

CFTC Chairman Clarifies Position on Regulation of Digital Assets

MAY 26, 2023

On May 18, 2023, Commodity Futures Trading Commission (CFTC) Chairman Rostin Behnam clarified his position on the CFTC's authority over digital asset markets. Behnam's comments are consistent with Securities and Exchange Commission Chair Gary Gensler's recommendation of greater CFTC authority over cryptocurrency and pushes for increased regulation of digital asset markets generally.

In an interview at the International Swaps and Derivatives Association's annual meeting in Chicago, Behnam confirmed his view that decentralized finance exchanges, exchanges built on blockchain systems, are within the CFTC's purview, even when managed by a decentralized autonomous organization. Explaining that decentralization does not grant immunity from the Commodity Exchange Act (CEA), Behnam said, "It's easy to suggest ... 'there's no institution, there's no individual, it's just code. You can't regulate that....' [But] it's really about what are U.S. customers being offered and exposed to, and how is either [the] individual or the group of individuals who set up that entity, that code, to offer those products."

According to Behnam, the CEA's definition of commodity and the Howey test for determining investment contracts, a type of security and exempt from the CEA, are still the "driving force that sit[] as the foundation of our legal analysis to this day for digital assets." Behnam also confirmed the capacity for assets like coins and tokens to be governed as securities before becoming decentralized enough to be governed as commodities, an issue previously unaddressed in the context of traditional nondigital assets. Regarding future regulation, Behnam repeated through the interview the CFTC's role in facilitating "disclosures, information flow and availability, and knowledge about risk of loss."

We will continue to monitor developments in the digital assets and blockchain technology industry and provide friends of the firm with updates as they become available.

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Michael J. Blankenship

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Michael J. Blankenship



Jacob Botros

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