These lawsuits signal the SEC’s intent to look closely at crypto firms that may be bypassing regulations or operating in a legally ambiguous manner.

A notable aspect of the recent events is the perceived contradiction in the SEC’s approach toward Coinbase. On one hand, the SEC approved Coinbase’s initial public offering, signifying a degree of regulatory approval. However, it then sued Coinbase for failure to register securities on its platform, suggesting regulatory noncompliance. This mixed stance highlights the need for more clarity and consistency in the SEC’s approach to regulating the crypto market. It also underscores the importance of developing comprehensive guidelines to avoid confusion and ensure fair treatment of crypto companies.

The legal actions against Coinbase and Binance have exposed potential gaps in current crypto asset regulations. One area that requires attention is the role of companies like Coinbase, which act as both custodians of their clients’ assets and broker-dealers. This dual role raises questions about potential conflicts of interest and highlights the need for clear guidelines to manage such situations appropriately. Additionally, the recent collapse of FTX, a company that managed a crypto-based fund and a cryptocurrency exchange, and the subsequent charges against its founder, Sam Bankman-Fried, for securities fraud and money laundering, emphasize the necessity of stringent oversight to prevent similar incidents.

Beyond its rulings on Coinbase and Binance, the SEC has also slowed the development of cryptocurrency exchange traded funds (ETFs). Bitcoin ETFs have emerged as a popular idea in the digital community, providing a safer way for regular investors to gain exposure to Bitcoin price movements without directly owning the cryptocurrency. The SEC’s decision on whether to approve a Bitcoin ETF could significantly impact the mainstream adoption of crypto

assets. An approved ETF may attract more traditional investors and institutional funds to the crypto market, leading to increased liquidity and legitimacy.

## Role of Congress: Legislative Solutions and Industry Impact

Recent lawsuits by regulators, along with various court rulings, underscore the importance of clearer regulations in the crypto space. The dynamic and complex nature of cryptocurrencies requires a nuanced regulatory approach that accommodates innovation while safeguarding investors’ interests. Clarity in rules and enforcement can prevent future contradictions and protect both investors and industry players. Moreover, it will foster greater confidence in the market, attracting more mainstream investors and institutions.

Uncertainty surrounding the lack of a clear set of rules is slowing down the growth of crypto in the United States. In an interview with the Wall Street Journal, Brian Armstrong, the CEO of Coinbase, stated, “We’re not against regulation. What we want is clarity. But instead, we’re getting enforcement actions instead of clear rules.”<sup>10</sup> His comments voice a shared complaint within the crypto industry: that regulatory bodies are failing to provide clear guidelines, making it difficult for companies to operate within the law. In contrast, many other countries have moved forward and proven that building a healthy system of regulation is feasible. The UK has recognized crypto as a regulated mainstream financial instrument. The European Union is closer to the world’s first comprehensive crypto-specific framework, called EU Market in Crypto-assets Regulation (MiCA). In other parts of the world, Japan has premiered its stablecoin regulations, Singapore is working to incorporate public feedback into upcoming legislation, and the United Arab Emirates is actively opening doors for new projects. If regulation does not catch up, the crypto industry might just move out of the United States, risking the loss of talent and the potential movement of this multitrillion dollar sector to more favorable jurisdictions.

Fortunately, Congress is finally crafting legislation to clarify some of the rules. In fact, in late July



2023 the Financial Services Committee of the House of Representatives passed a bill that aims to develop a regulatory framework for cryptocurrencies.<sup>11</sup> The main point of this bill is to clearly identify when a cryptocurrency is a security or a commodity and to expand the CFTC's regulatory oversight of the crypto industry. The United States has urgently needs policies and regulations of this caliber. Representative Patrick McHenry (R-NC) stated, "As other jurisdictions like the UK, the [European Union], Singapore and Australia have moved forward with clear regulatory frameworks for digital assets, the United States is at risk of falling behind. We intend to change that today."<sup>12</sup> The passage of the bill is widely considered to be a win for crypto lobbyists, since this is the first time that Congress has voted on a crypto bill.

