



The Daily Dish

Cryptocurrencies and Financial Regulation

DOUGLAS HOLTZ-EAKIN | AUGUST 10, 2022

Thomas Wade has a new [piece](#) that summarizes the state of play for financial regulation of cryptocurrencies (“crypto”). Eakinomics’ view of the universe is that crypto is poorly understood but remains a staple of cocktail party chatter, nevertheless. For that crowd, the fun fact in the Wade paper is that Bitcoin *futures* are regulated by the Commodity Futures Trading Commission (CFTC), but Bitcoin itself is unregulated (by any of the financial regulators other than those with the unenviable responsibility to prevent cyber financial crimes). The co-existence of a regulated futures market with an unregulated spot market is weird (economic term) and likely very inefficient.

A second important takeaway is that crypto is by and large unregulated, and in a patchwork fashion. As Wade puts it, “Except in limited circumstances, taxation, or, the activity of most cryptocurrencies and the treatment of digital assets is currently largely unregulated in the United States.... The lack of a primary regulator is only part (and possibly a cause) of the regulatory patchwork of inconsistent agency regulations and guidance on various isolated aspects of crypto.”

One reason for the current state of regulation is that crypto is poorly understood. Put differently, what *is* crypto? If crypto is a commodity, it is straightforward to assign jurisdiction to the CFTC: “The CFTC [defines a commodity](#) to include all ‘goods and articles, ... and all services, rights, and interests ... in which contracts for future delivery are presently or in the future dealt in’ and is not limited to solely tangible assets.” Or, is crypto a security, in which case the Securities and Exchange Commission has the turf? Per Wade: “The SEC defines a security as an ‘[investment contract](#)’ and relies on the [Howey Test](#), established by a Supreme Court decision nearly a hundred years old. Any financial instrument (including potentially a cryptocurrency) is considered a security if it is: an investment of money; in a common enterprise; with a reasonable expectation of profits; and derived from the entrepreneurial or managerial efforts of others.”

Those kind of definitional disputes can only be successfully refereed by Congress, so the ultimate framework for regulating crypto depends upon Congress taking up legislation in the near future.