

## Look Ahead Calendar - PolicyPartner

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- PolicyPartner & Talos MiCA call series
  - ESMA issues request for comment on final consultation
  - Congress challenges SAB 121
  - Energy Information Administration study on mining
  - FDIC's treatment of financial innovation
  - OCC Tokenization Symposium
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The regulatory process to implement MiCA in Europe is progressing as planned. As part of the third and final consultation package, [ESMA has released a request for comment](#) on guidance to NCAs (National Competent Authorities), specifying the difference between typical financial instruments (regulated by MiFID) and the various crypto assets defined under MiCA. **This set of questions is most relevant for Crypto Asset Service Providers (CASPs) that list tokens for trading and for the issuers of tokens.**

The guidance makes clear that local regulators should not consider the technological structure of the asset as the key determining factor. Rather, for a crypto-asset to be recognized as a financial instrument, it must be “negotiable, transferable, and encapsulate rights attached to securities. These key conditions and criteria should be assessed on a case-by-case basis by NCAs.”

Contents of final consultation package:

- Qualification of crypto-assets as financial instruments ((Published and in focus above)
- Monitoring, detection, and notification of market abuse
- System resilience and security access protocols
- Investor protection
  - Reverse solicitation (Published)
  - Suitability of advice and portfolio management services to the client
  - Policies and procedures for crypto-asset transfer services, including clients' rights

**PolicyPartner will host a series of calls with Talos in February for digital asset firms seeking registration in Europe.** We will meet with policymakers and experts from Portugal, Netherlands and other countries. Focus questions for the call series:

What if one NCA determines that a crypto asset should be treated as a financial instrument and another NCA disagrees?

Will there be multiple NCAs per jurisdiction? Could ARTs live with banking regulators and CASPs with securities regulators? What are the differences in the local regimes?

Another key question remains the application of MiCA to decentralized autonomous organizations and DeFi. [RSVP here](#) for the MiCA call series:

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## **SAB 121 Legislation**

Polycypartner believes the strong show of support behind the bipartisan proposal to revoke SAB 121 increases the odds the bulletin is successfully eliminated. While the law itself would need to pass the Seante and be signed by the president to take effect, **if the bill progresses further, we believe the political pressure could cause the SEC to withdrawal the rule.**

A GAO report published in late October concluded that the Bulletin was in effect a rulemaking, giving Congress the option to challenge under Congressional Review Act.

The measure released this week enjoys tremendous support from the banking industry – SIFMA, the Bank Policy Insitute, the Financial Services Forum and American Banker Association all have publicly supported the bill. **We believe if Maxine Waters and other Democrats get behind the measure, the SEC may retract the rule – making custody of digital assets at banks a much more realistic prospect.**

The next HFSC [meeting](#) scheduled for February 6 on FSOC will include the resolution from Mike Flood and Wiley Nickel, which echoes Sen. Lummis's challenge.

## **EIA rulemaking on BTC energy activities**

We view the recently announced study into bitcoin mining activities as consistent with objectives set in the Biden Administration's executive order. EIA (the Energy Information Administration) collects information about energy usage and demand in the United States. While we view the impact of this study as limited, we have noted an increased interest from the Biden administration in politicizing certain USES of electricity – a stark contrast from the majority of climate debate centered on the energy generation method.

We believe there are limited options the Federal government could take to impede the mining of cryptocurrencies like Bitcoin. The Biden administration has proposed the [DAME tax](#), a 30% tax on the consumption of energy by Bitcoin manners. This tax is highly unlikely to be implemented. While excise taxes are intended to limit the demand for certain products or services, we believe such a tax would have limited or even positive impact on the demand for Bitcoin.

Because mining is a global competition, a tax on miners in a confined jurisdiction like the US may have a limited impact. We believe such a tax could be potentially positive for BTC demand as increased costs to mine bitcoin would in theory increase the difficulty to mine BTC, leading to more scarcity. A silly tax indeed.

Beyond an excise tax or the deceleration of a national emergency (or the Defense Production Act), we are not aware of regulatory powers the government could enact to directly impede bitcoin mining. Especially in Texas where ERCOT (Electric Reliability Council of Texas) operates entirely within state borders and has been highly resistant to federal intervention in its operations.

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## **FDIC's Treatment of Financial Innovation Continues to Fester**

On February 2nd three senior Republican House Financial Services Committee members, McHenry, Barr, and Hill, [denounced the FDIC's failure](#) to provide guidance to financial innovation and FinTech firms. The Members site the disassembly of the external facing portion of the FDITech Office, along with the lack of “publicly available information detailing how the FDIC’s posture on innovation will manifest in examinations.” Details are still opaque on how the changes fit in the FDIC’s Compliance Examination Manual. The members requested the Corporation respond by February 29th.

The letter largely highlights that the FDIC is not being proactive towards innovation at best and restrictive at worst. Notably, just last October the FDIC faced [criticism](#) from its OIG office for hindering member banks’ crypto activities by issuing pause letters to banks with crypto products/initiatives. Based on the recommendations from the OIG, by January 30, the FDIC had to establish internal timeframes for reviewing additional information requested by the FDIC and responding to supervised institutions. However, even given the slap on the wrist from the OIG, the Corporation largely retained its control over what information could be requested from banks as well as over deadlines by which the information is deemed to be sufficient.

## **OCC Tokenization symposium on February 8.**

On February 8, OCC will host a symposium on Tokenization of RWAs. The symposium will host a number of speakers ranging from policymakers to academia and corporate worlds. The panels will focus on legal foundations for digital assets, regulation, tokenization use cases and risks. Previously Acting Comptroller Hsu recognized the potential for tokenization and disintermediation in finance pioneered by fintechs and non-bank startups. More information on the symposium can be found [here](#).