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Digital Asset Regulation and The CLARITY Act of 2025

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After years of uncertainty and regulation by enforcement, the U.S. may finally be moving toward a more comprehensive framework for the regulation of digital assets. On June 4, 2025, the House Committee on Financial Services held a hearing on American Innovation and the Future of Digital Assets: From Blueprint to a Functional Framework. The hearing followed Committee Chairman French Hill's introduction of H.R. 3633 — the CLARITY Act of 2025 (the Act) — on May 30, 2025. The Committee is expected to continue its markup of the Act at its June 10, 2025, Full Committee Markup hearing.

Defines Key Terms

The Act defines "digital asset" to mean "any digital representation of value which is recorded on a cryptographically-secured distributed ledger or other similar technology," and defines two primary categories of digital assets: (1) "digital commodities"; and (2) "investment contract assets." A digital asset may be considered a digital commodity, subject to certain exclusions described below, and if it is sold pursuant to an investment contract it is also an "investment contract asset."

The term "digital commodity," is defined as "a digital asset that is intrinsically linked to a blockchain system — meaning, if the digital asset is directly related to the functionality or operation of the blockchain system or to the activities or services for which the blockchain system is created or utilized — and the value of which is derived from or is reasonably expected to be derived from the use of the blockchain system." A digital asset is considered "intrinsically linked to a blockchain system" if it is generated by the blockchain, used to transfer value between participants, used to access services on a blockchain, used to participate in governance, used to pay fees, or used as an incentive for participants to engage in activities or to validate transactions.

The Act's definition of "digital commodity" expressly excludes a wide swath of assets such as a banking deposit, commodity, commodity derivative, pooled investment vehicle, and any other good, work of art, video game, collectable, virtual land, credit card points and other rewards, or assets that are not speculative in nature or rights. Notably, the term "digital commodity" also expressly excludes the following assets, which are commonly recognized as securities: notes; investment contracts; and certificates of interest or participation in any profit-sharing agreement that represents or gives the holder an ownership interest or other interest in the revenues, profits, obligations, debts, assets, or assets or debts to be acquired of the issuer of a digital asset or another person (other than a decentralized governance system).

A digital asset qualifies as an "investment contract asset" under the Act if it is a digital commodity that: (i) can be "exclusively possessed and transferred, person to person, without necessary reliance on an intermediary, and is recorded on a blockchain," and (ii) "is sold or otherwise transferred, or intended to be sold or transferred, pursuant

to an investment contract." The Act focuses on the transaction, not the token, to determine whether or not an asset is a security rather than a digital commodity.

If a digital asset is air-dropped, mined or otherwise distributed for nominal consideration, which the Act defines as an "end-user distribution," then the digital asset may be initially classified solely as a digital commodity; while if it is offered for capital raising, it may be initially classified as an "investment contract asset."

Establishes Exclusive CFTC Jurisdiction over Digital Commodity Intermediaries

At a high level, the Act would establish the Commodity Futures Trading Commission's (CFTC) exclusive jurisdiction over digital commodity exchanges, digital commodity brokers, and digital commodity dealers and require provisional registration with the CFTC within 180 days after the date of the enactment of the Act. The entity provisionally registering must submit management and operating information and keep its books and records open to the CFTC. Such entities must also maintain membership in a registered futures association and comply with rules regarding disclosures to customers and the treatment of customer assets.

The Act also provide rules for CFTC registered entities to custody customer digital commodities and authorizes the CFTC to define minimum standards for adequate supervision and appropriate regulation of qualified digital asset custodians by certain federal, state, or foreign authorities. At a minimum, customer assets will be subject to comprehensive segregation and commingling restrictions. The Act prohibits CFTC registered entities from using customer assets to participate in a blockchain service, such as staking, other than as expressly directed by the customer. Customers may waive this restriction, but their service provider cannot require a waiver as a condition of service.

Clarifies or Confuses Security Status?

Despite promises of clarity in the Act's short title, its definitions and numerous cross references to securities and commodities statutes and rules provide a complex and potentially confusing approach to clarifying status as a security and, accordingly, regulatory jurisdiction over digital assets.

Digital commodities and permitted payment stablecoins — which are currently the subject of proposed regulation under H.R. 2392, the Stablecoin Transparency and Accountability for a Better Ledger Economy Act of 2025 (the STABLE Act of 2025) — would expressly be excluded from the definition of "security" under the securities laws.

In addition, the Act clarifies that a digital asset that is directly transferable peer-to-peer and recorded on the blockchain is not an "investment contract" and, therefore, not a security.

Creates New Exemptions and Exclusions from Securities and Commodities Laws

The Act further distances the digital assets regulatory regime from existing securities and commodities laws in a number of ways:

- The Act provides an exemption from registration under the Securities Act for an investment contract involving units of a digital commodity, subject to certain affiliate exclusions. New §4(a)(8) would permit the primary offer

or sale of an investment contract involving units of a digital commodity by its issuer, provided that it meets certain conditions and satisfies disclosure requirements. Notably, the exemption allows for offerings up to $75 million in a 12-month period.

- The Act provides that, even if the digital commodity was initially sold as part of an investment contract, a secondary market transaction in a digital commodity involving an investment contract is not deemed to be an offer or sale of the original investment contract and therefore is not a securities transaction for purposes of the securities laws, so long as the transaction does not involve the issuer or its controlled entities — an important clarification given recent competing court decisions on this issue.

- The Act preempts state blue sky law registration requirements for digital commodities by deeming a digital commodity under the Securities Act to be a "covered security."

- The Act exempts certain decentralized finance activities related to the operation and maintenance of blockchain networks from Securities and Exchange Commission (SEC) and CFTC regulation, although not from anti-fraud or anti-manipulation enforcement authorities. Decentralized finance activities include validating or providing incidental services with respect to a digital asset, providing user-interfaces for a blockchain network, publishing and updating software, or developing wallets for blockchain networks.

- The Act prevents federal regulators from imposing requirements on financial institutions to include customers' assets as liabilities on their balance sheets or to hold additional capital against these assets, except as necessary to mitigate against operational risks as determined by the appropriate federal or state regulator — effectively codifying the SEC's repeal of SAB 121. (This provision may be in tension to some extent with the requirements of the STABLE Act of 2025.)

The Act still leaves a number of gaps for which it requires the CFTC to address through rulemaking, including in some cases, jointly with the SEC, no later than 360 days after the Act's enactment. Among other things, the Act requires the SEC and CFTC to issue joint rules further defining key terms, including "digital commodity", which is already quite narrow and would likely cover only a small fraction of existing tokens being traded. The Act also authorizes the CFTC to provide further exclusions and exemptions from other definitions and intermediaries required to register. Critics of the draft legislation, including former CFTC Chair Timothy G. Massad, have expressed concerns that rather than filling the existing regulatory gap, the Act if passed would leave unregulated the vast majority of the digital asset industry and potentially undermine existing securities and commodities laws.

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