The bill, while bipartisan, is not without its critics. Of note, Representative Maxine Waters (D-CA) believes the bill is too lenient on crypto firms. In addition, the SEC is continuing to argue that most cryptocurrencies should be classified as securities.<sup>13</sup> Still, the bill has drawn extensive support from both Democrats and Republicans. In addition, large firms, such as JP Morgan, have released statements urging policymakers to create a "comprehensive framework on how to regulate the crypto industries and the relative responsibilities of SEC vs. the Commodity Futures Trading Commission."<sup>14</sup> Doing so would make sense. Without regulatory clarity, domestic crypto firms are likely to move their businesses entirely out of the United States.<sup>15</sup>

The US Senate is working on a parallel crypto bill with bipartisan sponsorship. The comprehensive legislative effort seeks to establish a framework that enhances transparency and consistency within the crypto industry. As Senator Cynthia Lummis (R-WY), one of the bill's co-sponsors, stated, "We know how to regulate it. We know how to safely define what is a commodity and what is a security."<sup>16</sup> The Senator is highlighting the importance of a formal definition (commodity or security) for crypto assets, which Congress has the power to codify. This legislative effort aims to strike a balance among safeguarding investors from fraud, fostering transparency, and preserving the decentralized nature of crypto assets. The

proposed bill requires companies to disclose cryptocurrency risks to consumers with clear and plain language. Senator Lummis emphasized the need for proper consumer protections by stating, "We can put sufficient consumer protections and safeguards on this industry so that something like the failure of FTX would likely not happen in the United States."<sup>17</sup>

Additionally, the Senate bill grants jurisdiction over crypto assets that are deemed "non-securities" to the CFTC and requires all crypto asset exchanges to register with the agency. Senator Lummis and her co-sponsor, Senator Kirsten Gillibrand (D-NY), believe that the CFTC is well-equipped for its regulatory role in the crypto industry. Senator Lummis expressed confidence in the SEC's ability to handle the disclosure aspects, citing the commission's existing experience in this space.<sup>18</sup> Senators Lummis and Gillibrand argue that with the bill's passage, innovation can flourish, empowering investors and nurturing a thriving crypto ecosystem.

We support these actions by the US House of Representatives and the Senate. Regulations that bring clarity and define the ground rules can help legitimize the platform, boost customers' confidence, and bring in the interest of institutional investors, since they often require strict compliance requirements. The key challenge for regulators remains striking the right balance between oversight and fostering innovation.

## Future of Crypto

What does this mean for the future of crypto? There are many possibilities. For example, in a recent interview with CNBC, BlackRock's CEO Larry Fink says there is great potential for cryptocurrencies to transcend international currencies as global demand is exponentially increasing.<sup>19</sup> It was, however, controversial that Fink had not named Bitcoin in this interview, because of his historical skepticism with the digital asset. He stated that, "We are working with our regulators because, as in any new market, if BlackRock's name is going to be on it, we're going to make sure that it's safe and sound and

protected.”<sup>20</sup> On June 15, 2023, BlackRock submitted a proposal for a spot Bitcoin ETF to the SEC. This application stands out from previous attempts by other firms due to its inclusion of enhanced crypto oversight to address concerns about fraud and safety. BlackRock’s application is still pending with the SEC, which prevents BlackRock from extensive commenting on this issue, but the application it did spark heated debate among commentators. BlackRock’s interest in Bitcoin is sparking hope for other firms, as the SEC has previously rejected dozens of crypto ETF applications. If approved, BlackRock’s Bitcoin ETF could attract substantial investment and contribute to the digital-asset market’s maturation. It might also pave the way for further innovation in the crypto ETF space.

While legislation is in the works, we still are left without a comprehensive framework that clarifies the rules for innovation in crypto. Whether or not an asset is deemed a security or commodity directly impacts the registration process when filing an ETF. This uncertainty can slow the approval process. Until Congress clarifies the rules, regulation is likely to be a game of tug-of-war between agency regulators (the SEC and CFTC) and the courts. Crafting effective legislation will be tricky—if regulation is perceived as too burdensome, crypto firms are very likely to move to countries with less strict regulations. Additionally, since the main attraction of crypto is its bypassing of centralized control, extensive regulation could defeat the very purpose of the existence of crypto assets.

The scrutiny over crypto regulation is not uniquely American; countries worldwide are grappling with the same issues of regulation. Each jurisdiction has adopted a different approach to address these challenges, which, when studied together, offers a diverse range of regulatory frameworks from which to learn.

