Securities Regulation Daily Wrap Up, TOP STORY—Senate Banking Committee questions SEC, CFTC chairs about cryptocurrency regulation, (Feb. 6, 2018)

Testifying on virtual currency oversight before the Senate Banking Committee, the chairmen of the SEC and CFTC doubled down on their promises to regulate markets and protect investors within their respective jurisdiction. CFTC Chairman Christopher Giancarlo said that the agency has gone after fraud and will continue to do so while making sure investors get the message that this is sometimes perilous territory. SEC Chairman Jay Clayton said that although his agency’s jurisdiction in the area of crypto assets is limited, initial coin offerings are subject to SEC oversight, including registration requirements.

The agencies’ focus. Clayton conceptualizes the developing landscape in terms of three groups: the underlying technology (distributed ledger/blockchain), cryptocurrencies, and initial coin offerings. With respect to DLT, he hopes that proponents are right that it will bring efficiencies to economies, including the capital markets. His assessment of the other two groups was more grim. The promise that cryptocurrencies would make it easier and cheaper to buy and sell goods, especially across borders, have proved illusive in many ways, he said. And with respect to ICOs, he said fairly unequivocally that they are securities offerings subject to his jurisdiction. Clayton returned to this point throughout the hearing, particularly expressing frustration that investors may believe they are protected when in fact they are not.

Giancarlo stressed his agency’s outreach efforts, which includes the issuance of investor alerts, the creation of a podcast, and even visits to libraries and senior centers. He told the committee that his own children never cared about the stock market, but are getting excited about Bitcoin. “We owe it to this new generation to respect their enthusiasm with a thoughtful and balanced response, not a dismissive one,” he said. “But we need to crack down hard on those who want to exploit their enthusiasm with fraud and manipulation.”

Systemic risk. In both his prepared and delivered remarks, Giancarlo also stressed the relatively small size of Bitcoin: with a $130 billion “market capitalization,” Bitcoin is comparable to a single large-cap company, such as McDonalds. “Clearly, the column inches of press attention to virtual currency far surpass its size and magnitude in today’s global economy,” he wrote.

When his turn came later in the hearing, Senator Mark Warner (D-Va) pushed back slightly on this assertion. He observed that if crypto assets continue at the same rate of increase, their total market capitalization will be upwards of $20 trillion by 2020. Warner posited that this may rise to the level of a systemically relevant event that should be put to analysis by the Financial Stability Oversight Council. The chairmen agreed that this is something to keep an eye on and assured that they are working with not just FSOC, but also the Financial Stability Board and IOSCO.

Coordination and enforcement. Interagency coordination was a frequent topic of the hearing. Both the agency leaders discussed their relative jurisdiction, and the lack thereof, with Giancarlo reiterating that while the CFTC has limited jurisdiction, it can go after fraud and manipulation. He cited the agency’s enforcement action against My Big Coin, which he said was actually a big con that amounted to a Ponzi scheme.

Clayton also asserted the SEC’s dominion in the area of ICOs, which he assured Senator Elizabeth Warren (D-Mass) he takes seriously. None of the ICOs to date have been registered, he confirmed, and he sees it as a problem that promoters are trying to get both the disclosure-light benefits of a private placement and the benefits...
of general solicitation and the promise of a secondary market. When Warren asked if he was sounding a warning bell, Clayton responded that he was.

Senator Warner posited that the CFTC may have moved too fast in allowing Bitcoin futures trading, and he observed that the SEC has not allowed ETFs. Giancarlo agreed with him that coordination is critically important, and said that there was communication in connection with the Bitcoin futures—a product that is very different from the Bitcoin market itself. Bitcoin futures give the regulator visibility and data into underlying spot markets that it wouldn’t otherwise have. Clayton also observed that ETFs are different from futures products in that, while an investor can take both sides of an ETF, they are predominately a long position. The SEC is more concerned about investor protection in approving these types of products.

**Blocking class actions.** Warren also asked whether the agency was considering allowing issuers to block investor lawsuits, as recently reported in Bloomberg. Clayton explained that he cannot prejudge an issue that may come before the SEC, and stressed that his vote is only one of five at the agency. He did say that the issue would be a subject of great debate and that it doesn’t make his list of things the SEC can do better.

MainStory: TopStory CFTCNews Enforcement ExchangesMarketRegulation IssuerRegistration RiskManagement SECNewsSpeeches SecuritiesOfferings