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Shortchanged: The Failures of Digital Asset Regulation and Potential Improvements

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Shortchanged:

The Failures of Digital Asset Regulation and Potential Improvements

I. Introduction

Rapid growth in digital asset markets and failures to enact corresponding legislation have challenged the United States' regulatory system to fit digital assets within existing regulatory schemes.[1] Federal regulators have attempted to address these gaps in digital asset regulation to both protect investors and maintain stability in the financial markets. As digital assets have become more prevalent, many believe the current regulatory scheme is inconsistent, fragmented, and dangerous, thus failing to keep pace with the market's growth and provide adequate investor protections.[2]

Digital assets offer investors the benefits of increased transaction speed, enhanced security, automatic transactions, and simplified compliance. While most digital assets are currently used to facilitate transactions involving other digital assets, there is potential to use them to support a broader array of payments and transactions in the future.[3] They have, however, posed problems for regulators seeking to classify these assets in traditional frameworks or attempting to apply antiquates rules and regulations to modern transactions. A strong regulatory scheme is necessary to help maintain stability of financial markets and protect investors from fraud, manipulation, and bad actors. Expanding the Commodity Futures Trading Commission's ("CFTC") purview over these transactions provides unique advantages to the

[1] *See generally* Press Release, Gibson Dunn, Digital Asset Developments: U.S. Commodity Futures Trading Commission Asserts That Tether is a Commodity (Oct. 20, 2021) (available at https://www.gibsondunn.com/wp-content/uploads/2021/10/digital-asset-developments-us-commodity-futures-trading-commission-asserts-that-tether-is-a-commodity.pdf).
[2] *See* Press Release, U.S. Dep't of Treasury, President's Working Group on Financial Markets Releases Report and Recommendations on Stablecoins (Nov. 1, 2021) (available at https://home.treasury.gov/news/press-releases/jy0454); Andrew Ross Sorking, Jason Karaian, et al. *Regulators Feel Torn About Cryptocurrencies*, N.Y. Times, (July 16, 2021), https://www.nytimes.com/2021/07/16/business/dealbook/crypto-powell-regulators.html.
[3] *Id.*

overall regulatory framework and alleviates some of the burden imposed on other regulatory bodies.

The CFTC, a federal agency that serves as a regulator for the derivative market, should take an expansive role in the regulation of digital assets, because many of these assets fall under their jurisdiction.[4] Increased oversight would correspond with the agency's goal of strengthening federal regulation in protecting and policing financial markets. This comment will introduce pertinent background information on popular digital assets, explaining the characteristics of cryptocurrencies, stablecoins, and non-fungible tokens (NFTs). It will explore the existing regulatory framework within the United States and explain the CFTC's interactions with various digital assets. The involvement of the SEC, Federal Reserve, and other regulatory bodies involved will be discussed and the strengths and weaknesses of the different agencies regulating digital assets will be analyzed. The comment will conclude probing the positive externalities of increased CFTC involvement and explaining how the financial markets would benefit from greater regulatory oversight from the CFTC, especially concerning stablecoins and NFTs.

II. What are Digital Assets?

The term "digital asset" refers to "anything that can be stored and transmitted electronically, and has associated ownership or use right(s)."[5] Digital assets take many forms including digital photography, smart contracts, and virtual currencies representing physical or virtual assets, a value, or usage rights.[6] Blockchain technology supports most digital assets, using a digital, decentralized ledger and software algorithms to record transactions occurring

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[4] *See* CFTC, https://www.cftc.gov/About/AboutTheCommission, (last visited Feb. 17, 2022).
[5] CFTC, *Digital Assets Primer* (2020), https://www.cftc.gov/media/5476/DigitalAssetsPrimer/download.
[6] *Id*.

across a peer-to-peer network.[7] This allows transactions without a central certifying authority, such as a central bank or clearinghouse.[8] Blockchain has become the technological foundation behind digital asset transactions, including those involving virtual currencies, stablecoins, and non-fungible tokens.[9]

A. Virtual Currencies

Virtual currencies, also referred to as cryptocurrencies, coins or tokens, are the most prevalent type of digital assets. They use blockchain technology, enabled by a network of computers and algorithms, to digitally represent value, functioning as a medium of exchange and a store of value.[10] Blockchain, a communal database storing digital information, allows the purchase, transfer, and sale of encrypted digital assets, including virtual currencies.[11] Virtual curriers provide "an electronic payment system based on cryptographic proof," allowing parties to transact directly with each other and recording transactions on a shared public ledger, rather than through a third-party intermediary like a clearinghouse.[12] With a market capitalization of over $2 trillion, they are frequently exchanged for U.S. dollars or other government issued currencies, but are neither backed, nor supported by any government or central bank and lack legal tender status.[13] Their value is completely derived from the market forces of supply and demand, causing their values to be more volatile than traditional fiat currencies. Certain virtual currencies are liquid enough where they are considered "convertible," meaning they are easily

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[7] IBM, *What is Blockchain Technology?*, https://www.ibm.com/topics/what-is-blockchain (last visited Dec. 18, 2021).
[8] Videotape: Anthony Fata, Financial Privacy Law (Seton Hall University School of Law 2021) (on file with author).
[9] *Id*.
[10] Nathaniel Popper, *What is the Blockchain? Explaining. The Tech Behind Cryptocurrencies*, N.Y. Times, June 27, 2018 https://www.nytimes.com/2018/06/27/business/dealbook/blockchains-guide-information.html#:~:text=A%20blockchain%20is%20a%20database,Cryptocurrencies.
[11] *Id*.
[12] Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* 1 (2009).
[13] Coin Market Cap, https://coinmarketcap.com/ (last visited Dec. 19, 2021).

exchanged for fiat currencies.[14] Launched in 2009,[15] Bitcoin is the most popular virtual currency in terms of market capitalization, but has recently been undermined because of extreme price volatility.[16]

B. Stablecoins

Stable value coins, more commonly known as stablecoins, are a subclass of cryptocurrencies that are pegged to a separate and more stable asset, like the U.S. dollar or gold.[17] "Pegging" involves fixing the price of a stablecoin to the currency of a more established fiat currency, like the U.S. dollar, to increase stability.[18] With an overall market capitalization of nearly $130 billion, stablecoins account for roughly 5% of all crypto assets and have grown twenty-fold since the beginning of 2020.[19] Stablecoins were created in response to the high degree of volatility involved with traditional cryptocurrencies that resulted from market conditions, instances of fraud, and a lack of asset or government backing.[20] This volatility diminished cryptocurrencies' ability to store value and cratered its market capitalization, leading to fears about its potential as a payment mechanism.[21] Consequently, stablecoins were developed to hold a stable value through pegging, making them a more efficient digital medium of exchange.[22]

