

# The Buzz in Washington about Initial Coin Offerings

**A**s public interest and activity with cryptocurrencies and initial coin offerings (ICOs) increases around the globe, lawmakers and regulators in Washington are coming to realize that they need to respond to the booming industry.

Over the past few months, we have seen a spur of activity in the form of statements by lawmakers, hearings on Capitol Hill, and guidance and statements made by officials at regulating agencies. This article gives a glimpse of the action that we're seeing on the Hill and at the agencies, and what we can expect to see going forward.

## ON CAPITOL HILL

Though most Congressional staff on Capitol Hill are still learning what an ICO is, some members have been paying attention to the market and trends. Mainstream media coverage of ICO activity is helping some staffers to understand the industry. Even more promising, some Members of Congress, such

as Reps. Bill Foster (D-IL), Patrick McHenry (R-NC), and Ed Perlmutter (D-CO), and Senator Thom Tillis (R-NC) have asked questions about ICOs at Congressional hearings.

Some Members of Congress have shown strong interest in acting to regulate the industry. On January 9, at a hearing on money laundering, Senate Banking Committee Member Mark Warner (D-VA) said that "we are about to be overwhelmed by bitcoin, other kinds of cryptocurrencies." He continued that he would hope "we would be able to get ahead of it rather than chasing it after the fact." Many Members are concerned about national security and money laundering, as well as investor fraud. Others, on the other hand, are concerned about overregulating and quashing a nascent industry with the potential to raise capital. Some industry stakeholders are concerned that large enforcement actions by the Securities and Exchange Commission may cause an overreaction by Congress and result in regulatory overreach.

## AT THE SECURITIES AND EXCHANGE COMMISSION (SEC)

The SEC started paying attention to ICOs last year, with its first major action last July, and has been focusing increasing attention on the industry since. On July 25, 2017, the

SEC issued an investor Bulletin on ICOs. The investigative report issued cautioned market participants that offers and sales of digital assets (such as ICOs) by virtual organizations are subject to the requirements of federal securities laws. A couple months later, speaking on risks created, SEC Chairman Jay Clayton said that he thinks that ICOS may expose buyers to possible fraud and could be susceptible to abuse from "pump and dump" schemes.<sup>1</sup>

The SEC has also shown its willingness to crack down on industry marketing. In November, the agency issued a notice to celebrities in connection with their use of social media networks to encourage the public to purchase stocks and other investments, including ICOs. The SEC stated that "these endorsements may be unlawful if they do not disclose the nature, source, and amount of any compensation paid, directly or indirectly, by the company in exchange for the endorsement.

A week later, SEC Chairman Jay Clayton spoke at an event and said that there is a "distinct lack of information about many online platforms that list and trade virtual coins or tokens offered and sold in Initial Coin Offerings . . . trading of tokens on these platforms appears to be susceptible to price

<sup>1</sup> A "pump and dump" scheme occurs when an individual encourages investors to buy shares in a company in order to inflate the price artificially, and then sells their own shares while the price is high.



■ BY DINA ELLIS ROCHKIND, ESQ.  
AND CASEY MILLER, ESQ.

manipulation and other fraudulent trading practices.” He also said that he has he has “yet to see an ICO that doesn’t have a sufficient number of hallmarks of a security.” Chairman Clayton made further statements toward the end of the year, saying that he “caution[s] those who operate systems and platforms that effect or facilitate transactions in [virtual currencies] that they may be operating unregistered exchanges or broker-dealers that are in violation.” He referred interested parties to “closely read” the DAO report released earlier that year, and said that “excessive touting in thinly traded and volatile markets can be an indicator of ‘scalping,’ ‘pump and dump,’ and other manipulations and frauds.

The SEC has brought three enforcement actions since issuing the DAO report in July 2017. Some industry stakeholders are concerned that increasing enforcement actions and the potential for litigation may have chilling effect on offerings.

## AT THE COMMODITY FUTURES TRADING COMMISSION (CFTC)

The CFTC has determined that Bitcoin and other virtual currencies are indeed commodities. This is significant because under federal law, there are certain activities that are prohibited under commodity trading, including: price manipulation of a virtual currency, wash trading in an exchange-traded virtual currency swap or derivatives contract, trades in virtual currency futures or options on exchanges that are not properly registered with the CFTC, and counter margin trades with entities not registered with the CFTC.

