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PAVING THE WAY TO A SENSIBLE TOKEN DISCLOSURE FRAMEWORK

Lilya Tessler, Partner, Head of FinTech and Blockchain Group, Sidley Austin LLP[1]

I. Introduction

From 2017 through the end of 2023, the total market capitalization of all digital assets rose from approximately $20 billion to approximately $1 trillion, with a peak of nearly $3 trillion in late 2021.[2] In 2024, the total market capitalized rebounded to near all-time highs.[3] Digital assets have been the subject of hundreds of headlines and dozens of hearings in both chambers of Congress. Federal and state regulators have issued guidance, proposed rules, and taken numerous enforcement actions related to digital assets. However, a 2022 report by the U.S. Government Accountability Office found that while blockchain technology and digital assets may offer potential benefits for both financial and non-financial applications, legal and regulatory uncertainties present a challenge to adoption.[4] Without comprehensive, digital asset-specific legislation, various regulators have asserted a patchwork-yet overlapping-jurisdiction over digital assets and related activities based on their existing authority. This article surveys the existing regulatory landscape applicable to digital assets and discusses a sensible token classification and disclosure framework that is relevant, irrespective of which agency has jurisdiction over digital assets.

II. Background on Blockchain Technology and Digital Assets

Blockchain technology enables users to record transactions in a shared ledger, such that under normal operation of the blockchain network, no record of a transaction can be changed once published.[5] This distributed database continuously grows as new sets of transactions or "blocks" are "linked" together to form a "chain." Each record in the data set is individually labeled, described, and time stamped within blocks. Blockchains are distributed, meaning that instead of one person or entity controlling the database, numerous computers connect to a network and work together to come to an agreement on which transactions are valid.

Blockchain technology is being used across a variety of sectors to address different industry challenges. Originally, it was developed as the infrastructure behind bitcoin, recording transactions in a transparent, secure, and immutable manner. But blockchain use cases and applications continue to grow well beyond peer-to-peer payments. Blockchain is being imple-

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mented or considered within numerous industries, including financial services, real estate, supply-chain management, and healthcare, among others.

In general, "digital assets" are digital representations of an asset, right, privilege, security, commodity or other interest represented on a blockchain. Virtually any type of interest can be digitized and recorded on a blockchain. This process is commonly referred to as "tokenization."[6] "Digital asset" is often used as a broad, catchall term (which can pose challenges when drawing a regulatory perimeter), and various regulators have defined "digital assets" similarly, but with subtle differences. For example, the U.S. Securities and Exchange Commission ("SEC") defines "digital assets" to include "cryptocurrencies, coins and tokens,"[7] and more recently has started using the term "crypto assets" to refer to digital assets relying on cryptographic protocols.[8] The Financial Industry Regulatory Authority ("FINRA") defines the term "digital asset" more broadly as "cryptocurrencies and other virtual coins and tokens (including virtual coins and tokens offered in an initial coin offering ("ICO") or pre-ICO), and any other asset that consists of, or is represented by, records in a blockchain or distributed ledger (including any securities, commodities, software, contracts, accounts, rights, intangible property, personal property, real estate or other assets that are "tokenized," "virtualized" or otherwise represented by records in a blockchain or distributed ledger)."[9] The Commodities Futures Trading Commission ("CFTC") interprets "digital assets" even more broadly still, as "anything that can be stored and transmitted electronically, and has associated ownership or use rights."[10] Recently, an Advisory Committee to the CFTC comprised of financial market infrastructures, market participants, end-users, service providers, and regulators recommended an updated definition of "digital asset," along with a taxonomy for classifying digital assets, for consideration by the CFTC.[11]

Since the technology places no constraints on what the data recorded in a blockchain represents, digital assets can be used to represent a variety of asset types and associated rights. These assets can be "native" assets that are created, maintained, and utilized on a specific blockchain or smart contract and are an integral feature of the blockchain or smart contract, or tokenized representations of another type of asset that can exist without blockchain technology.