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[14] Allen Kogan, *Not All Virtual Currencies Are Created Equal: Regulatory Guidance in the Aftermath of CFTC v. McDonnell*, 8 Am. U. Bus. L. Rev. 199, 203 (2019).
[15] CFTC, *supra* note 5.
[16] Marco Dell'Erba, *Stablecoins in Cryptoeconomics: From Initial Coin Offerings to Central Bank Digital Currencies*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 7 (2019).
[17] *Id.*
[18] Chrisjan Pauw, "Important Aspects of Stablecoins: The Difference Between Pegging, Collateralization and Redeemability," COINTELEGRAPH (Oct. 19, 2018) cointelegraph.com/news/important-aspects-of-stablecoins-the-difference-between-pegging-collateralization-and-redeemability.
[19] Coin Market Cao, https://coinmarketcap.com/ (last visited Dec. 19, 2021).
[20] Dell'Erba, *supra* note 16, at 4.
[21] *Id.*
[22] *Id.*

To achieve proper pegging, companies backing stablecoins typically commit collateral or reserves to ensure investors can exchange tokens for traditional money.[23] Through pegging, stablecoins attempt to mitigate this volatility risk while maintaining the advantageous speed and anonymity of cryptocurrency transactions.[24] Despite attempts to mitigate volatility, stablecoins are not without risk.[25] They are not collateralized like index funds, so holders have no claim to the underlying asset.[26] Additionally, stablecoin companies are not required to maintain their peg, so their values can fluctuate.[27] The most popular stablecoin, Tether, is designed to always be worth $1.00.[28] In 2018, the price fell to $0.91, demonstrating that even prominent stablecoins have trouble maintain their pegs.[29] This led to further criticism of stablecoin companies' accounting and audit practices, generating allegations regarding market manipulation and insufficient U.S. dollar reserves.[30] Stablecoins have posed additional problems for regulators as certain parts of stablecoins may be either securities, commodities, or derivatives, leading to uncertainty concerning regulation.[31]

C. Nonfungible Tokens

Nonfungible tokens (NFTs) are cryptographic objects with special identification codes and metadata that differentiate them from one another, using blockchain technology to verify asset authenticity and ownership.[32] Only a fraction of the overall market size of

[23] Shalini Nagarajan, *The SEC is Likely to get the Green Light to Target Stablecoins This Week, Report Says*, Business Insider (Oct. 26, 2021), https://markets.businessinsider.com/news/currencies/sec-stablecoin-regulation-gary-gensler-biden-crypto-rules-treasury-cftc-2021-10.
[24] *See generally* Dell'Erba, *supra* note 16.
[25] Press Release, U.S. Dep't of Treasury, *supra* note 2.
[26] Marissa Lee, *Stablecoin: Yet Another Layer of Cryptocurrency Complexity*, Am. Bankr. Inst. J., Sept. 2019, at 36.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Gary Gensler, Chairman, SEC, Statement: President's Working Group Report on Stablecoins (Nov. 1, 2021).
[32] Rakesh Sharma, *Non-Fungible Token (NFT) Definition*, INVESTOPEDIA, (Dec 14, 2021) https://www.investopedia.com/non-fungible-tokens-nft-5115211.

cryptocurrencies, NFTs have seen significant growth in the past year, jumping from $41 million in sales in 2018, to an estimated $20 billion in 2021.[33] These unique digital tokens are created and recorded on blockchain's digital ledger, allowing them to be bought and sold like other property.[34] They have no physical form, but are distinguished from other NFTs because of their unique data on the blockchain.[35] There are two primary subsets of NFTs: "Category 1" and "Category 2". Category 1 NFTs are a digital token linked to a physical asset, with the digital certificate confirming the asset's authenticity and proof of ownership.[36] Whereas paper-based records can be lost, stolen, or fabricated, Category 1 NFTs provide buyers with an indisputable digital record of ownership.[37] After every transaction, the digital token is updated to reflect the detail of the physical asset's new owner.[38] Category 2 NFTs are digital tokens that represent the right to use or access a licensed copy of a digital asset.[39] The asset is not included in the NFT, but it is accessible through a code in the NFT's blockchain.[40] Category 2 NFTs are commonly associated with media files, pictures, and music.[41] NFTs' ability to link to a variety of different assets, representing a myriad of rights and obligations has created challenges for regulators seeking to classify them.[42]

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33 Clive Thompson, *The Untold Story of the NFT Boom*, N.Y. TIMES, (May 12, 2021).
34 *Id*.
35 *Id*.
36 Jonathan Emmanuel, Esq., Gavin Punia, Esq., and Simi Khagram, Esq., BIRD & BIRD, Commentary, *Non-fungible Tokens: What's All the Fuss?*, (July 4, 2021) https://www.twobirds.com/en/insights/2021/uk/nonfungible-tokens-whats-all-the-fuss#:~:text=An%20NFT%20is%20a%20one,they%20have%20no%20physical%20form.
37 *Id*.
38 *Id*.
39 *Id*.
40 *Id*.
41 *Id*.
42 Jones Day, Commentary, *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, (Apr. 2021) https://www.jonesday.com/en/insights/2021/04/nfts-key-us-legal-considerations-for-an-emerging-asset-class.

III. The Current Regulatory Framework

In the United States, the regulation of digital assets is split between a myriad of federal regulators, because of the diverse characteristics of the various digital assets.[43] This is a stark contrast to most other countries, which commonly have a single centralized agency to regulate all digital assets.[44] Each asset's classification as a security or commodity subjects it to a different regulatory body with implications on sales, trading, clearing, registration, and reporting.[45] The Securities and Exchange Commission ("SEC") serves as the primary regulator for securities, while the CFTC handles the regulation of commodities, with an "alphabet soup" of other bodies, including the Federal Reserve System ("the Fed"), Financial Crimes Enforcement Network ("FinCEN"), Office of the Comptroller of the Currency ("OCC") and state governments serving to regulate distinct missions.[46]

A. The SEC

The SEC is the primary agency involved in the regulation of U.S. capital markets and enforces federal securities law.[47] Parties effecting transactions involving digital assets that are considered securities are subject to registration and continued regulation by the SEC.[48] Initial offerings of several digital assets have been deemed offerings of securities and subject to the applicable regulatory requirements for all publicly traded securities, including disclosure requirement and rules for public and private transactions.[49]

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[43] Donna Parisi, *Who's in Charge? An Overview of U.S. Digital Asset Regulation*, REUTERS, (June 14, 2021).
[44] *See id.* (contrasting the United Kingdom's regulatory framework where the UK Financial Conduct Authority regulates all digital assets).
[45] *Id.*
[46] *Id.*
[47] CFTC, *supra* note 5.
[48] Parisi, *supra* note 43.
[49] Parisi, *supra* note 43.

