



KURTIN PLLC
Attorneys at Law

November 13, 2024

Cryptocurrency & Digital Asset Regulation in the Second Trump Administration: What to Expect and How to Prepare

Executive Summary

The U.S. Presidential election this month ushered in a second Trump Administration that will have Republican majorities in both chambers of Congress, the Senate and House of Representatives, and therefore able to pass and enact nearly law that does not violate the U.S. Constitution. The election result was largely supported by the Cryptocurrency/Digital Asset industry, which expects the incoming administration and 119th Congress to approach the industry with a deregulatory bias and a light regulatory touch, including treating Cryptocurrency and Digital Assets as commodities rather than securities when possible, since commodities are seen as a less strictly regulated regime than securities.

However the Cryptocurrency/Digital Asset industry is regulated, a coherent and competitive approach that fosters growth while protecting investors is needed. The Cryptocurrency market was \$1.7 Trillion in early 2022, and has nearly tripled to \$3.2 Trillion today, while the largest cryptocurrency, Bitcoin, today hit an all-time high of \$90,000.

This client advisory will review pending legal/regulatory proposals to date for the clues they may give to what to expect for Cryptocurrency and Digital Asset regulation going forward in 2025 under the incoming Trump Administration and 119th Congress. Further information, including representative transactions and other client advisories, are available at [Kurtin PLLC Information Technologies & Internet](#).

I. Legislative and Executive Actions to Date

A. March 2022 Executive Order

In March 2022, President Biden signed an Executive Order (EO) commissioning several U.S. Government departments and agencies to study and potentially develop a comprehensive regulatory framework for the Cryptocurrency/Digital Asset market. The EO directed the Departments of the Treasury, Justice, Commerce and Homeland Security and the Offices of Management and Budget, Science and Technology and Director of National Intelligence to study whether the Federal Reserve (the U.S. central bank) should issue a digital dollar "Stablecoin" (a Crypto asset

pegged to the value of a non-virtual asset, and more stable and less volatile by consequence) that would function as a fully virtual reserve currency backed by the full faith and credit of the United States, like the traditional dollar. A digital dollar would revolutionize banking, commerce and payment systems, but also arguably cut sharply against the guiding philosophy and dynamics of Blockchain-based Cryptocurrencies, which by definition are based on decentralized and distributed databases not subject to government or centralized control. Of course, such a "digital dollar," because not be subject to non-Stablecoin Cryptocurrency volatility, might be a different kind of investment category. Agencies including the U.S. Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) will study the use of Cryptocurrency and Digital Assets in fraudulent schemes and how best to prevent illicit activity in a harmonized regulatory framework.

B. Lummis-Gillibrand Bill

Also in 2022, U.S. Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) introduced a bipartisan bill to regulate the Cryptocurrency/Digital Asset market, called the Lummis-Gillibrand Responsible Financial Innovation Act Bill. The Lummis-Gillibrand Bill's bipartisan provenance points to likely directions for U.S. Cryptocurrency/Digital Asset law and regulation. The Lummis-Gillibrand Bill's proposals include:

Securities v. Commodities Regulation

- On the securities v. commodities regulation issue, to notionally split a Digital Asset from the investment contract that sells it. The investment contract would be a security and regulated by SEC. The notionally split-off Digital Asset would be called an "ancillary asset" of the investment contract - a novel idea - and regulated as a commodity, when appropriate, by the CFTC. 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 non-fungible tokens (NFTs) or other non-fungible Digital Assets and most Stablecoins issued by depository institutions. Currently, the SEC has jurisdiction over "Digital Asset securities."
- Authorization of spot Crypto asset exchanges for the physical delivery of Digital Assets to register with the CFTC.
- Amendment of the 2021 Infrastructure Investment and Jobs Act to include in its expanded definition of "Broker" any person who is responsible for effecting transfer of Digital Assets on behalf of another person.

Banking

- To permit depository institutions to issue payment Stablecoins (those redeemable for U.S. dollars) subject to reserve and redemption requirements.
- Prohibit banks from using reputational risk in examination ratings and require appropriate reasons for requesting termination of a customer account.

Taxation

- Exclude gain or loss of U.S. \$200 or less in transactions for "goods and services" from gross income for federal income tax purposes.
- Make clear that Crypto/Digital mining and staking proceeds are

not treated as gross income until the taxpayer exercises dominion over them.

- Make clear that a loan of Digital Assets is generally not a taxable event.

Jurisdiction

Applies in its jurisdiction to incorporated and licensed legal entities, but not to unincorporated "decentralized autonomous organizations" or "DAOs," users of Digital Assets and "decentralized finance," or "DeFi" protocols. See our [Wyoming's Digital Asset/DAO Laws and How to Use Them](#) also available at [Kurtin PLLC Information Technologies & Internet](#).

Consumer Protection

- Require regulated entities to make transaction-specific disclosures to consumers.
- Direct state regulators to adopt uniform money transmitter license requirements for digital asset transactions.