III. The Current Regulatory Landscape

Given the potential breadth of what a digital asset represents, digital assets may be subject to multiple overlapping regulatory frameworks in the United States. To date, U.S. financial regulators, principally the SEC and CFTC, have been the most active in this space. In the absence of an overarching federal regulatory framework for digital assets, however, certain states have enacted digital asset-specific customer protection regimes-and at the federal level, the consumer protection-focused Federal Trade Commission ("FTC") has become increasingly active recently.[12]

A. Federal Securities Regulation

Whether a digital asset is subject to the securities laws turns on the definition of "security" in each of the relevant federal securities statutes.[13] As stated in the Supreme Court case *SEC v. C.M. Joiner Leasing Corp.*,[14] the term "security" was defined in the Securities Act to

> *"include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized, and the name alone carries well settled meaning. Others are of more variable character, and were necessarily designated by more descriptive terms, such as 'transferable share,' 'investment contract'. . . ."*

Debt, equity, or another instrument specifically listed within the definition of a security may be issued and recorded using blockchain technology and reflected as a digital asset, and thus those digital assets would meet the definition of a security. Additionally, the SEC, in staff guidance and enforcement actions, have stated that certain offers and sales of digital assets meet the definition of an "investment contract" under the test set forth by the Supreme Court in *SEC v. Howey*[15] and its progeny, based on particular facts and circumstances.[16]

Regardless of whether a digital asset is an equity security (for example) or an investment contract security, offers and sales of securities must be registered with the SEC under the Securities Act or offered pursuant to an exemption from registration. In addition, persons providing certain services with respect to securities may be required to register with the SEC under the Exchange Act, including persons that meet the definition of an "exchange," "broker-dealer," or "clearing agency."[17]

B. Federal Commodities Regulation

Digital assets may also be subject to CFTC jurisdiction as a "commodity," as defined by the Commodity Exchange Act ("CEA").[18] The CFTC has taken the position that bitcoin and other digital assets are commodities,[19] and the CFTC's interpretation has since been confirmed by federal courts.[20] More recently, the CFTC stated that, "Bitcoin, ether, litecoin, and tether tokens, along with other digital assets, are encompassed within the broad definition of "commodity" under Section 1a(9) of the [CEA]."[21]

Currently, the CFTC's oversight of commodity, spot trading venues is limited.[22] The CFTC does not have regulatory authority over "spot" transactions of digital assets; however, the CFTC has general anti-fraud and anti-manipulation enforcement authority over "any . . . contract of sale of any commodity in interstate commerce,"[23] which includes the underlying spot markets for digital assets (as well as the futures and swaps markets that it regulates).[24] Beyond instances of fraud and manipulation, the CFTC's jurisdiction over digital assets is implicated where digital assets are the subject of futures, options, swap contracts, or leveraged retail commodity transactions. With respect to futures, options and swaps on digital assets traded in U.S. markets, as with any such trading in any commodity, the CFTC has broad regulatory authority and oversight and imposes: (1) registration requirements for trading and market surveillance; (2) reporting and monitoring standards; (3) capital requirements; and (4) platform and system safeguards.[25]

However, because "securities" are included within the definition of an "excluded commodity" under the CEA, whether a digital asset is subject to the federal securities laws or federal commodities laws depends on whether the pertinent asset or transaction is a security or securities transaction.[26] As discussed above, whether a digital asset or transaction is a security or securities transaction often involves a facts and circumstances analysis, creating jurisdictional ambiguity in the absence of congressional action.

C. Consumer Protection Laws

The FTC's dual mission is (1) promoting competition and (2) protecting consumers. Increasingly, the FTC has used its authority under the FTC Act to enforce federal consumer protection laws in cases involving digital asset companies.[27] Section 5(a) of the FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful."[28] "Deceptive" practices are defined in the FTC's Policy Statement on Deception as involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably under the circumstances.[29] While a powerful tool, the FTC Act does not prescribe specific disclosures related to digital assets that persons engaged in digital asset activities must make.