The "*Howey* Test" is the modern test used to determine whether a specific instrument is an investment contract qualifying as a security under the Securities Act of 1933, explaining that,

> an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.[50]

The four-part *Howey* Test is applied to modern digital assets and broken down into whether the asset involves (1) the investment of money, (2) in a common enterprise, (3) with the expectation of profit, (4) through the efforts of someone other than the investor. Assets that are not deemed securities under the *Howey* Test are generally commodities and not subject to SEC regulation.[51]

B. The CFTC

The CFTC regulates the futures market, swaps market, options market, and certain categories of commodity transactions, strengthening the resiliency and integrity of the derivatives market while fostering growth.[52] From a regulatory perspective, many popular digital assets are considered commodities, giving the CFTC purview over futures, option, swaps, and other derivative transactions for those digital assets not considered securities.[53] The CFTC is not the primary regulator for spot commodity transactions, transactions with instant payment and near-term delivery on a specified spot date within 48 hours,[54] but such transactions are subject to

[50] S.E.C. v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946).
[51] *See id*.
[52] *See generally* CFTC Strategic Plan 2020-2024 (Jul. 8, 2020).
[53] *Id*.
[54] 182 A.L.R. Fed. 559 (2002).

CFTC prohibitions concerning fraud and manipulation.[55] Many popular virtual currencies, such as Bitcoin, have been determined to be commodities under the Commodity Exchange Act ("CEA").[56]

C. The Alphabet Soup of Regulators

The Fed, FinCEN, OCC, and the 50 state governments are among the range of government authorities contributing to the alphabet soup of digital asset regulation.[57] Also serving as the nation's central bank, the Federal Reserve System is the primary regulator of payments and monitor of systemic risk in the United States.[58] FinCEN is a bureau of the Department of the Treasury in charge of enforcing the Bank Secrecy Act ("BSA"), a comprehensive anti-money laundering statute,[59] as well as overseeing the money service industry. The BSA requires that certain financial institutions maintain "know your customer" and anti-money laundering programs, register these programs with FinCEN, and report currency transactions and suspicious activity.[60] The OCC regulates national and foreign banks operating in the United States and has jurisdiction depending on the custody of the digital asset. Custody of digital assets, however, is an evolving and complex issue, focused on strength of security and ease of access, rather than traditional measures.[61]

Because of the emerging nature of digital assets, conflict has developed between different government authorities seeking to regulate digital assets. Recently, the SEC and the Federal Reserve have both taken aim at regulating stablecoins and their potential risks to investors and

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[55] *Id*.
[56] *See* In the Matter of Coinflip, Inc, CFTC Docket No. 15-29 (Sep. 17, 2015).
[57] Parisi, *supra* note 43.
[58] CFTC, *supra* note 5.
[59] Parisi, *supra* note 43.
[60] CFTC, *supra* note 5.
[61] Parisi, *supra* note 43.

the financial system.[62] While proponents of the asset-backed cryptocurrency value their relative stability and efficient transacting, SEC Chairman Gary Gensler[63] compared stablecoins to "poker chips at the casino" and has aggressively moved to impose tough restrictions on these stablecoin gamblers.[64] Under SEC oversight, stablecoins would be regulated similar to money market mutual funds, with liquidity requirements and redemption limits, with financial institutions dealing in stablecoins considered issuers and subject to stricter reporting requirements.[65] Meanwhile, Federal Reserve Chairman Jerome Powell has stated his belief that stablecoins should be regulated like money market funds or bank deposits.[66] Under the Fed's plan, stablecoins will be subject to a bank-regulatory approach, giving banks a major advantage when issuing stablecoins.[67] In a November 2021 report, the President's Working Group issued a report focusing on the SEC's and CFTC's combined authority to broadly regulate different parts of stablecoin transactions, depending on the facts and circumstances of each transaction.[68] While this situation is not all-encompassing, it epitomizes the frequent conflict between the various regulatory agencies.

IV. Commodity Futures Trading Commission's Involvement with Digital Assets

The CFTC has used the authority granted to it under the Commodity Exchange Act to insert itself in digital asset regulation. Rather than limit the definition to tangible items, the CEA

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[62] Shalini Nagarajan, *The SEC is Taking a Hard Line on Stablecoins Right Now – But It Could Permit More Coin Issuers if It Gets to Regulate Them, a Financial Policy Expert Says*, BUSINESS INSIDER (Oct. 9, 2021) https://markets.businessinsider.com/news/currencies/stablecoin-regulation-sec-federal-reserve-gary-gensler-jerome-powell-cowen-2021-10.

[63] Current SEC Chair Gary Gensler was formerly the Chairman of the Commodity Futures Trading Commission, serving from May 2009 until January 2014.

[64] Tory Newmyer, *SEC's Gensler Likens Stablecoins to 'Poker Chips' Amid Call for Tougher Crypto Regulation*, Wash. Post, (Sep. 21, 2021).

[65] *See* Nagarajan, *supra* note 23.

[66] Nagarajan, *supra* note 23.

[67] Nagarajan, *supra* note 23.

