

## The Digital Commodities Consumer Protection Act – A Bullet Point Summary

August 9, 2022

### Key Points:

- On August 3, 2022, Sens. Debbie Stabenow (D-MI) and John Boozman (R-AR)—the Chair and Ranking Member of the Senate Agriculture Committee—introduced the Digital Commodities Consumer Protection Act of 2022 ([S. 4760](#)), which would establish a comprehensive regulatory framework for digital assets. Senate Minority Whip John Thune (R-SD) and Sen. Cory Booker (D-NJ) joined as original cosponsors. Generally consistent with the preferences of the crypto industry, the bill provides the CFTC (which sits within the jurisdiction of the Senate Agriculture Committee) authority to regulate digital commodities. CFTC Chairman Rostin Behnam, a former staffer to Sen. Stabenow, **has assisted** as well in the crafting of this legislation. The bill offers a much narrower approach than the Responsible Financial Innovation Act ([S. 4356](#)), which was introduced recently by Sens. Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY). Just as one example, the Stabenow-Boozman legislation excludes securities from its definition of digital commodities.
- This aims to settle the ongoing dispute between the SEC and the CFTC over primary regulatory jurisdiction for cryptocurrency, with deference being given to the CFTC. The bill creates a new digital commodity asset class, excluding securities, and would empower the CFTC to regulate spot markets for such assets—furthering its jurisdiction beyond derivatives to underlying commodities in the digital asset space.
- The bill would require all digital commodity platforms and companies—including trading facilities, brokers, dealers and custodians—to register with the CFTC through several new registration categories. This would allow the CFTC to fill the regulatory gap and hold digital commodities to existing standards. It also creates a funding instrument for CFTC oversight by enabling the regulator to impose user fees on digital commodity platforms. Further, it directs the CFTC to complete a report on demographic customer trends and statistics and how such findings will impact CFTC rulemaking and other activities.
- With the midterm elections around the corner, and limited floor time in the Senate between now and the end of the calendar year, it is unlikely that this legislation will become law before the end of the 117<sup>th</sup> Congress. Still, Sen. Stabenow suggested

### Contact Information

**If you have any questions concerning this alert, please contact:**

**Brendan M. Dunn**

Partner

[bdunn@akingump.com](mailto:bdunn@akingump.com)

Washington, D.C.

+1 202.887.4230

**Zachary M. Rudisill**

Partner

[zrudisill@akingump.com](mailto:zrudisill@akingump.com)

Washington, D.C.

+1 202.887.4225

**Samuel J. Olswanger**

Senior Policy Advisor

[solswanger@akingump.com](mailto:solswanger@akingump.com)

Washington, D.C.

+1 202.416.5142

**Eric C. Ettore**

Policy Advisor

[eettore@akingump.com](mailto:eettore@akingump.com)

Washington, D.C.

+1 202.887.4235

that the committee could mark up the bill during the September work period. It is clear that this bill is more than a “marker,” and as a bipartisan effort, we should expect some movement on this legislation next year, regardless of the outcome of the November midterm elections.

The proposed legislation is detailed. In an effort to make the salient points accessible to business and finance professionals, we have prepared the following bullet-point summary:

## Section 2: Definitions

- Defines “digital commodity” as “a fungible digital form of personal property that can be possessed and transferred person-to-person without necessary reliance on an intermediary.” This “includes property commonly known as cryptocurrency or virtual currency, such as Bitcoin and Ether” and does not include “an interest in a physical commodity,” securities, “a digital form of currency backed by the full faith and credit of the United States” or any other financial interest determined by the Commodity Futures Trading Commission (CFTC) to not be a digital commodity.
- Alters the Commodity Exchange Act’s understanding of “commodity” to include “digital commodity.”
- Creates new CFTC registration categories for all “Digital Commodity Platforms” (including “digital commodity broker,” “digital commodity custodian,” “digital commodity dealer,” “digital commodity trading facility”) and associated persons of digital commodity brokers and digital commodity dealers.
- Clarifies that mining activity alone does not trigger mandated registration as a digital commodity platform.

## Section 3: Commission Jurisdiction

- Gives the CFTC sole jurisdiction over digital commodity trades, except for those transactions in which a merchant or consumer is using a digital commodity solely for the purchase or sale of a good or service.
- Prohibits fraud in any digital commodity trade.

## Section 4: Digital Commodity Platforms

- *Registration*: Requires any entity acting as a Digital Commodity Platform to register with the CFTC in one or more of the newly defined and applicable categories. (Subsection (a))
- *Core Principles for Digital Commodity Platforms*: Mandates that every digital commodity platform comply with all applicable core principles, including:
  - **Digital commodity trading facilities** must only allow transactions in digital commodities that are not susceptible to manipulation; ensure a competitive, open and efficient market for executing transactions; monitor digital commodity trading and protect market participants from abuse; and capture and publish trading information in a timely manner.
  - **Digital commodity dealers and brokers** must establish fair and objective prices; keep records of all digital commodity transactions and provide information

to the CFTC upon request; conform with business conduct standards; and establish risk management systems.

