

New Crypto Bill Seeks to Regulate Digital Assets and Their Markets

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The [Responsible Financial Innovation Act](#) is the most recent legislative package attempting to standardize and regulate the digital assets markets on a federal level. Introduced in Congress by Sens. Cynthia Lummis and Kirsten Gillibrand on June 7, 2022, the following is a summary of the draft act. If enacted, the act would go into effect on December 31, 2022. The act attempts to bring clear definitions to the various types of digital assets on the market, set a standard for which federal agency should regulate digital assets and their markets, and create regulations to guide how, if, and when digital assets should be treated as securities. When possible, the act proposes methods of integrating digital assets into existing statutory and regulatory frameworks.

Definitions

The draft act creates new definitions for a broad range of elements related to the digital assets ecosystem. Most notably, the act creates a distinction between “digital asset,” “virtual currency,” and “payment stablecoin” whereby “digital asset” means a “natively electronic asset that confers economic, proprietary, or access rights or powers” including virtual currency and payment stablecoins, and may comprise of other assets such as ancillary assets and securities.

The act defines “virtual currency” as “a digital asset that is used primarily as a medium of exchange, unit of account, store of value, or any combination of such functions” but continues that virtual currency “is not legal tender ... and does not derive value from ... an underlying financial asset (except other digital assets).”

Similarly, the act defines “payment stablecoin” as a digital asset that is denominated or pegged to the value of legal tender and whose value is backed by one or multiple financial assets. However, a significant change, and potential trap for the unaware, is the required statement from the issuer that must accompany the offering of a payment stablecoin, assuring the reasonable expectation to users that the issuer will maintain the denominated or pegged value.

Finally, the act defines “ancillary asset” as “an intangible, fungible asset that is offered, sold, or otherwise provided to a person in connection with the purchase and sale of a security” and may include certain digital assets. It is widely presumed that this definition intends to include digital assets such as NFTs (non-fungible tokens).

Securities

The draft act’s classification of a digital asset as security depends on its regulatory and statutory context. For example, for tax purposes, the term “securities” includes any digital asset. However, under the Commodity Exchange Act, “digital asset” is not included in the definition of security.

Likewise, it is presumed that ancillary assets are not securities in most instances; however, the issuers of ancillary assets are required to treat them as a security. The draft act also empowers the SEC and the courts to issue a public order if they determine that an ancillary asset is a security.

Statutory and Regulatory Structures

Much of the proposed act is dedicated to integrating digital assets into current statutory and regulatory structures, such as the Bankruptcy Code, Federal Reserve provisions, the Internal Revenue Code, and the Commodity Exchange Act. The act proposes self-regulatory organizations, over which the SEC or Commodity Futures Trading Commission are to have statutory jurisdiction. These self-regulatory organizations are to be comprised of digital asset intermediaries. The act recommends lengthy requirements for membership. Self-regulatory organizations are to apply for registration with the SEC or CFTC. The act proposes significant regulatory authority to the CFTC, and Rostin Behnam, chairman of the CFTC, has publicly announced his support for the proposed act.

Tax Provisions

The draft act provides several industry-favored tax provisions. The two most anticipated are (1) a taxpayer’s gross income will not include any gain, if it is less than \$600, from the sale of digital assets; and (2) income from mining and staking digital assets will not be realized as taxable income until those newly generated digital assets are sold or exchanged. A similarly important provision of the act is that it requires the IRS to adopt final guidance on many of the outstanding questions regarding the taxation of digital assets.

Other Provisions of Interest

The act provides disclosure requirements for ancillary assets, which are divided into initial compliance, ongoing compliance, and transition requirements. Disclosure obligations generally apply to issuers who are engaged in activities that determine the value of the ancillary asset, and whose daily trading of the ancillary asset has an aggregate value of more than \$5 million.

The act also proposes a board of trade primarily for the protection of retail traders engaged in digital asset activities. The act includes laws to regulate access to contract markets, standards for digital assets that are tradeable in this context, and standards and procedures for the protection of retail traders.

Finally, the act also contains draft consumer protection standards for digital assets generally, such as source code verification, settlement finality, enforcement, and other consumer protections.

Carlton Fields will continue to closely monitor the legislative developments and analyze the effects that such developments may have on our clients.

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