In 2015, New York became the first state to create a separate regulatory scheme specifically for digital asset activities, with the New York Department of Financial Services ("NYDFS") publishing regulations that require, among other things, the licensing of any person engaging in "virtual currency business activity" in New York or with a New York resident (commonly referred to as the "BitLicense").[30] The BitLicense provides requirements expressly intended to address consumer protection, including disclosure of material risks, disclosure of general terms and conditions, disclosure of the terms of transactions, and the establishment of anti-fraud policies and procedures.[31] In the absence of a comprehensive legal regime applicable to digital assets, other states have also enacted or are considering enacting laws and regulations to address perceived gaps in consumer protection.[32]

Additionally, while not specific to digital assets, every state (except Montana) has laws governing money transmission, which may or may not apply to digital assets, depending on the state. While state money transmitter laws complement federal illicit finance laws, they also contain prudential standards and disclosure requirements aimed at consumer protection, to varying degrees.

IV. Key Legislative Proposals

In July 2023, leaders in both the U.S. Senate and House of Representatives introduced legislation intended to establish a comprehensive and unified regulatory scheme for digital assets and to clarify the regulatory framework applicable to digital assets in the United States (the "2023 Legislative Proposals"). While both bills face significant barriers to enactment this term, on May 22, 2023 the McHenry-Thompson Bill passed the House of Representatives with bipartisan support and will now be considered in the Senate.

A. McHenry-Thompson Financial Innovation and Technology for the 21st Century Act[33]

The McHenry-Thompson Bill gives the CFTC primary jurisdiction over digital asset markets while outlining a process for market participants and regulators to allocate oversight of digital assets between the SEC and CFTC.

1. "Digital Commodities" and "End User Distributions"- Regulated by CFTC

A digital asset is classified as a "Digital Commodity" and is regulated by the CFTC if the blockchain network to which a digital asset relates is both "functional" and certified as "decentralized" (each as defined in the bill and proposed to be incorporated into the securities laws and CEA)—unless the digital asset is a "Restricted

Digital Asset," defined below. Any person (whether or not related to the network's development) may certify an asset's status as a Digital Commodity, and networks are presumed to be decentralized unless the SEC objects within 60 days of the certification and provides a detailed analysis of its reasons for doing so. If the network is (1) not functional or (2) not decentralized, the digital asset is regulated by the SEC until such time as both are true (if ever).

If a digital asset is issued through an "end user distribution," the digital asset is regulated by the CFTC-unless the digital asset is a Restricted Digital Asset. An "end user distribution" is defined as an issuance of digital assets that does not involve an exchange of cash or other assets and is distributed in a broad, nondiscretionary manner based on satisfied conditions, including incentive-based awards (i) to users of a digital asset in its native blockchain network and (ii) for validating, mining, staking, and interacting with a functional blockchain system.

2. Restricted Digital Assets-Regulated by SEC

"Restricted Digital Assets" are regulated by the SEC and include: (a) digital assets held by the issuer of the digital asset, related persons, or affiliates of the issuer before the networks to which the assets relate are functional and certified as decentralized; and (b) digital assets held by persons other than issuers, their related persons, and their affiliates before the networks to which the assets relate are functional and certified as decentralized, unless the digital assets are distributed through an "end user distribution" or acquired on a CFTC-regulated exchange.

3. Payment Stablecoins-Neither CFTC Nor SEC

"Payment Stablecoins" are excluded from the definition of both "Digital Commodity" and "Restricted Digital Asset." Payment Stablecoins are permitted to trade on both SEC and CFTC regulated venues; however, neither the SEC nor CFTC is given authority to regulate the operations (issuance, redemption, collateral, etc.) of permitted stablecoins or their issuers. Still, the SEC and CFTC retain antifraud and antimanipulation authority over permitted stablecoins trading on venues subject to their respective jurisdiction.

4. Regulation of Intermediaries

The bill defines and provides for the regulation of various new types of CFTC and SEC registrants.

