

[Securities Regulation Daily Wrap Up, TOP STORY—House Ag Committee explores regulatory oversight for digital assets, \(Jul. 19, 2018\)](#)

Securities Regulation Daily Wrap Up

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The House Agriculture Committee heard from a diverse panel of prominent blockchain thought leaders in a hearing titled [Cryptocurrencies: Oversight of New Assets in the Digital Age](#). The witnesses included virtual currency entrepreneurs, academics, an attorney, and a government regulator, all seeking to shed light on the promise of digital assets and the regulatory challenges associated with these novel products.

At the hearing's onset, Committee Chairman Michael Conaway (R-Tex) [identified one of the core issues under consideration](#) observing, "Perhaps no question has generated greater uncertainty than how to determine if a particular token is a security. We generally know what to do if a commonly traded asset is deemed a security—we apply the securities laws. And if it is not a security, there is a good chance it's a commodity and subject to the requirements of the Commodity Exchange Act."

The chairman also noted, "Providing a strong, clear legal and regulatory framework for digital assets is essential. To that end, there are several questions before us about how laws should govern the issuance, trade and utilization of digital assets." During the course of hearing, the witnesses shared their varied insights, opinions and expertise regarding how the digital asset landscape is evolving and how the lawmakers and regulators could best move forward. A summary of some of those witness observations and ideas follow:

Underlying cryptocurrency markets are a mess. [Gary Gensler](#), now a lecturer at the MIT Sloan School of Management and a former CFTC Chairman, drew some attention when he shared his observation, "The underlying crypto cash market is a mess." He added, "The CFTC is doing a good job regulating derivatives but they are referencing an underlying market where, at best, is the Wild West." Gensler indicated there are gaps around the crypto exchanges themselves noting they are currently being regulated under state money transmission laws. He observed "this approach regulating them like Western Union or MoneyGram is just not satisfactory because crypto activity is more complex."

Gensler predicted that perhaps the next Congress will be debating whether the CFTC should have more authority over cash cryptocurrency markets. He noted, though, that the agency will have to be provided more resources to take on this task.

A commonsense approach to regulation should prevail. [Joshua Fairfield](#), a law professor at Washington and Lee University, called on lawmakers to focus on how people are actually using these new digital technologies, and then regulators should best proceed on how the technology is being utilized. Fairfield called for the *Howey* test to serve as the outer bound of regulation. Fairfield noted, "If a token is being used as a security, then it should be regulated as such, but don't if it's not. He also noted it's important to keep in mind the community's use of a token can shift over time.

Principles over prescriptions. [Daniel Gorfine](#), Director of LabCFTC and the CFTC's Chief Innovation Officer, noted that no one can predict where this technology is going. Moreover, he observed that laws generally cannot keep up with technological innovations. Accordingly, Gorfine urged lawmakers to take a principles-based approach to legislation rather than a prescriptive one involving numerous detailed requirements.

Providing clear guidance is essential. [Lowell Ness](#), a partner with Perkins Coie LLP, stated, "We also believe it is equally essential to provide clear guidance beyond enforcement actions to allow continued development and innovation around what many believe to be potentially transformational technology development." Ness pointed

to the very real threat of people going offshore as a result of the lack of regulatory clarity. "Enticing them back is a much tougher problem," he noted.

Caution and thoughtfulness are crucial. [Amber Baldet](#), Cofounder and CEO of Clovyr, a company building tools to access blockchain networks, suggested that lawmakers adopt a cautious and thoughtful regulatory approach. She observed, "When it comes to cryptographically unique digital bearer assets, the genie is out of the bottle" and further noted, "we are building next-generation systemically important infrastructure for the American economy. It's ...about learning how to balance the enormous potential value of this technology with the need for consumer protections and national security, and how to achieve this while respecting human and Constitutionally protected rights."

Risk-taking and capital formation should be encouraged. [Scott Kupor](#), Managing Partner at AH Capital Management & CNK Capital Management, a company focused on early-stage IT-related investments, advised the committee that cryptonetworks present a new and exciting opportunity to continue on a trajectory of economic growth and consumer utility stemming from innovations that have come from the great technology companies of our time. He told the lawmakers that "We need to develop a regulatory framework that encourages risk-taking and capital formation, provides clarity and certainty to market participants and protects individual investors and the integrity of the markets."

Final remarks. Following the hearing, Chairman Conaway noted, "Digital assets hold immense promise as an emerging area of commerce." He concluded, "Our committee looks forward to engaging with the community to promote a safe, efficient and transparent digital asset market for consumers, developers and investors. Over the coming months and years, we'll continue exploring what is needed to properly regulate these markets to protect the public, while also promoting innovation."

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