[68] President's Working Grp. on Fin. Markets Releases Rep. & Recommendations on Stablecoins, Treas. JY-0454 (Nov. 1, 2021).

broadly defines the term "commodity" to mean "goods and articles …. services, rights, and interests … in which contracts for future delivery are presently or in the future dealt in."[69] This gives the CFTC regulatory authority over most derivative transactions, market participants, and other market infrastructure.[70] Depending on their structure and use, digital assets may be deemed to be commodities, swaps, or other derivatives.[71] The CFTC also maintains general powers under the statute concerning anti-fraud and anti-manipulation authority over "any ... contract of sale of any commodity in interstate commerce," including underlying spot transactions and virtual currencies sold in interstate commerce.[72]

A. CFTC and Virtual Currencies

In September 2015, the CFTC stated for the first time that virtual currencies are commodities within the agency's jurisdiction, finding that "Bitcoin and other virtual currencies are encompassed in the [commodity] definition and properly defined as commodities."[73] "Because the definition of a 'commodity' is broad," the CFTC found virtual currencies within its jurisdiction and pursued administrative proceedings against Coinflip, alleging that Coinflip was conducting commodity options trades in violation of the Commodity Exchange Act.[74] The first instance that the CFTC exercised jurisdiction over virtual currencies, the commission contended that Coinflip offered option and forward contracts for virtual currencies through its platform.[75] Through a competitive bidding process, Coinflip matched users with counterparties to execute an exchange of US Dollars for Bitcoins at a predetermined price and date.[76] The contracts listed

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[69] 7 U.S.C. § 1a(9).
[70] *See generally* CFTC, *supra* note 5.
[71] *See generally* CFTC, *supra* note 5.
[72] 7 U.S.C. § 9(1).
[73] *In the Matter of Coinflip, Inc.*, CFTC Docket No. 15-29 (Sep. 17, 2015).
[74] *Id.*
[75] *Id.*
[76] *Id.*

Bitcoin as the underlying assets with strike and delivery prices in U.S. Dollars, where premiums were paid at a spot rate calculated by a third-party digital currency exchange.[77] The CFTC found that Coinflip conducted activity related to commodity option transactions that were not in compliance with the Commodity Exchange Act.[78]

In *Commodity Future Trading Commission v. McDonnell*, a federal court affirmed the CFTC's jurisdiction over digital assets, holding the cryptocurrency at issue was a "commodity" subject to the CFTC's anti-fraud and anti-manipulation jurisdiction under the CEA.[79] The case involved a CFTC suit against McDonnell and his company, where the agency alleged the defendants operated a deceptive and fraudulent scheme involving outside funds purportedly invested in virtual currencies, including Bitcoin.[80] The inclusion of virtual currencies as a commodity was legitimized "from the CFTC's allowance of futures trading on certified exchanges."[81] When the Chicago Mercantile Exchange, CBOE Futures Exchange, and the Cantor Exchange began to offer virtual currency future or option products, the CFTC policed there exchanges for core violations involving wash trading or prearranged trades.[82] Since courts "generally defer[] to an agency's interpretation of a statute 'that the agency is responsible for administering,'" the court deferred to the CFTC's broad interpretation of commodities to include virtual currencies and affirmed their jurisdiction pursuing relief for violations of the CEA.[83] The *McDonnell* court also noted that without "direct comprehensive U.S. regulation of virtual currencies" a multi-regulatory approach is being used.[84] Under this multi-regulatory approach,

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[77] *Id*.
[78] *Id*.
[79] *See* Commodity Future Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018).
[80] *Id*.
[81] *Id.* at 222.
[82] *Id*.
[83] *Id.* at 224.
[84] *McDonnell*, 287 F. Supp. 3d at 220.

several agencies held concurrent regulatory power over virtual currencies in certain settings, but current U.S. law did not provide any federal regulator with oversight of spot virtual currency transactions not involving fraud.[85]

In *Commodity Futures Trading Commission v. My Big Coin Pay*, a federal court was even more broad than the *McDonnell* court in defining the scope of a commodity.[86] The CFTC action accused the company of fraudulently offering the sale of a virtual currency, My Big Coin, that was supposedly similar to Bitcoin.[87] The defendants contended that because there were no futures contracts dealt in that were related to My Big Coin, it could not be considered a commodity under the CEA, leaving the CFTC with no jurisdiction over its trading.[88] The court rejected that argument, holding a commodity to be "broader than any particular type or brand of that commodity."[89] Citing to the existence of futures contracts for other virtual currencies including Bitcoin, the court determined that because futures contracts were dealt in for other virtual currencies and My Big Coin was also a virtual currency, it was therefore a commodity under the CEA.[90] Virtual currencies were compared to livestock, an example of a traditional and undisputed commodity.[91] Under the CEA, livestock are considered a commodity with no regard to the particular species of livestock underlying futures contracts.[92] Much like livestock, the CEA classifies virtual currencies categorically, without regard to "type, grade, quality, brand, producer, manufacturer, or form."[93] The holding in *My Big Coin Pay* extended the CEA's definition of commodity to include all items of a category where futures contracts are dealt in for

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[85] Id.
[86] *See* Commodity Futures Trading Comm'n v. My Big Coin Pay, 334 F.Supp.3d 492 (D. Mass 2018).
[87] *Id.* at 494.
[88] *Id.* at 496.
[89] *Id.*
[90] *Id.* at 496-97.
[91] *Id.* at 497.
[92] *My Big Coin Pay*, 334 F.Supp. at 497.
[93] *Id.*

a single item within that class and thus, expanding the CFTC's jurisdiction to include these items.[94]

While the initial rulings and cases concentrated heavily on the most prevalent virtual currency, Bitcoin, the CFTC has taken steps to clarify the scope of its regulation. In October 2019, then CFTC Chairman Heath Tarbert expressed his belief that ether is also a commodity under the CEA and falls under the agency's jurisdiction, citing anticipation of ether-derived futures contracts.[95] Ether-derived futures contracts would likely qualify as forked assets, which are assets created when blockchain code is amended resulting in permanent divergence from the previous version.[96] Tarbert's commentary acknowledged the CFTC's treatment of forked assets, reasoning that "similar assets should be treated similarly," so if an original digital asset is a commodity, the forked asset is most likely a commodity as well.[97]

With its definition as a commodity more certain, the CFTC clarified its jurisdiction over digital assets in a June 2020 guidance, saying it would continue to interpret the term virtual currency broadly.[98] Refusing to give a bright line definition of virtual currency, the CFTC's guidance described virtual currency as any digital asset that encompassing "digital representation of value or unit of account that is or can be used as a form of currency (i.e., transferred from one party to another as a medium of exchange)."[99] They "may be manifested through units, tokens, or coins, among other things," and may be distributed among structures including digital "smart

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[94] *Id.* at 498.
[95] Press Release, CFTC, Release Number 8051-19 (Oct. 10, 2019) https://www.cftc.gov/PressRoom/PressReleases/8051-19.
[96] Jake Frankenfield, *Hard Fork (Blockchain) Definition*, INVESTOPEDIA, (Mar. 23, 2022) https://www.investopedia.com/terms/h/hard-fork.asp.
[97] *Id.* (commenting "if the original digital asset hasn't been determined to be a security and is therefore a commodity, most likely the forked asset will also" be a commodity).
[98] Retail Commodity Transactions Involving Certain Digital Assets, 85 Fed. Reg. 122, 37741 (June 24, 2020) (to be codified 17 C.F.R. pt. 1).
[99] *Id.*

contracts."[100] In leaving their interpretation of virtual currency slightly ambiguous, the CFTC gave themselves flexibility to extend their jurisdiction broadly and quickly respond to technological advances that pose risks for financial markets and investors.[101]