"Digital Commodity Exchanges," "Digital Commodity Brokers," and "Digital Commodity Dealers" are required to register with the CFTC, expanding the CFTC's regulatory jurisdiction to spot markets for digital assets, while "Digital Asset Trading Systems," "Digital Asset Brokers," and "Digital Asset Dealers" are required to register with the SEC, preserving a distinction between "digital assets" and "securities" yet still providing the SEC with authority over certain digital asset activities.

B. Lummis-Gillibrand Responsible Financial Innovation Act[34]

Similarly, the Lummis-Gillibrand Bill provides the CFTC spot market jurisdiction over all fungible crypto assets that it does not define as securities, in addition to the agency's current jurisdiction over derivatives and leveraged transactions.

As such, the CFTC would become the primary digital asset market regulator since digital asset exchanges would be required to register with the CFTC, which would oversee their activity going forward.

1. Digital Assets

The bill divides digital assets into "ancillary assets" (presumed to be commodities and not securities) and other assets:

"Ancillary assets" are intangible, fungible assets offered, sold, or otherwise provided in connection with the purchase of securities through an arrangement or scheme that constitutes an investment contract and are regulated by the CFTC. However, notwithstanding ancillary assets' status as commodities, if any person owning not less than 10% of any class of equity securities of the issuer engages in entrepreneurial or managerial efforts that primarily determine the value of the ancillary asset, the issuer must file certain mandatory disclosures prescribed by the bill with the SEC.

By contrast, assets that provide the holder with debt or equity interests in a business entity, liquidation rights with respect to a business entity, entitlements to an interest or dividend payment from a business entity, or any other financial interest in a business entity are excluded from the definition of "ancillary assets" and are regulated by the SEC.

2. Payment Stablecoins

Under the Lummis-Gillibrand Bill, all stablecoin issuers are regulated as depository institutions under federal banking agency supervision.

3. Regulations of Intermediaries

CFTC-regulated exchanges are required to follow prescribed custody, customer protection, anti-market-manipulation, information-sharing, and risk management standards, and the bill grants the CFTC further rulemaking authority with respect to digital asset exchanges.

V. Towards a Sensible Token Classification and Disclosure Framework

While legislative proposals striving to provide clarity to market participants are laudable, the 2023 Legislative Proposals start with the presumption that either the SEC or the CFTC—financial regulators—is the appropriate agency to oversee all digital asset activities. Digital assets are not, inherently, financial assets. For example, the McHenry-Thompson Bill analogizes digital assets to commodities such as gold and oil (which are likewise not inherently financial assets), but then proceeds to give the CFTC primary regulatory authority over spot markets for digital assets (subject to certain exceptions) *in addition* to markets in their financial derivatives, an important distinction from the CFTC's lack of regulation of "traditional" commodities spot markets.

Since digital assets are digital records of data, those digital records can represent anything: physical, real-world assets; rights to receive digital or real-world services; traditional intangible assets (like equity, debt, and intellectual property); and so on. This fundamental premise has already been recognized by federal district courts.[35]

If a digital asset is a digital representation of an existing type of asset, then it should fit within a well-developed legal and regulatory regime.

The mere act of reflecting an asset or right on a blockchain ledger does not change the essential nature or character of the underlying asset or rights that are digitally represented. For example, it is generally understood in other contexts that a consumer buying shoes from a retailer's website is purchasing physical shoes, notwithstanding the digital image file on the website, or the retailer's database entries for managing inventory and shipping. Personal identity may be proven by a government-issued plastic card, or biometric scans. Shares of stock in a company or title in real estate can be reflected in paper form, entries in computer spreadsheets, or digital assets on a blockchain, and so on.

A. A Sensible Token Classification System

As coined by industry group Global Blockchain Convergence,[36] a "sensible token classification system" seeks to first understand the functions and features of a particular digital asset before applying a legal and regulatory framework to that asset. This is the foundation of the principle of "same activity (or asset), same risk, same regulation," which has served as the starting point for digital asset regulation.[37]

While any asset or rights can theoretically be tokenized as a digital asset, certain digital assets exist only within a particular blockchain network—i.e., "native" digital assets, such as bitcoin.[38] Certain people may treat native digital assets as an investment, or use native digital assets as a payment method, but these subjective uses are distinct from the essential characteristics of the digital asset.[39] A sensible token classification system, and the legal and regulatory implications that follow, should focus on the essential nature of the asset and not the subjective intent of individual market participants.