Early December 2017, the CFTC announced that three exchanges (CME Group, Cboe Global Markets, and the Cantor Exchange) will be allowed to self-certify new bitcoin trading products. Trading began on Cboe Global Markets on December 10, and CME Group started trading on December 17. Later that month, on December 15, the agency announced a Proposed Interpretation

concerning its authority over retail commodity transactions involving virtual currency. The Proposed Interpretation sets out the CFTC’s view regarding the “actual delivery” exception that may apply to virtual currency transactions.

## LOOKING FORWARD

The CFTC and SEC will continue their enforcement efforts, along with the Plaintiffs’ Bar. The SEC and CFTC don’t want to quash an innovative way to raise capital, but need to balance that with investor protection. The agencies would like to get this issue resolved, and more specifically, one of SEC Chairman Jay Clayton’s first statements was that he wanted to make it easier to raise capital. The ICO craze that we are seeing today has a lot to do with the fact that we haven’t changed our securities laws since the post-depression era. The JOBS Act was the first crack at attempting to do that, but there is recognition that more needs to be done to enhance capital formation.

The greater danger to ICOs and cryptocurrency comes from the law enforcement community, which is concerned about money laundering and terrorist financing. Secretary Mnuchin and Under Secretary Sigal Mandelker have made various comments expressing concern about this industry. Both the House and Senate are working on anti-money laundering legislation that has a good chance of being signed into law. Our fear is that this legislation will include provisions that shut down or effectively shut down the use of cryptocurrency in the U.S. Interest groups, including technologists, should be engaging with Capitol Hill and the Administration to make sure that lawmakers and regulators understand that blockchain technology can be used as a tool to prevent money laundering. Currently, their approach is to advocate that they be excluded from anti-money laundering laws. This is a mistake. They need to participate in the process rather than trying to exclude themselves from it.

**Dina Ellis Rochkind** is Of Counsel in the Paul Hastings Government Affairs practice [www.paul-hastings.com](http://www.paul-hastings.com) and is based in the firm’s Washington, D.C. office. Her practice focuses on representing clients before Members of Congress on Capitol Hill and the Executive Branch. Ms. Rochkind represents clients in matters involving regulatory initiatives, policymaking and legislation, and enforcement actions.

Ms. Rochkind has over 20 years of experience on Capitol Hill, lobbying, and working for the Executive Branch. Prior to joining Paul Hastings, she served as Washington Director in the office of Rep. Mike Coffman (R-CO). Other Capitol Hill experience includes serving as senior staff for various Congressional Committees and for Senator Pat Toomey (R-PA). Ms. Rochkind also served in the George W. Bush Administration as Deputy Assistant Secretary at the Treasury Department. She has been involved in drafting major pieces of legislation over the last two decades, including: the 2005 bankruptcy reform legislation, the FACT Act, E-Sign, Check 21, Federal Deposit Insurance Reform Act, Gramm-Leach-Bliley Act, and, most recently, the comprehensive and bipartisan JOBS Act, for which she was the lead staffer in the Senate.

Ms. Rochkind has worked across party lines on both sides of the aisle to achieve key legislative successes and has a reputation for “getting things done” in Washington. She is also experienced in crisis management. During the auto industry crisis, Ms. Rochkind led the lobby to rescue Chrysler and handled the consequences and fallout from its bankruptcy. She has led legislative advocacy on behalf of major corporate entities and advised congressional leaders on issues such as banking, bankruptcy, insurance, other financial services, and economic development.

Prior to leading Rep. Coffman’s office, Ms. Rochkind served as Vice President of Federal Government Affairs for a leading mortgage lending company. ■

**Casey Miller** is an associate in the Corporate Department and is based in the firm’s Washington, D.C. office [www.paulhastings.com](http://www.paulhastings.com). Her practice focuses on securitization and structured finance, with a particular emphasis on representing investment banks, asset managers, issuers, and investors in collateralized loan obligation transactions. In addition to her work in structured finance, Ms. Miller works with the Government Affairs practice in representing clients before Members of Congress on matters involving regulatory initiatives, policymaking and legislation, and enforcement actions.

Previously, Ms. Miller worked on Capitol Hill as a Senior Legislative Assistant to U.S. Representative Marcia L. Fudge. In Congresswoman Fudge’s office, Ms. Miller managed important legislative initiatives, including handling the Congresswoman’s healthcare portfolio. Additionally, Ms. Miller handled all of the Congresswoman’s work with the Committee on Science, Space, and Technology and related issues. She has experience navigating the legislative process and moving legislation through the U.S. House of Representatives.

Ms. Miller graduated with high honors from The George Washington University Law School in 2015, where she served on the school’s Law Review. She earned a Bachelor of Science degree in Mechanical Engineering from The Pennsylvania State University in 2009.