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**August 8, 2022**

**Second Bipartisan Senate Bill on Crypto/Digital Assets  
Introduced: Regulatory Outlines Start to Emerge**

We reported in June on the bipartisan bill introduced by U.S. Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) to regulate the cryptocurrency/digital assets market, the "Lummis-Gillibrand Responsible Financial Innovation Act" ("Lummis-Gillibrand;" see, "Bipartisan Senate Bill on Crypto/Digital Assets Introduced," available at [Kurtin PLLC Information Technologies & Internet](#)). A copy of Lummis-Gillibrand itself can be found [Here](#).

On August 3, a new bipartisan Senate crypto/digital assets bill was introduced by Senators Debbie Stabenow (D-MI), John Boozman (R-AR), Cory Booker (D-NJ) and John Thune (R-SD). A copy of the bill, titled the "Digital Commodities Consumer Protection Act of 2022" ("DCA") can be found [Here](#). We'll compare and contrast Lummis-Gillibrand and the DCA in this client alert. While neither bill is likely to become law in its current form, their common assumptions and elements, and that both are bipartisan efforts indicate the likely direction of U.S. regulation of crypto/digital assets. Notably, both

Lummis-Gillibrand and the DCA seek to fit crypto/digital assets into the existing U.S. securities and commodities regulatory scheme, rather than create a new regulatory paradigm or let the crypto/digital assets industry continue to self-regulate. In addition, the DCA would expand the existing commodities regulatory scheme from derivatives to "spot," or cash, markets, as described below.

As its name suggests, the DCA focuses on treatment of crypto/digital assets as commodities, while Lummis-Gillibrand attempts a comprehensive approach to categorize and separate crypto/digital assets to be treated as securities from those to be treated as commodities. The DCA, structured as amendments to the Commodity Exchange Act of 1936:

### **Establishment of "Digital Commodity" and "Digital Commodity Platform" Categories**

- 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" (i.e., including peer-to-peer, Blockchain and Decentralized Autonomous Organizations or "DAOs," but excluding Non-Fungible Tokens, or "NFTs"), specifically includes cryptocurrencies and specifically includes cryptocurrencies Bitcoin and Ether, by far the largest cryptos, accounting collectively for approximately \$600 billion in market cap (about 60% of the approximately \$1 trillion overall crypto/digital asset market cap). Notably, no other cryptocurrency coins, tokens, certificates or other digital assets are expressly categorized as Digital Commodities by DCA.
- Excludes from the definition of Digital Commodity securities, financial instruments and stablecoins pegged to the U.S. dollar.
- Amends the definition of "commodity" in the Commodity Exchange Act to include Digital Commodities.
- Introduces new Commodity Exchange Act registration categories for "Digital Commodity Brokers," "Digital Commodity Dealers," "Digital Commodity Custodians," and "Digital Commodity Trading

Facilities" (collectively defined as "Digital Commodity Platforms"), and specifies that mining activity alone is not sufficient to require registration as a Digital Commodity Platform.

### **Commodities Futures Trading Commission Jurisdiction and Oversight**

- Grants the Commodities Futures Trading Commission ("CFTC"), the U.S. derivatives regulator, exclusive jurisdiction to regulate Digital Commodity trading, except where a merchant or consumer is using a Digital Commodity for the purchase or sale of a good or service.
- Grants/Expands the CFTC jurisdiction over spot commodity trades, (i.e., cash settlement trades), including in Digital Commodities (current CFTC jurisdiction covers only non-spot trades (futures, options, swaps and other derivatives)).
- Requires CFTC registration of Digital Commodity Brokers, Digital Commodity Dealers, Digital Commodity Custodians, and Digital Commodity Trading Facilities. Dual Registration with the Securities and Exchange Commission ("SEC"), the U.S. securities regulator, is permitted, underscoring that the question of whether a given crypto/digital asset is a security or a commodity, or, per Lummis-Gillibrand, may have attributes of both (see discussion below), may need to be resolved on a case-by-case basis, especially as Fintech evolves and new products emerge.