However, as the sensible token classification observes, the attributes of native digital assets could benefit from regulation apart from mapping to an existing regulatory framework. In particular, the different types of native digital assets, their ease of transferability, and the prevalence of trading venues have led to questions about market integrity. A potential solution to market integrity concerns could be regulating intermediaries who provide services related to native digital assets (but not the users of the assets themselves).[40]

The industry and legislature have proposed solutions such as a new self-regulatory organization to implement rules for trading platforms that require compliance with certain principles, including protection of customer assets, prevention of fraud and manipulation, prohibition of conflicts of interest, adequate disclosure to investors, regular reporting, pre- and post-trade transparency, risk management, and governance standards, among others.[41]

B. Baseline Disclosures

An important component (but not the only component) of market integrity regulation would be ensuring that potential purchasers of a digital asset have accurate and adequate information about that asset ("token disclosures"). According to a recent survey of digital asset holders in the United States, Canada, and United Kingdom, only 36.9% of respondents believe the information required to make an informed decision to hold or purchase a digital asset is always available, with 43.9% of respondents answering that such information is only sometimes available.[42]

Irrespective of the regulatory characterization

of a digital asset or the features of a particular blockchain, market participants would likely agree that certain information about a digital asset should be available to the public. Token disclosures may include "baseline" or foundational information about a token, associated with a particular blockchain protocol, that would be material to all holders or purchasers of the token. The foundational token disclosures can be supplemented by existing disclosure regimes if the digital asset is the subject of a regulated financial instrument, or is being used in a manner that fits within a regulated activity, such as being sold to raise capital in a securities transaction.

While certain token disclosures may overlap with existing disclosure regimes, the unique features of native digital assets also need to be considered in developing disclosure guidelines. For example, as noted by academics, legal practitioners, and market participants alike, the disclosures required by existing securities laws may be underinclusive of information relevant to digital assets, but also overinclusive of *irrelevant* information, and therefore raise the potential unintended consequence of misleading purchasers.[43] The 2023 Legislative Proposals recognize this fact by setting forth disclosure requirements specifically tailored to digital assets.[44]

Broadly speaking, token disclosures may need to address some of the following types of information. In nearly all cases, it will be necessary to include information about the asset itself. This can include the intended purpose of the digital asset, a description of its features and functionality and any additional commercial and operational information, in addition to technical information about the relevant blockchain protocol, including the results of security and code audits. Although details will depend on the particular digital asset, token disclosures should generally include a description of what is often referred to as the "tokenomics"-that is, information about the current and total supply of the digital asset, whether supply is inflationary or deflationary, how assets are created and/or destroyed, and other protocol-based incentives or disincentives for certain uses and behaviors. If the digital asset is already in use, token disclosures could also include quantitative metrics about how the asset is used, such as the number of transactions, number of unique wallet addresses, information about code contributions and network updates (including third-party development proposals and projects), and the total value locked and/or staked, if applicable. Because token disclosures would likely be static, it could be beneficial to identify blockchain explorers and other tools that enable market participants to track the data in real time.

Other types of information may not be applicable to every digital asset, but could be relevant depending on the particular facts and circumstances. This includes a description of how decisions relating to the operation of the digital asset and network are made, which may or may not require the identification of key executives or developers responsible for, or significantly contributing to, ongoing development efforts and the identification of holders with significant token ownership.

To that end, a working group of legal academics and practitioners recently proposed guidelines designed to identify and elicit the disclosure of material information about certain types of digital assets. Currently a discussion draft, the proposed disclosure guidelines are ultimately intended to

establish a baseline of relevant disclosure, regardless of the applicable regulatory regime.[45]

It goes without saying that all token disclosures should also be fair, accurate and not misleading and include an explanation of any material risks or conflicts of interest that may be applicable. In addition, there should be a mechanism to ensure persons making token disclosures are responsible and accountable for the content therein.