B. CFTC and Stablecoins

The CFTC has used their broad interpretations of virtual currencies and commodities to extend their jurisdiction to other emergent digital assets. In October 2021, the commission affirmed the stablecoins are considered commodities under the CEA and asserted its ability to oversee regulation of stablecoins.[102] In the enforcement order against Tether, a prominent stablecoin, the CFTC levied a $41 million dollar fine for misleading statements regarding the issuer's maintenance of sufficient fiat currency reserves.[103] In the order, the CFTC stated that "a virtual currency stablecoin, is a commodity" subject to the CFTC's jurisdiction under the CEA, classifying stablecoins as a subclass of virtual currencies.[104] In "the first U.S. enforcement action against a major stablecoin," the CFTC asserted its enforcement authority over stablecoins at a time before the President's Working Group on Financial Markets issued its reports on stablecoins and after SEC Chairman Gary Gensler's comments that he believed stablecoins backed by securities were subject to the SEC's jurisdiction.[105] However, in her statement concurring the Tether settlement, CFTC Commissioner Dawn Stump reiterated that while the

[100] *Id.*
[101] *See generally id.* (noting that blockchain technologies have the potential to yield notable advancements and the Commission continues to follow the cash and spot markets in the context of their impact on the derivative market).
[102] In the Matter of Tether Holdings Limited, Tether Operations Limited, Tether Limited, and Tether International Limited, CFTC Docket No. 22-04 (Oct. 15, 2021), available at https://www.cftc.gov/media/6646/enftetherholdingsorder101521/download.
[103] *See generally* In the Matter of Tether Holdings Limited, CFTC Docket No. 22-04 (Oct. 15, 2021).
[104] *Id.* at 8.
[105] *See* Gibson Dunn, *supra* note 1.

action fell within the anti-fraud provisions of the CEA, the CFTC "[does] not regulate stablecoins and [does] not have daily insight into the businesses of those who issue such."[106]

C. CFTC and NFTs

To date, the CFTC's involvement has been minimal, as there have been no existing cases, judgments, or orders concerning the agency. This is likely because NFTs are an emerging technology which have experienced tremendous growth and a rise in popularity during 2021 that exceeds the speed of the U.S. legislative and regulatory processes.[107] Originally debuting in 2017, NFTs have recently jumped into the public view following celebrities, artists, and athletes issuing their own individually branded NFTs.[108] The key regulatory issue with NFTs is that they can represent a wide variety of assets, rights, and obligations, making them difficult to place in the traditional regulatory framework.[109]

The CFTC has previously classified intangible items within the CEA's definition of a commodity, including cryptocurrencies, stablecoins, renewable energy credits, emission allows, certain indices, and debt instruments.[110] NFTs share many commonalities with other digital assets, most strikingly that all are purchased, sold, traded, and held using blockchain technology.[111]

The CFTC is likely not the only agency that will look to regulate NFTs. For a number of reasons, NFTs could be considered a security and subject to SEC regulation. NFTs would be

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[106] Public Statement, Dawn D. Stump, CFTC, Concurring Statement by Commissioner Dawn D. Stump Regarding Tether and Bitfinex Settlement (Oct. 15, 2021) https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement101521.
[107] Thompson, *supra* note 33.
[108] Thompson, *supra* note 33.
[109] Jones Day, *supra* note 42.
[110] Jones Day, *supra* note 42.
[111] Jones Day, *supra* note 42.

subjected to the Howey Test.[112] If an NFT were determined to be a security and subject to SEC jurisdiction, then securities law issues and the Securities Act of 1933 would apply, rather than the CEA.[113] Certain NFTs are can be divided and shared among several investors, which depending on the specific facts and circumstances, "could be considered an investment contract under the Howey Test."[114]

While the issue has not yet been decided, classifying NFTs as a commodity under the CEA could have several implications concerning enforcement. Should NFTs be deemed commodities, the CFTC would be allowed to enforce the CEA's general anti-fraud and anti-manipulation provisions on spot transactions.[115] Additionally, for derivative or futures products, NFTs may be required to meet more stringent requirements, such as being traded on a registered derivatives exchange unless the transaction results in actual delivery within 28 days.[116] As the NFT market develops, it is nearly certain that futures, options, swaps, or other derivative contracts would be developed for NFTs and those contracts will bring NFTs under the purview of the CFTC.[117]

V. Reasons the CFTC Should Expand Their Jurisdiction in Regulating Digital Assets

Without sufficient federal oversight, digital assets lack reliability because they are dependent on self-regulation and unreliable reserve reporting. As market efficiency has shown

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[112] Jones Day, *supra* note 42. (noting that the Howey Test is applied to modern digital assets and broken down into whether the asset involves (1) the investment of money, (2) in a common enterprise, (3) with the expectation of profit, (4) through the efforts of someone other than the investor).
[113] Jones Day, *supra* note 42.
[114] Jones Day, *supra* note 42.
[115] Jones Day, *supra* note 42.
[116] Jones Day, *supra* note 42.
[117] Gary DeWaal & Lee A. Schneider, *Summary Overview of Stablecoins and The Law Regarding Stablecoins*, CTFC, Technology Advisory Committee, Subcommittee on Virtual Currencies (Oct. 3, 2019) https://www.cftc.gov/media/2731/TAC100319_Stablecoins/download.

us, investors value digital assets because they have many positive externalities, including increasing speed, efficiency, and certainty, making it easier for investors to transact.[118]

Treating digital assets as commodities is heavily dependent on the facts and circumstances surrounding the individual asset. While there is sufficient prior enforcement and case law to support the classification of common virtual currency as commodities subject to CFTC enforcement, the classifications of stablecoins and NFTs are emerging issues and more ambiguous.

