

## [Securities Regulation Daily Wrap Up, TOP STORY—House Ag members propose legislation to clarify CFTC role in blockchain regulation, \(Apr. 29, 2022\)](#)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The bill would not alter the SEC's authorities but it would provide additional CFTC-regulated avenues for firms to engage in the digital asset marketplace.

A bipartisan group of lawmakers on the House Agriculture Committee have introduced legislation that would clarify the CFTC's authorities to regulate the digital asset marketplace. The central purpose of the bill is to provide for the registration of digital commodity exchanges, registration of fixed value digital commodity operators (i.e., issuers of stablecoins), and to provide for voluntary registration of digital commodity developers. The bill would be the first of its kind to address the CFTC's regulatory authorities, although a prior legislative proposal would have emphasized the CFTC for purposes of studying digital asset markets. The bill also purports to preserve the SEC's authorities over digital asset markets.

The Digital Commodity Exchange Act of 2022 ([H.R. 7614](#)), sponsored by House Agriculture Committee Ranking Member Glenn "GT" Thompson (R-Pa), and co-sponsored by fellow Agriculture Committee member Rep. Ro Khanna (D-Calif), and non-committee members Rep. Tom Emmer (R-Minn), and Rep. Darren Soto (D-Fla), purports to offer a federal regulatory alternative to firms that would otherwise have to comply with multiple state money transmitter laws.

All four co-sponsors [expressed](#) concern about the absence of a clearer set of federal rules for digital assets. According to Rep. Thompson, "[a]s digital assets continue to grow in use and importance throughout the world, it is critical Congress take legislative action to promote sensible regulation and define how these markets should be regulated." Representative Thompson added that "[c]losing the spot-market gap is an essential piece of the regulatory puzzle, but more work remains. I look forward to working with my colleagues to bring greater clarity to crypto users and creators and I hope to see it move through the legislative process promptly."

With respect to CFTC activities regarding digital assets, Chair Rostin Behnam [testified](#) before the House Agriculture Committee in late March 2022 and committed to work with the Biden Administration regarding its executive order on digital assets and the Agriculture Committee on digital asset regulation. Behnam also reiterated that the CFTC would use its existing authorities in digital markets. "The CFTC will continue its proactive approach in using our existing enforcement authority in the digital asset commodity space to protect customers and markets from fraud and manipulation," said Behnam.

Whether the CFTC bill ultimately moves forward in this or a subsequent session of Congress, however, likely depends to some degree on the conclusions reached in the numerous agency reports required to be submitted to the president under the Biden Administration's [executive order](#) on digital assets. The EO is heavily focused on the feasibility of a U.S. central bank digital currency, financial stability, and illicit finance, but largely relegates the SEC and the CFTC to being agencies to be consulted by other federal agencies on these topics rather than making them drivers of the EO's search for a policy framework, although the EO urges the SEC and the CFTC to consider their existing authorities. It is into this milieu that the proposed Digital Commodity Exchange Act makes its debut.

**Digital commodity exchanges.** The bill would provide for the registration of a new entity called a digital commodity exchange (DCE), which is defined as "a trading facility that lists for trading at least one digital commodity." According to the bill's companion [Fact Sheet](#), a DCE would register with the CFTC if it offers

leveraged trading or lists for sale digital commodities that were distributed to an individual before they were available to the public (the bill also contains special rules for digital commodity presales). In addition to registration with the CFTC, a DCE must join a registered futures association and register with the Treasury Department as a money services business.

A DCE could make available for trading only those digital commodities that are “not readily susceptible to manipulation.” For example, a DCE could not permit trading in a unit of a digital commodity if it is reasonably likely that the transaction history of the digital commodity can be fraudulently altered by any person or group of persons acting collectively; trading also would not be permitted if a unit of a digital commodity if it is reasonably likely that the functionality or operation of the digital commodity can be materially altered by any person or group of persons under common control. A digital commodity would be assessed for its manipulative propensities by evaluating its: (1) purpose and use; (2) unit creation or release process; (3) consensus mechanism; (4) governance structure; (5) its current and proposed functionality; and (6) any other factors identified by the CFTC.