VI. Conclusion

The long-term development and health of the digital asset ecosystem will ultimately require standardized, readily available token disclosures. Existing legal and regulatory regimes, such as the federal securities and commodity laws, along with state and federal consumer protection laws are significant and should continue to serve as a guide for digital asset transactions that fit within these frameworks. Nevertheless, existing laws are far from a one-size-fits-all solution, especially as digital assets are concerned: certain requirements are not applicable, and information gaps may still remain. The 2023 Legislative Proposals recognize this fact and propose enhanced disclosures tailored to the unique features and characteristics of digital assets. Yet, passing major financial market structure legislation is a difficult task even in the most favorable circumstances and may take years to navigate the political considerations. However, by adopting a sensible token classification system, the seemingly unwieldy question of which U.S. financial regulator should be vested with jurisdiction over digital assets becomes more manageable, and regulated activities continue to be subject to existing legal frameworks.

ENDNOTES:

[2]Global Cryptocurrency Market Charts, https://coinmarketcap.com/charts/ (last visited Mar. 14, 2024).

[3]Global Cryptocurrency Market Charts, https://coinmarketcap.com/charts/ (last visited Mar. 14, 2024).

[4]U.S. Government Accountability Office, Technology Assessment-Blockchain (Mar. 2022), https://www.gao.gov/assets/gao-22-104625.pdf.

[5]*See* Nat'l Inst. of Standards & Tech., U.S. Dep't of Comm., NISTIR 8202, Blockchain Technology Overview (Oct. 2018).

[6]CFTC, Digital Assets Primer (Dec. 2020), https://www.cftc.gov/PressRoom/PressReleases/8336-20. The CFTC has also historically used the term "virtual currency." However, the CFTC has since stated that that "the term 'digital assets' encompasses the term 'virtual currency' " and that "it did not intend to create a bright line definition" through its previous use of the term "virtual currency." *See* CFTC, The CFTC's Role in Monitoring Virtual Currencies (2020), https://www.cftc.gov/media/4636/VirtualCurrencyMonitoringReportFY2020/download.

[7]SEC, 2019 Examination Priorities (Dec. 20, 2018), https://www.sec.gov/files/OCIE%202019%20Priorities.pdf.

[8]*See* Safeguarding Advisory Client Assets, Investment Advisers Act Release No. 6240 at n.25 (noting that "the Commission does not distinguish between the terms 'digital asset' and 'crypto asset' ").

[9]FINRA, Regulatory Notice 18-20 (July 6, 2018), http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-18-20.pdf.

[10]*See* CFTC, Digital Assets Primer (Dec. 2020), https://www.cftc.gov/PressRoom/PressReleases/8336-20.

[11]*See* CFTC Press Release No. 8873-24, CFTC's Global Markets Advisory Committee Advances 3 Recommendations (Mar. 7, 2024), https://www.cftc.gov/PressRoom/PressReleases/8873-24.

[12]*See, e.g.*, FTC Reaches Settlement with

Crypto Platform Celsius Network (Jul. 13, 2023), available at: https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-reaches-settlement-crypto-platform-celsius-network-charges-former-executives-duping-consumers; FTC Reaches Settlement with Crypto Company Voyager Digital (Oct. 12, 2023), available at: https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-reaches-settlement-crypto-company-voyager-digital-charges-former-executive-falsely-claiming.

[13]They are principally: Securities Act of 1933, 15 U.S.C.A. §§ 77a *et seq.* ("Securities Act"); Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78a *et seq.* ("Exchange Act"); 1940 Investment Company Act, 15 U.S.C.A. §§ 80a-1 *et seq.* ("Company Act"); and 1940 Investment Advisers Act, 15 U.S.C.A. §§ 80b-1 et seq. ("Advisers Act").

[14]*Securities and Exchange Commission v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S. Ct. 120, 88 L. Ed. 88 (1943), judgment entered, 53 F. Supp. 714 (N.D. Tex. 1944).