A. THE CFTC REGULATIONG VIRTUAL CURRENCIES

In addition to affirming the CFTC's self-declared oversight over virtual currencies, *McDonnell* provides reasoning to support classifying virtual currencies' as commodities.[119] The court reasoned virtual currencies meet the dictionary and economic definitions of the word "commodity" and share several important features with traditional commodities, like gold and silver.[120] Dictionaries define a commodity as "an article of trade or commerce" or economic good or "[a]n economic good ... [or] an article of commerce ..."[121] In common usage, commodities are "goods sold in the market with a quality and value uniform throughout the world."[122] Since they are able to be bought, sold, and traded with traditional fiat currencies, Bitcoins and other virtual currencies are articles of commerce according to the traditional dictionary definition.[123] Virtual currencies also meet the economic definition of a commodity, because they are sold and transacted a global market with uniform quality and value throughout the world.[124] Much like traditional commodities, it largely does not matter if you try to purchase

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[118] CFTC, *supra* note 5.
[119] *See generally* McDonnell, 287 F. Supp. 3d 213.
[120] *Id.* at 225.
[121] *Id.* at 224.
[122] *Id.*
[123] *Id.*
[124] *Id.*

or sell precious metals or agricultural products in any part of the world, because an ounce of gold in the United States is exactly an ounce of gold in any other party of the world.[125] Commodities traditionally serve as a way to store value apart from their intrinsic value.[126] Comparatively, fiat currency is considered a security because it is secured by a commodity or a government's ability to tax and defend.[127] Much like gold, virtual currencies' pricing derives from market demand and its value as a currency, varying in accordance with scarcity.[128] Gold is scarce, because only so much can be mined. Bitcoin has the same type of scarcity, because "the algorithm controlling how many Bitcoins are released into the market… is designed to taper the supply of Bitcoins until no more are created."[129] Bitcoins value is driven through extreme demand where the market sees a limited supply and their worth as a currency, driving demand higher.[130] Likewise with gold, the fixed supply leads to demand because the market values rarity.[131] A key difference is that while gold has some intrinsic value for its worth as a precious metal, virtual currency has no intrinsic value outside of the computer codes associated with it.[132] If gold's demand stems from its extrinsic value as a currency, virtual currencies may have even greater value because rather than being a heavy metal that needs to be physically exchanged, virtual currencies can efficiently be transacted in a digital format.[133] While commodities have traditionally been physical, the CEA has been previously interpreted to encompass intangible

[125] *See generally McDonnell*, 287 F. Supp. 3d 213.
[126] *Id.* at 224.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] Dominic Wilson and Jose Ursua, *Is Bitcoin a Currency? No*., GOLDMAN SACHS, (Mar. 14, 2021) Issue 21 at 7, https://cryptochainuni.com/wp-content/uploads/Goldman-Sachs-Global-Investment-Research-All-About-Bitcoin.pdf.
[131] *Id.*
[132] *Id.* at 4.
[133] *Id.* (Highlighting gold's physical weight, resilience to decay, and ability to be divided into smaller pieces as property needed in order for a currency to function).

goods in its definition of a commodity.[134] The CFTC has previously recognized renewable energy credits, emission allowances, certain indices, and debt instruments a commodities.[135]

B. THE CFTC REGULATING STABLECOINS

Because of attempts to peg or correlate to other asset prices, stablecoins face unique challenges that lend well the CFTC regulation. Among the challenges unique to stablecoin are the difficulty of pegging, having adequate reserves, an unreliable performance history, and a lack of government or central bank support.

With one-to-one dollar reserves, pegging of stablecoins to U.S. dollars is an unsustainable practice. The U.S. dollar is supported by the full faith and credit of the federal government, while stablecoins are speculative investments dependent on financial technology start-ups to balance them.[136] Previous attempts of central banks in countries including Greece, Mexico, and Argentina have all been unsuccessful in pegging their currencies to the U.S. dollar.[137] If foreign central banks have been unsuccessful, it demonstrates the difficulty of such an accomplishment and is unlikely start-up companies will be able to have more success.

Because stablecoins require large amounts of U.S. dollar reserves to operate, there are fears about inadequate reserve reporting or fraud, diminishing confidence in the stablecoin market.[138] Following the 2008 financial crisis, regulators intensified collateral requirements to help reduce counterparty risk.[139] Weaker or less collateral involved in a transaction can increase counterparty risk, something stablecoins hoped to minimize through pegging.[140] To date,

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[134] *See, e.g.*, In re Barclays PLC, CFTC No. 15–25 (May 20, 2015) (regulating fixed interest rate benchmarks as commodities).
[135] Retail Commodity Transactions Involving Certain Digital Assets, *supra* note 98.
[136] Marissa Lee, Stablecoin: Yet Another Layer of Cryptocurrency Complexity, Am. Bankr. Inst. J., September 2019, at 37.
[137] *Id.*
[138] Dell'Erba, *supra* note 16, at 21.
[139] Dell'Erba, *supra* note 16, at 21.
[140] Dell'Erba, *supra* note 16, at 21.

pegging has been highly untransparent, regarding the effective existence of collateral, a result of external auditing, fraud, and inadequate technology behind stablecoins.[141] In Tether's case, although the company claimed it was collateralized one-to-one by the U.S. dollar, there were significant concerns among investors regarding the legitimacy of those claims. On those fears, Tether's value slid from $1.00 to $0.96.[142] While this was not a serious uncoupling, other stablecoins have traded down to $0.50.[143] Without adequate regulation, there is no way to gauge the accuracy of reserve reporting, so investors are left with uncertainly and potential risk. More dangerous, poor or fraudulent reporting could wreck confidence in the cryptocurrency market and lead to major financial losses for investors.

C. THE CFTC REGULATING NFTs

Because of their unique and varied nature, it is difficult to determine the extent the CFTC will be able to regulate NFTs. Many NFTs have similarities to other digital assets but the underlying assets share few characteristics with commodities, making it difficult for the CFTC to assert jurisdiction. Commodities inherently possess a standardization that enables the goods to be "'sold in the market with a quality and value uniform throughout the world.'"[144] In recent months, the ascendence of the NFT market has centered around art, music, images, or videos.[145] The NFTs traded consist of unique copies or access to these works, meaning they do not possess any standardization. Without standardization or serious commonalities, it is difficult to envision a large enough scale to support derivative trading based on these assets. Therefore, the CFTC will find it difficult to assert any jurisdiction over a market without futures, swaps, or options

[141] Dell'Erba, *supra* note 16, at 24.
[142] Dell'Erba, *supra* note 16, at 21.
[143] Dell'Erba, *supra* note 16, at 21.
[144] Mitchell Prentis, *Digital Metal: Regulating Bitcoin As A Commodity*, 66 Case W. Res. L. Rev. 609, 626 (2015).
[145] *See generally* Emmanuel, *supra* note 36.