A DCE would be barred from offering derivative products unless it is also registered as a designated contract market or swap execution facility (however, a registered DCM or SEF could elect to be considered a DCE). A DCE also must have rules necessary to reasonably ensure the orderly sale of units of digital commodities obtained via digital commodity presales.

Moreover, DCEs would have to abide by a set of core principles. One such principle would be that a DCE must hold in a qualified digital commodity custodian each unit of a digital commodity that is property of a customer of the DCE, that is required to be held by the DCE under the Commodity Exchange Act, or that is required by the CFTC to be held by the DCE in order to reasonably protect customers or promote the public interest. The CFTC could designate a digital commodity custodian to be a qualified digital commodity custodian if the agency finds that the digital commodity custodian is subject to adequate supervision and appropriate regulation by the CFTC, the SEC, federal and state banking regulators, or a foreign government authority. The digital commodity custodian also would have to agree to regular and periodic information sharing.

Lastly, DCEs also would have to segregate customer assets and DCEs would be incorporated into existing commodity broker bankruptcy protections.

**Stablecoins.** The bill would provide for the registration with the CFTC of fixed-value digital commodity operators for the purpose of facilitating the utilization of fixed-value digital commodities on registered DCEs. This provision would apply to asset-backed stablecoin operators. Fixed-value digital commodity operators would have to abide by rules for information sharing and make certain disclosures, address conflicts of interest, and maintain books and records.

With respect to the trading of stablecoins on DCEs, the core principles for DCEs would require a DCE to only make available for trading digital commodities not readily susceptible to manipulation. However, the core principles for DCEs would define what it means *not* to be readily susceptible to manipulation in the case of fixed-value digital commodities. As a result, a fixed-value digital commodity would be determined to be not readily susceptible to manipulation if the issuer of the fixed-value digital commodity is registered as a fixed-value digital commodity operator *or* subject to comparable, comprehensive supervision and regulation by another federal regulator or an appropriate government authority in the fixed-value digital commodity operator’s home country.

**Digital commodity developers.** Persons who create or develop a digital commodity would have the option of registering with the CFTC, although registration would not be required for such persons to develop a digital commodity or for a digital commodity to be listed for trading. A digital commodity developer would register by submitting an application to the CFTC and by joining a registered futures association for the duration of the registration. A digital commodity developer’s registration would cease upon the digital commodity developer’s withdrawal from registration, the digital commodity developer’s failure to abide by legal requirements under the Digital Commodity Exchange Act, or at any time set by CFTC regulation.

A digital commodity developer would have to make certain disclosures about each of its digital commodities via a submission to the CFTC (or its designee) and on the digital commodity developer’s public website.

These disclosures would consist of items that are similar in breadth to the disclosures that would be required under a proposed digital token safe harbor under securities regulations that was previously proposed by SEC Commissioner Hester Peirce (See, Hester M. Peirce, [Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization](#), February 6, 2020; and Hester M. Peirce, [Token Safe Harbor Proposal 2.0](#), April 13, 2021).

Specifically, a digital commodity developer would have to make:

- **Initial disclosures**—These disclosures would focus on three areas: (1) project disclosures regarding the digital commodity's purpose and use, unit creation or release process, consensus mechanism, governance structure, participation and distribution, and current and proposed functionality; (2) development disclosures regarding individuals who are participants in a related digital commodity presale, holders of units of the digital commodity, holders of rights or promises to future units of the digital commodity, or compensated in any manner for providing material support for the development of the digital commodity; and (3) technical disclosures regarding the digital commodity's whitepaper, source code, development guide, or other similar materials.
- **Periodic disclosures**—These disclosures would consist of updates to the initial disclosures made in a time frame to be set by the CFTC.
- **Post-filing digital commodity sale disclosures**—These disclosures encompass the sale or transfer of any unit of a digital commodity and would include information about: (1) the date of sale; (2) the number of digital commodities sold; (3) the number of purchasers, if identifiable; (4) any limitations or restrictions on the transferability of the digital commodities sold; (5) the price per digital commodity; and (6) the type and amount of consideration received.

The CFTC also would be authorized to use its exemptive authority to allow a kind of substituted compliance with respect to the disclosure requirements if a digital commodity developer meets the comparable disclosure requirements of another federal regulator.

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