[15]*S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).

[16]*See, e.g.,* SEC, Strategic Hub for Innovation and Fin. Tech., Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.

[17] *See generally*, SEC Press Release No. 2023-150, Crypto Asset Trading Platform Bittrex and Former CEO to Settle SEC Charges for Operating an Unregistered Exchange, Broker, and Clearing Agency (Aug. 10, 2023), https://www.sec.gov/news/press-release/2023-150.

[18]7 U.S.C.A § 1a(9).

[19]*See* In re Coinflip, Inc., CFTC No. 15-29 (Sept. 17, 2015) (stating that "Bitcoin and other virtual currencies are encompassed in the definition [of a commodity] and properly defined as commodities").

[20]*See, e.g.*, *Commodity Futures Trading Commission v. McDonnell*, 287 F. Supp. 3d 213, Comm. Fut. L. Rep. (CCH) P 34222 (E.D. N.Y. 2018), adhered to on denial of reconsideration, 321 F. Supp. 3d 366, Comm. Fut. L. Rep. (CCH) P 34289 (E.D. N.Y. 2018), *Commodity Futures Trading Commission v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, Comm. Fut. L. Rep. (CCH) P 34345 (D. Mass. 2018).

[21]In the Matter of iFinex Inc, BFXNA Inc. & BFXWW Inc. CFTC Dkt. No. 22-05 (Oct. 15, 2021).

[22]See Testimony by Chairman Rostin Behnam Before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies Committee on Appropriations of the H. Comm. on Appropriations, 118th Cong. (Mar. 28, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam35.

[23]*See* CEA 7 U.S.C.A. § 9(1); 17 C.F.R. § 180.1

[24]Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission Before the S. Comm. on Banking, Hous. and Urban Affairs, 115 Cong. 101-109 (2018) (statement of J. Christopher Giancarlo, former Chairman of the CFTC) [hereinafter J. Christopher Giancarlo, Statement Before Senate Comm.].

[25]J. Christopher Giancarlo, Statement Before Senate Comm., supra note 22.

[26]*See* The CFTC's Role in Monitoring Virtual Currencies (2020), https://www.cftc.gov/media/4636/VirtualCurrencyMonitoringReportFY2020/download. ("In February, 2020, CFTC was asked to comment on the SEC v. Telegram case with regard to the commodity and security definition for the Telegram's "Gram" token. In response to the Judge's request for comment from the Commission, the Office of General Counsel (OGC) issued a letter that defined commodities and the Commission's jurisdiction. The letter stated that blockchain-based digital assets are commodities and acknowledged that these digital assets may also be securities but declined to offer analysis on that point as such analysis is within the purview of the SEC. CFTC did not comment on the merits of the case, nor take a position on

whether GRAM was a security or a commodity.")

[27]*See supra* note 10.

[28]15 U.S.C.A. Sec. 45(a)(1).

[29]FTC, FTC Policy Statement on Deception (Oct. 14, 1983), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[30]23 NYCRR pt. 200 defines "virtual currency" as "any type of digital unit that is used as a medium of exchange or a form of digitally stored value . . . . Virtual Currency shall be broadly construed to include digital units of exchange that (i) have a centralized repository or administrator; (ii) are decentralized and have no centralized repository or administrator; or (iii) may be created or obtained by computing or manufacturing effort," subject to certain exemptions.

[31]*See* 23 NYCRR 200.19.

[32]*See, e.g.*, La. Rev. Stat. ch. 21 §§ 1381-1394, as enacted by Act 341 of the 2020 Regular Session of the Louisiana Legislature. In 2023, Louisiana adopted significant amendments to the Virtual Currency Business Act, which took effect immediately. *See* Act 331 of the 2023 Regular Session of the Louisiana Legislature and implementing regulations, LAC 10:XV §§ 1901-1937. *See also* A.B. 39, 2023-2024 Legis. Sess., Reg. Sess. (Cal. 2022); H.B. 3479, 103rd Gen. Assemb. (Ill. 2023); S.B. 1756, 2022-2023 Legis. Sess. (N.J. 2022) (each introducing state-specific licensing requirements).