trading. As the federal agency in charge of regulating the futures, swaps, and options markets, if a derivatives market were to form around NFTs, the CFTC would find it easier to oversee NFTs.[146] The NFTs share many characteristics with other digital assets that the CFTC currently regulates. Like virtual currencies and stablecoins, NFTs have no physical form but use blockchain technology to transact on a digital ledger.[147] A key difference is that virtual currencies and stablecoins are traded on prominent exchanges, in both the spot and derivative markets. NFTs trade through auctions and online marketplaces, without a presence on any of the exchanges that the CFTC already regulates.[148] Without a presence on exchanges, the size of the derivative market is minimal, whereas virtual currencies have established derivative markets.[149] While NFT-based derivatives may exist, it would be unusual for the CFTC to oversee an over-the-counter market with minimal size. For instance, options are occasionally bought and sold on real estate properties, but the CFTC has never sought to oversee that market.[150] If the CFTC sought to regulate a market without derivatives, the commission could use general anti-fraud or anti-manipulation provisions of the CEA to garner jurisdiction over a spot market, but they have not previously attempted to oversee such a spot market. An attempt to regulate spot NFT transactions would be akin to regulating any collectibles market, and the Commission has not previously attempted to regulate the baseball trading card industry or anything similar. Should a more established derivative market emerge, the CFTC may seek to oversee that market, but without the existence of NFT-backed derivatives, it is unlikely the commission would seek jurisdiction over NFTs.

[146] CFTC, *supra* note 5.
[147] Even if the underlying asset does
[148] *See* Thompson, *supra* note 33.
[149] Bitcoin USD (BTC-USD), Yahoo! Finance, https://finance.yahoo.com/quote/BTC-USD/ (noting a 24-hour trading volume of $24,909,232,704, as of Feb. 18, 2022 3:03pm).
[150] Real estate options are governed by contract law.

Barring legislative changes, the CFTC is the government agency best suited to oversee regulation of digital assets. The Commodity Exchange Act (CEA) defines "commodity" broadly to include all "goods and articles, … and all services, rights, and interests … in which contracts for future delivery are presently or in the future dealt in."[151] Courts have deferred to the CFTC's ability to interpret the term commodity and include intangible items within that definition, giving the agency internal ways to expand its regulatory jurisdiction.[152] While the commission possesses only limited jurisdiction in spot markets, it has shown the ability to bring enforcement actions with respect to digital asset derivatives, especially among virtual currencies.[153] The CFTC has proven itself an adapt delegator of authority, as agencies with authority granted from the CFTC have instituted rules to protect investors. Pursuant to its authority delegated from the CFTC, the National Futures Association (NFA) has established reporting requirements for commodity pool operators or trading advisors that execute transactions involving "underlying virtual currency spot/cash contracts or virtual currency futures, options, or swaps on behalf of a commodity pool or managed account, introducing brokers that solicit or accept orders for virtual currency futures, swaps, or options, and futures commission merchants that offer customers or non-customers the ability to trade virtual currency futures only."[154] While its regulatory oversight authority over commodity cash markets is limited, the CFTC maintains general anti-fraud and manipulation enforcement authority over virtual currency cash markets as a commodity in interstate commerce.[155]

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151 7 U.S.C. § 1a(9).
152 Retail Commodity Transactions Involving Certain Digital Assets, *supra* note 98.
153 CFTC, *supra* note 5.
154 Clifford Chance, *Regulation of Bitcoin: The Role of the CFTC*, (Jan. 2018) https://talkingtech.cliffordchance.com/en/industries/fintech/regulation-of-bitcoin--the-role-of-the-cftc-.html.
155 Press Release, CFTC, Customer Advisory: Understand the Risks of Virtual Currency Trading (Dec. 15, 2017) https://www.cftc.gov/sites/default/files/idc/groups/public/@customerprotection/documents/file/customeradvisory_urvct121517.pdf.

The CFTC has also shown unique flexibility in regulating the wide variety of commodities under its purview. Originally established to regulate the delivery of agricultural commodities, the CFTC has evolved to handle the diverse regulatory framework of modern products and already implements procedures to handle both cash-settled and physically-settled derivatives.[156] For cash-settled digital asset derivatives, the CFTC's

> primary focus is to ensure that the contract settlement prices are reliable. Among the issues, are the quality and liquidity of the underlying market and pricing data, the safeguards in place to ensure fraud and manipulation risk is mitigated, and the accuracy of methodology for calculating the settlement price. All of these are factors applicable in commodity settlement.[157]

For physically-settled digital asset derivatives, the CFTC "consider[s] the physical transfer and cloud storage, just as custody is an issue in commodity transactions."[158] Appropriate protocols and clear rules around the delivery process should be developed that are consistent with prevailing cash market practices.[159] While these strategies are somewhat different for virtual commodities, the logistics are all similar to the tangible commodity markets.

Digital assets are still new and evolving rapidly, with ecosystems developing over time. Digital assets offer potential in a range of contexts, as well as the challenges and vulnerabilities associated with new technologies and decentralized finance. The opportunities and risks most closely correlate to the protections needed in commodity transactions. Digital asset markets are also rapidly developing so regulators must support transparent, liquid markets and help ensure integrity.

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[156] Prentis, *supra* note 144, at 630.
[157] CFTC, *supra* note 5.
[158] CFTC, *supra* note 5.
[159] CFTC, *supra* note 5.

The CFTC is situated in a good position to impose regulations on digital assets, many of which are similar to existing requirements for other products. They agency should foremost partner with spot market platforms that follow AML rules to prevent money laundering.[160] While there have been fears about the CFTC, SEC, and other federal agencies fighting for jurisdiction, these markets are too fast-paced for interagency bickering and the task too large for any single agency to handle alone. The products almost certainly possess features that lend to regulation from multiple regulatory bodies, so the CFTC must be prepared to work with other agencies and have information sharing agreements as price volatility is a serious issue and values can deviate from pegs. In addition, the CFTC should actively monitor price settlement data from spot markets and identify/investigate anomalies and disproportionate moves. They can set large trader reporting thresholds, similar to the way transactions of certain sizes must be reported to banks. The CFTC must review initial and maintenance margin for virtual currency futures, as digital assets have already faced problems with companies not possessing large enough reserves. Lastly, since volatility and pegging are such issues, the CFTC should help establish relative prices of digital assets, both limiting price fluctuations and providing a means to hedge the risk of price fluctuations. This does not need to be done by the CFTC directly, but they could mandate investors or large institutions report estimated prices for common digital assets, similar to the way certain banks report LIBOR.