### **Digital Commodity Platform Regulation**

- Requires Digital Commodity Trading Facilities to permit only transactions not readily susceptible to manipulation and to be competitive, open and efficient; to monitor Digital Commodity trading; to protect market participants from abuse; and to capture and publish trading information in a timely manner.
- Requires Digital Commodity Brokers and Digital Commodity Dealers to establish fair and objective prices; keep records of all Digital Commodity transactions; provide information to the CFTC on request; conform with business practice standards; establish

risk management systems, including relating to cybersecurity and other operational risks and conflict of interest protections; maintain adequate financial resources and reserves; and comply with CFTC requirements for treatment of customer assets.

- Authorizes the CFTC to establish rules for margin, leveraged and financed Digital Commodity trading.
- Establishes Digital Commodity Trading Facility listing practices, both by self-certification of Digital Commodity trading contracts and rules or by seeking CFTC prior approval, in either case subject to CFTC review and revocation; and establishes minimum requirements for trading contracts and rules, including the structure, trading volume and volatility of the Digital Commodity to be traded and information relating to fixed value Digital Commodities.
- Requires Digital Commodity Brokers and Digital Commodity Dealers not to make or facilitate a trade in a Digital Commodity susceptible to manipulation and to adhere to the same listing and disclosure requirements as apply to Digital Commodity Trading Facilities.
- Requires Digital Commodity Brokers, Digital Commodity Dealers and Digital Commodity Custodians to register with a "Registered Futures Association" and delegates registration procedures to those associations.
- Preempts state law as to money transmission, virtual currency and commodity brokers, making them exclusive federal domains.

### **Consumer Protection**

- Requires the CFTC to adopt Digital Commodity consumer protection rules, including to require Digital Commodity Platforms to disclose to consumers conflicts of interest and risks of Digital Commodities trading in a fair and balanced manner and to establish Digital Commodity Platform marketing and advertising standards.

- Prohibits any Digital Commodity Platform from engaging in any false, deceptive or misleading practice.

### **Energy Consumption**

- Requires the CFTC to report on energy consumption and sources used in Digital Commodity creation and trading, publish the information on its website and periodically update the information.

### **Banking**

- Makes Digital Commodity trading subject to the Bank Secrecy Act of 1970 to protect against money laundering.

### **DCA v. Lummis-Gillibrand Comparison and Takeaways**

- The crypto/digital assets industry, until now virtually unregulated in the United States, with the SEC providing inconsistent oversight over what it calls "digital asset securities," has been hoping for its own, new, low-key regulatory regime, not far removed from its current "Wild West" self-regulatory status. The decline in the crypto industry since November and a number of well-publicized, predatory consumer scams have sunk that boat, and it is clear that Congress has little appetite to let the industry police itself and leave consumers to their fate. Short of that, the industry has hoped for regulation as commodities by the CFTC, perceived as less rigorous than securities regulation by the SEC. The DCA's classification of Bitcoin and Ether, the largest cryptocurrencies by market cap, is a nod in the direction of commodity regulation by the CFTC, although DCA's provision for dual registration of Digital Commodity Platforms cuts in the other direction.
- The DCA implicitly acknowledges Lummis-Gillibrand on the division between securities v. commodities regulation issue. Both proposed laws fit crypto/digital assets into the existing securities/commodities scheme and system of SEC and CFTC regulation and oversight. Lummis-Gillibrand has a novel approach in splitting a digital asset displaying elements of both commodities and securities from the investment contract that

sells it. The investment contract would be a security and regulated by the SEC. The notionally split-off digital asset would be called an "ancillary asset" of the investment contract and regulated as a commodity, when appropriate, by the CFTC.

- Under Lummis-Gillibrand, digital assets not having attributes of securities, such as debt or equity interests, liquidation, dividend and profit-sharing rights derived from the managerial efforts of others, would be presumptively subject to CFTC jurisdiction, excepting NFTs or other non-fungible digital assets and most stablecoins issued by depository institutions. As seen, the DCA "Digital Commodity" definition is limited to fungible assets and therefore also excludes NFTs. NFTs are therefore exempt from both bills' coverage, although anti-fraud rules always apply.
- Both DCA and Lummis-Gillibrand authorize CFTC registration of spot crypto/digital asset exchanges for the physical delivery of digital assets.
- Both DCA and Lummis-Gillibrand contemplate amendment of existing definitions of market intermediaries like brokers, dealers and their associated persons to include those dealing in digital assets on behalf of another person.

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