Switzerland, for instance, has made a name for itself as a crypto-friendly country. Its national regulator, the Financial Market Supervisory Authority (FINMA), has issued clear guidelines on ICOs and the treatment of different tokens, offering predictability to crypto businesses.<sup>21</sup> Moreover, in the country’s pursuit of becoming

a global crypto hub, it has created the “Crypto Valley” in the city of Zug, attracting a large number of blockchain businesses.<sup>22</sup> Zug has been particularly alluring to firms because of its business-friendly environment and openness to crypto. Switzerland’s corporate tax rate is only 14.6%—significantly lower than that of most countries. And unlike other countries such as the United States, its policies and thoughts on crypto are clear. Crypto Valley is all about clarity.<sup>23</sup>

Similarly, Singapore, known for its pro-business stance, has also proven to be a supportive environment for crypto. The Monetary Authority of Singapore (MAS) has adopted a “technology-neutral” approach in its Payment Services Act, addressing a broad spectrum of digital payment and trading activities.<sup>24</sup> Its intention is to strengthen consumer protection and promote confidence in the use of e-payments.

In contrast to these countries, China has clamped down on crypto assets, banning ICOs and crypto exchanges.<sup>25</sup> Under this ban, institutions such as banks are prohibited from offering clients services involving crypto assets (registration, trading, clearing, and settlement). The ban is a tad contradictory, because the Chinese government has endorsed blockchain technology, the database engine that backs the distribution of crypto. However, despite this seeming endorsement, the Chinese government sees crypto as a risk to financial stability and control over its currency, leading to this severe regulatory stance. The recent introduction of China’s digital yuan, a central bank digital currency, reiterates the government’s preference for a centralized digital currency system.

Despite the different approaches to regulation, all countries are concerned about the potential for crypto to facilitate fraud and illegal transactions. These concerns are likely to play a part in shaping future regulations. To give just one example, Bitcoin has been used to purchase fake IDs. In 2018, a federal jury in Ohio indicted four people for operating a large-scale fake ID operation. In the investigation, federal authorities seized \$4.7 million in Bitcoin generated from this illegal operation.<sup>26</sup> Yes, these four people were caught, but thousands of others are operating similar

businesses. The G20 countries, recognizing the global nature of digital assets, have committed to implementing the recommendations of the Financial Action Task Force (FATF), an international body setting standards to combat money laundering and terrorist financing. The FATF has recommended that countries apply their existing anti-money laundering frameworks to virtual asset service providers, thereby fostering international coordination in the fight against illegal financial activities involving cryptocurrencies.<sup>27</sup> Turning back to legislation, if we begin to control some aspects of crypto, where does it end? Any centralization of digital assets could cause firms to take drastic measures to avoid regulation.

## Conclusion

The regulation of crypto assets within the United States remains a patchwork of rulings and judgments as regulators worldwide face a dilemma: They must strike a balance between embracing innovation and safeguarding the stability of their financial systems. For the United States, the consensus among most crypto companies supports some regulation to create clarity. Many firms urge Congress to

pass legislation categorizing crypto assets as commodities, rather than securities, and clarifying the myriad rules needed to remove uncertainty. Fortunately, there are positive signs of bipartisan cooperation in addressing this matter. “This is one of those rare subjects where it’s bipartisan, it’s bicameral. There is a pretty strong recognition by the people on the committees of jurisdiction that it’s time to regulate,” Senator Lummis said.<sup>28</sup> The parallel legislation currently pursued by both the House and the Senate could remove a great deal of confusion among industry participants, and pave the way for industry growth. This level of bipartisan support is rare, although some opposition remains.

Understanding this asset class is crucial for the investment management industry, given its inevitable presence in our future, with or without regulations. Investors already grapple with the complexities and technical jargon surrounding crypto assets, making clear and timely regulation essential to protect their interests. If formulated in the right way, with a clarification of the rules, digital-asset regulation can foster growth in the industry, without stifling the very purpose of the industry’s existence.

## Authors’ Note

In the midst of the changing landscape of asset regulations our research delves into the world of crypto regulations and explores the ongoing battle, between the need for regulation and the fundamental principles of decentralization. This struggle will undoubtedly shape the future of digital assets.

This opinion snapshot represents an effort to provide perspectives on crypto regulations. It is rooted in research and careful analysis with the goal of resonating with investors. Our aim is to offer insights that cut through the perplexities of regulations without claiming to provide investment recommendations.

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