DRAWBACKS & ALTERNATIVES

While the CFTC expanding jurisdiction would improve the regulatory framework surrounding digital assets, the Commission is already stretched thin, and better alternatives may exist within the United States' fragmented network of other regulatory agencies. The Dodd-

[160] *See* Prentis, *supra* note 144, at 630.

Frank Wall Street Reform and Consumer Protection Act was passed in 2010 and gave the CFTC new responsibilities without proportionately increasing the Commission's funding.[161] Targeting sectors of the financial system that were believed to have been responsible for the 2007-2008 financial crisis, the Dodd-Frank increased regulatory oversight on banks, lenders, and other financial institutions.[162] Under Dodd-Frank, the CFTC was tasked with enacting comprehensive reform of swap market regulation, researching and recommending improvements to the derivative market, and lowering systemic financial risk.[163] As a result, the Commission acquired numerous added responsibilities, including monitoring capital and margin requirements, supervising the recordkeeping of financial institutions, and managing swap execution facilities, clearinghouses, and derivative exchanges.[164] These changes increased market stability and transparency, but enhanced the CFTC's oversight to include over $400 trillion in notional trading value.[165] Despite the addition of these massive responsibilities, political disagreement has left the Commission with an underfunded budget, fluctuating between $200 and $300 million annually, well short of CFTC requests.[166] Already described as "woefully understaffed, underfunded, and outmatched," adding the rapidly growing digital asset market to the Commission's regulatory purview could further strain the CFTC's resources.[167] Though the Commission has continually met rulemaking deadlines, it lacks sufficient resources and staffing to properly examine and enforce rules over the expansive markets that they are tasked with

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[161] Press Release, Fact Sheet on CFTC Funding, Americans for Financial Reform (Mar. 2014) (available at https://ourfinancialsecurity.org/wp-content/uploads/2014/03/CFTC-Funding-Fact-Sheet2.pdf).
[162] Dodd-Frank Act, Commodity Futures Trading Commission (March 23, 2022) https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm.
[163] *Id.*
[164] *Id.*
[165] Agency Financial Report Fiscal Year 2021, Commodity Futures Trading Commission (Nov. 2021) https://www.cftc.gov/About/CFTCReports/index.htm.
[166] *Id.* (reporting that the CFTC's 2020 budget was $284 million, an increase from $249 million in 2018).
[167] Americans for Financial Reform, *supra* note 161.

regulating.[168] Adding digital assets to the CFTC's purview could further stress an already underfunded agency, leaving it lacking resources to properly enforce regulations and oversee markets.

The CFTC may not have the requisite capabilities to handle the complexities of regulating digital assets, and other regulatory agencies may be required to lend assistance or be better positioned to take the lead regulating digital assets. Financial regulators have already seen issues when stablecoins are not properly collateralized with fiat currencies.[169] Stablecoins may inherently require a third party to monitor collateral, as this would force the CFTC to expand their responsibilities, further taxing their limited resources. The Fed, as the primary regulator of payments, or the OCC, as the regulator of banks, are two agencies that could potentially lend assistance in this area, monitoring to ensure digital assets are supported with sufficient collateral.[170] Other agencies may be entirely better positioned to take the lead in digital asset regulation. The SEC, an agency with superior reach and a budget four times larger than that of the CFTC, has already taken steps to increase its involvement regulating digital assets.[171] Because of its larger resources and budget, the SEC may be better positioned to protect investors and improve financial stability, should digital assets continue to be deemed "securities" under the *Howey* Test.[172]

VI. Conclusion

In reaction to the emergence of digital assets, the Commodities Future Trading Commission has sought to expand its jurisdiction as broadly as possible to keep markets safe,

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[168] *See generally* Americans for Financial Reform, *supra* note 161.
[169] *See In the Matter of Tether Holdings Limited, supra* note 103.
[170] CFTC, *supra* note 5.
[171] *See* Todd Phillips, *The SEC's Regulatory Role in the Digital Asset Markets*, CENTER FOR AMERICAN PROGRESS (Oct. 4, 2021) https://www.americanprogress.org/article/secs-regulatory-role-digital-asset-markets/.
[172] *Id.*

transparent, and fair. Much like the CFTC uses derivatives based on commodities to take enforcement action in commodity markets, the agency should look to utilize the same jurisdiction expanding tactics when interacting with digital assets.

Despite the restrictions that the CEA imposes, the CFTC has emerged as a primary federal regulator of the virtual currency market. Popular cryptocurrencies are classified as commodities under the CEA, and the CFTC actively polices the derivative markets as well as the overall market for fraud and manipulation.[173] The Commission should look to take advantage of court rulings giving them broad discretion to inject themselves into the spot market, as courts have held that the definition of "commodity" include all items of a category where futures contracts are dealt in for a single item within that class.[174]

Limited case law appears to favor the interpretation that stablecoins are also commodities subject to the regulatory outcome of their underlying asset.[175] Frequently classified as a subclass of virtual currencies, stablecoins are subject to the regulatory outcome of their underlying asset, so the CFTC should take an active role in policing stablecoins based on derivative products.[176] Cryptocurrencies and stablecoins backed by commodities appear within the agency's jurisdiction.[177] Though there is potential for stablecoins to develop outside the CFTC's traditional boundaries, it must broadly extend jurisdiction and anticipate the trading of derivatives on these products to make sure they do not slip through regulatory gaps.

The oversight of NFTs is largely unclear, but presents a unique opportunity for the CFTC to assert jurisdiction. Depending on the rights and obligations of the individual NFT, some will

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[173] *See McDonnell*, 287 F. Supp. 3d at 220.
[174] *See My Big Coin Pay*, 334 F.Supp.3d 492.
[175] *Id.*
[176] *Id.*
[177] *Id.*

certainly be classified as commodities while other NFTs that pass the Howey Test will be classified as securities. It is certainly too early to tell, but the CFTC must be prepared for developments in the NFT marketplace.

As the markets grow and disruptions occur, the CFTC and other federal regulators may feel pressure to expand their supervision of these markets.[178] The CFTC should affirmatively take action to expand their jurisdiction, so they can keep pace with the explosive growth of digital asset markets, maintain stability and trust in the markets, and protect investors from risk and fraud.

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[178] Clifford Chance, *supra* note 154.