- **Digital commodity platforms** must implement conflict of interest procedures; maintain adequate financial resources; establish system safeguards to minimize cybersecurity and other operational risks; and comply with CFTC requirements for the treatment of customer assets. (Subsection (b))
- *Rules Governing Margined or Leveraged Trading:* Allows the CFTC to create rules governing margined, leveraged or financed digital commodity trades. (Subsection (c))
- *Contract Listings, Rules and Rule Amendments for Digital Commodity Trading Facilities:*
  - Details the process for digital commodity trading facilities to list trading digital commodity contracts and implement new rules or rule amendments. Under this process, a digital commodity trading facility can either self-certify a contract or rule or seek prior approval. Under either process, the CFTC reserves the ability to reject a contract listing or rule if inconsistent with the aforementioned core principles.
  - Mandates digital commodity trading facilities to disclose specified information about digital commodity contracts listed for trading, including the operating structure and system of the digital commodity; the trading volume and volatility of the digital commodity; and information relating to digital commodities purporting to have a fixed value. (Subsection (d))
- *Product Listing for Digital Commodity Brokers and Digital Commodity Dealers:*
  - States that digital commodity dealers and brokers may not trade, arrange to trade or engage with a digital commodity that is “readily susceptible to manipulation.”
  - Details that digital commodity brokers and dealers are subject to the same listing and disclosure requirements as trading facilities for contracts on digital commodities. (Subsection (e))
- *Customer Protection:* Requires the CFTC to establish customer protection rules and guidelines. These rules must mandate that platforms disclose all material customer conflicts of interest and risks, communicate in an equitable manner, and provide marketing and advertising guidelines. (Subsection (f))
- *Examination and Publication of Energy Consumption in Digital Commodity Markets:* Directs the CFTC to conduct a report on energy consumption in connection with the creation and trading of digital commodities. (Subsection (g))
- *Prohibition on Fraud, Deception and Manipulation:* Prohibits digital commodity platforms from engaging in actions that are fraudulent, manipulative or deceptive. (Subsection (h))
- *Self-Regulation:* Requires digital commodity dealers, brokers and custodians to be members of a Registered Futures Association (RFA) and enables the CFTC to delegate registration functions to an RFA. (Subsection (i))

- *Dual Registration*: Allows a digital commodity platform to be simultaneously registered with the CFTC and U.S. Securities and Exchange Commission (SEC). (Subsection (j))
- *Fees for Registration*: Requires all digital commodity platforms registered with the CFTC to pay an annual fee to strictly offset costs associated with the CFTC's oversight of and actions connected to digital commodity markets. (Subsection (k))
- *Education and Outreach*: Ensures that the CFTC engages with customer education and outreach efforts. (Subsection (l))
- *Inspection*: Allows the CFTC to monitor and inspect digital commodity platforms. (Subsection (m))
- *Preemption of State Laws*: Preempts registration requirements under state law relating to money transmission, virtual currency and commodity brokers. (Subsection (n))
- *Regulations*: Authorizes the Commission to write rules and regulations to implement this section. (Subsection (o))

## Section 5: Additional Amendments

- *Retail Commodity Transactions*: Specifies that a digital commodity trade is not beholden to the exchange trading requirements applicable to retail, leveraged, non-spot commodity transactions provided in this legislation. (Subsection (a))
- *Applicability*: Establishes the extra-territorial application of the provisions of the Act relating to digital commodities. (Subsection (b))
- *Registration of Association Persons*: Requires persons associated with digital commodity brokers and digital commodity dealers to register with the Commission. (Subsection (c))
- *Commodity Trading Advisers; Commodity Pool Operators*: Ensures that digital commodity interests requiring a commodity trading advisor or commodity pool operator register with the CFTC. (Subsection (d))
- *Acceptable Business Practices Under Core Principles*: Permits the CFTC to publish acceptable business practices in line with its digital commodity core principles. (Subsection (e))
- *Public Disclosure*: Allows the CFTC to disclose information received from digital commodity platforms. (Subsection (f))
- *Anti-Money Laundering*: Further defines digital commodity platforms as financial institutions under the Bank Secrecy Act. (Subsection (g))
- *Registration of Commodity Dealers and Association Persons*: Allows the CFTC to register digital commodity brokers, digital commodity dealers and their associated persons. (Subsection (h))
- *Amendments to Title 11*: Extends relevant provisions of the Bankruptcy Code to digital commodity trades, ensuring similar protections in insolvency as other commodity contracts. (Subsection (i))

## Section 6: Applicability

- States that this law will not apply to registrants until the CFTC's final rule on digital commodity platform registration requirements is put into effect.

### Section 7: Report on Historically Underserved Customers Participating in Digital Commodity Markets

- Directs the CFTC to complete a report on demographic customer trends and statistics and how such findings will impact CFTC rulemaking and other activities.

[akingump.com](http://akingump.com)