[33]Financial Innovation and Technology for the 21st Century Act, H.R. 4763, 118th Cong. (2024).

[34]Lummis-Gillibrand Responsible Financial Innovation Act, S. 2281, 118th Cong. (2023).

[35]*See* SEC v. Ripple Labs, Inc. No. 20-cv-10832 (S.D.N.Y. 2023) ("the security in this case is not simply the [digital token], which is little more than alphanumeric cryptographic sequence . . . .") *quoting Securities and Exchange Commission v. Telegram Group Inc.*, 448 F. Supp. 3d 352, 379, Fed. Sec. L. Rep. (CCH) P 100769 (S.D. N.Y. 2020).

[36]Global Blockchain Convergence, A Sensible Token Classification System, Novum Insights (Jun. 8, 2021), available at: https://novuminsights.com/post/sensible-token-classification-system/.

[37]*See* FSB, Press Release, FSB proposes framework for the international regulation of crypto-asset activities (Oct. 11, 2022), available at: https://www.fsb.org/2022/10/fsb-proposes-framework-for-the-international-regulation-of-crypto-asset-activities/ ("The proposed recommendations are issued for public consultation. They are grounded in the principle of 'same activity, same risk, same regulation.' ").

[38]While all native digital assets are intangible assets, not all intangible assets are native digital assets because various intangible assets may exist apart from any blockchain network or service.

[39]For a more detailed discussion of characteristics of native digital assets, see *supra* note 34.

[40]*Id.*

[41]*See Written Statement of Timothy Massad, Research Fellow and Director, Digital Assets Policy Project, Harvard Kennedy School Mossavar-Rahmani Center for Business and Government; Chairman of the Commodity Futures Trading Commission (2014-2017), before the U.S. House of Representatives Subcommittee on Digital Assets, Financial Technology and Inclusion U.S. House of Representatives Financial Services Committee and Committee on Agriculture Subcommittee on Commodity Markets, Digital Assets and Rural Development*, "The Future of Digital Assets: Measuring the Regulatory Gaps in the Digital Asset Market" (May 10, 2023), available at: https://democrats-financialservices.house.gov/uploadedfiles/hhrg-118-ba21-wstate-massadt-20230510.pdf. The Lummis-Gillibrand Responsible Financial Innovation also proposed the creation of a new Self-Regulatory Organization to be jointly chartered by the SEC and CFTC.

[42]Broadridge Financial Solutions, Crypto Asset Disclosure Study (Jul. 11, 2023), available at: https://www.broadridge.com/press-release/2023/crypto-investors-dont-always-prioritize-key-metrics.

[43]*See, e.g.*, Chris Brummer, Disclosure, Dapps

and DeFi, Stanford Journal of Blockchain Law & Policy (Jun. 29, 2022), available at: https://stanford-jblp.pubpub.org/pub/disclosure-dapps-defi/release/1; Rodrigo Seira, Justin Slaughter and Katie Biber, Due to SEC Inaction, Registration is Not a Viable Path for Crypto Projects, Paradigm Policy Lab (Mar. 23, 2023), https://policy.paradigm.xyz/writing/secs-path-to-registration-part-i; Coinbase, Inc., Comment Letter in Response to Petition for Rulemaking re: Digital Asset Issuer Registration and Reporting (Dec. 6, 2022), available at: https://www.sec.gov/comments/4-789/4789-20152418-320297.pdf.

[44]*See, e.g.*, Financial Innovation and Technology for the 21st Century Act, H.R. 4763, 118th Cong. (2023) at Section 203; Lummis-Gillibrand Responsible Financial Innovation Act, S. 2281, 118th Cong. (2023) at Section 501.

[45]The *Proposed U.S. Disclosure Guidelines for a Particular Category of Tokens* is available at: https://www.sidley.com/en/-/media/uploads/mn23267-fintech-and-blockchain-symposium--token-standardized-disclosures-document_fnl.pdf?la=en.