C. Digital Commodities Consumer Protection Act (DCA)

Also in 2022, a different, 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) (who was elected today as the Republican majority leader in the incoming 119th Congress) titled the "Digital Commodities Consumer Protection Act of 2022," or "DCA." That both Lummis-Gillibrand and the DCA are bipartisan bills indicates the likely direction of U.S. Crypto/Digital Assets regulation. 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 self-regulate and be exempt from either regime. In addition, the DCA would expand the existing non-digital 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, provides:

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 DAOs, but excluding NFTs, specifically includes Cryptocurrencies and specifically includes Cryptocurrencies Bitcoin and Ether, by far the largest Cryptos. 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 CFTC 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 SEC 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.

D. Financial Innovation and Technology for the 21st Century Act

On May 22, 2024, the U.S. House of Representatives passed the "Financial Innovation and Technology for the 21st Century Act" (FITA), which would prohibit the SEC from treating investment contracts recorded on a Blockchain as securities, whether they had other traditional attributes of securities or not, thereby depriving investors of SEC regulatory protections. FITA would also allow Crypto issuers to self-certify that their products, once recorded on a Blockchain, were Digital Commodities not subject to SEC oversight, allowing the SEC 60 days to challenge the self-certification. The Senate has not yet taken up FITA, and likely will not, now that the 118th Congress is in its final days.

E. Lummis-Gillibrand, DCA and FITA 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. Short of that, the industry has hoped for regulation as commodities by the CFTC, perceived as less rigorous and less protective of investors and consumers than securities regulation by the SEC. The DCA's classification of Bitcoin and Ether, the largest Cryptocurrencies by market cap, and fully Blockchain-based Cryptocurrencies without a traditional issuer entity, is a nod in the direction of commodity regulation by the CFTC, and the FITA provision for self-certification as Digital Commodities any investment contract registered on a Blockchain is a further nod in the direction of complete self-regulation.

- 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 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, as opposed to classifying a given Crypto/Digital Asset as one or the other. 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. FITA goes further, and basically fulfills the industry's wish list by allowing self-certification as Digital Commodities, and total exemption from securities regulation. 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.

II. What to Expect and How to Prepare

What to Expect? Based on the foregoing legislative and regulatory efforts, it seems to us unlikely that the Cryptocurrency/Digital Asset industry will be left alone to completely self-regulate in the second Trump Administration and 119th Congress. However, especially for Cryptocurrency and Digital Assets that are Blockchain-based and lack the attributes of an investment contract such as debt or equity in an issuer of securities, less onerous regulatory treatment as commodities is possible and even likely. We think it is unlikely that FITA's provision that even Blockchain-based Crypto/Digital Assets that HAVE the attributes of an investment contract will be allowed in most cases to self-certify as Digital Contracts, unless CFTC protections more akin to the SEC's for investors are put into place. There is precedent: while most Crypto/Digital Assets have so far been treated and regulated as securities in the absence of a comprehensive regulatory scheme, Bitcoin and Ether have been accepted by both the SEC and CFTC as commodities, given their blockchain-based lack of central issuer.

How to prepare? Post the FTX and Coinbase debacles, there are indications that the industry, as much as it wants commodities regulation instead of securities regulation at least and self-regulation if possible, has become less of a Wild West show and more responsible. Its explosive growth almost ensures that. Outright fraud or gross negligence that cause investors or consumers monetary damage will always be subject to sanctions. Even when subject to the lighter commodities regime, and even

when Blockchain-based, Cryptocurrencies and Digital Assets that avoid fraud or gross negligence and give reasonable warnings and disclaimers to investors and consumers, either through "smart contracts" or otherwise, should fare best. Positioning Crypto/Digital Assets issuers, developers and promoters to succeed while avoiding those pitfalls is our job.

Owen D. Kurtin

Kurtin PLLC is a New York City-based law firm. Our practice focuses on corporate, finance, commercial and regulatory representation for both mature and early stage companies, investment funds, investors and lenders in the [Biotechnology & Life Sciences](#), [Communications & Media](#), [Information Technologies & Internet](#), [Satellites & Space](#) and [Venture Capital & Private Equity](#) sectors. Since our founding in 2008, we have represented clients in over forty countries on six continents and across the United States on transactional and dispute resolution matters. Among our key values, none rank higher than creative and individualized solutions to business issues, absolute client discretion and unsurpassed responsiveness.

Please visit our website at the button link below and contacts us at info@kurtinlaw.com or +1.212.554.3373 for further information on our professional services.

Kurtin PLLC
Website

The materials contained in this message and website pages, whitepapers, advisories and other items directly linked to it have been prepared for general informational purposes only and should not be construed or relied upon as legal advice or a legal opinion on any specific facts and circumstances. The publication and dissemination, including on-line, of these materials and receipt, review, response to or other use of them does not create or constitute an attorney-client relationship.

To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

These materials may contain attorney advertising. Prior results do not guarantee a similar outcome.

Copyright © Kurtin PLLC 2022 - 2024. All Rights Reserved.

Kurtin PLLC | [Website](#)



Kurtin PLLC | 575 Lexington Avenue Floor 14 | New York, NY 10022 US

[Unsubscribe](#) | [Update Profile](#) | [Constant Contact Data Notice](#)



Try email marketing for free today!