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Regulation Of An Industry Created Without Regulation: Implications of the CFTC's Attempt to Oversee Crypto's

I. INTRODUCTION

Many federal agencies claim to be the regulator of the emerging cryptocurrency industry.¹ Congress is in charge of deciding which agency would be the best fit to regulate the industry.² In August 2022, the U.S. Senate proposed the Digital Commodities Consumer Protection Act (DCCPA), attempting to clarify digital asset markets and allocate regulatory responsibility to oversee the vastly underregulated industry of cryptocurrencies.³ Currently, the regulation of U.S. cryptocurrency is uncertain as regulators continue to investigate the market to determine the best path for overseeing the market.⁴ The proposed bill authorizes the Commodities Futures Trading Commission ("CFTC") to have exclusive jurisdiction in regulating the trading of a newly created asset class termed "digital commodities."⁵ The bill grants authority to the CFTC to regulate spot markets for these digital commodities, where spot transactions in cryptocurrencies that meet the definition of a "digital commodity" will be subject to the regulation of the CFTC.⁶ In subjecting these spot transactions to regulation, the CFTC will mandate consistent and rigorous rules for all market participants, holding digital commodity platforms to the same standard as traditional

¹ Hester M. Pierce, Commissioner, U.S. Sec. Exchange Comm'n, Remarks at "Regulatory Transparency Project Conference on Regulating the New Crypto Ecosystem: Necessary Regulation or Crippling Future Innovation?" (June 14, 2022).

² *Id.*

³ Deric Behar, et al., *Digital Commodities Consumer Protection Act Seeks to Empower CFTC*, LATHAM & WATKINS (Aug. 16, 2022).

⁴ Wayne Duggan, *Crypto Regulation: Is Cryptocurrency A Security?*, FORBES (Oct. 7, 2022), <https://www.forbes.com/advisor/investing/sec-crypto-regulation/>.

⁵ Daniel Budofsky, et al., *Digital Commodities Consumer Protection Act to Provide Oversight of Digital Assets*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Aug. 17, 2022).

⁶ *Id.*

financial institutions.⁷ By requiring all digital commodity platforms to register with the CFTC, the bill sets forth a framework for a uniform national standard which may, in turn, bolster coordination with international regulators.⁸ In congruence with the intent of the DCCPA, the bill's enactment will bring customer protection and federal oversight to the industry while empowering consumers to make more informed trading decisions.⁹ Because of cryptocurrency's lack of oversight, there is a large risk for nefarious actors to prey on naïve investors.¹⁰ The introduction of this bill is a recent attempt by Congress to, in a bi-partisan manner, oversee a currently decentralized industry.¹¹ It is one of several proposals from Congress this year to address similar issues in the cryptocurrency market.¹²

Part II of this Comment discusses what cryptocurrency is, the history of cryptocurrencies, the challenges within the market, and the regulatory attempts to oversee the market. First, the section will discuss what exactly cryptocurrency is. Second, the section will detail the history and rise of the industry, looking specifically at the most popular and largest digital asset, Bitcoin. Third, the section will then analyze the key characteristics of Bitcoin and other cryptocurrencies that are pillars of their creation and discuss the negative implications of those characteristics. Next, the section will delve into how those implications have created risks for the digital asset market and consumers. Then, the section will discuss previous attempts to regulate that market among various regulatory bodies. In discussing prior regulatory attempts, the section will then go through an in-depth analysis of two major regulatory bodies in the market, the SEC and the

⁷ Debbie Stabenow & John Boozman, *The Digital Commodities Consumer Protection Act Closes Regulatory Gaps*, https://www.agriculture.senate.gov/imo/media/doc/crypto_one-pager1.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ Duggan, *supra* note 4.

¹¹ Fatima Hussein & Ken Sweet, *New cryptocurrency oversight legislation arrives as industry shakes*, PBS (Aug. 3, 2022), <https://www.pbs.org/newshour/economy/new-cryptocurrency-oversight-legislation-arrives-as-industry-shakes>.

¹² *Id.*

CFTC. Here, the Comment will address how these two regulatory bodies individually attempt to regulate cryptocurrencies.

Part III of this Comment addresses the recently proposed bill, the DCCPA, and discusses the authority it gives to the CFTC. Within this discussion, the Comment will delve into the benefits and drawbacks of this legislation on the market.

Part IV offers potential amendments to the bill in order to clear up some ambiguities contained in the bill. First, this section addresses the bill's failure to recognize non-fungible tokens and DeFi transactions and how they will be impacted by CFTC regulation. In including a provision that expressly discusses which regulatory body is to have jurisdiction over these matters, the DCCPA can create greater clarity and transparency for market participants. Second, this section addresses the bill's failure to properly deal with the issue of securities and how to define which digital assets are securities and which are commodities. The bill should either account for all digital assets under the definition of a commodity or explicitly state what a security is and delegate that power to the SEC. If these factors are not resolved, the potential for great fraud and deception and poor enactment of regulation remains at stake.

Finally, Part V of this Comment summarizes two main arguments. First, the Comment argues that the CFTC is the ideal regulatory body to oversee cryptocurrencies. Second, the Comment argues that in order to make the regulation of cryptocurrencies more successful and effective while further protecting consumers, the language of the proposed legislation needs to provide further clarification in regard to the two main factors mentioned above.

II. BACKGROUND/OVERVIEW

a. WHAT IS CRYPTOCURRENCY?

Cryptocurrency is a form of digital or virtual currency, acting as a medium of exchange.¹³ Digital assets have no central authority, as typical fiat currency like the Dollar or the Euro do, so they instead use a technology called blockchain to operate the distribution of the virtual currencies.¹⁴ There are a variety of different types of cryptocurrencies on the market that all facilitate work on the blockchains they are built on.¹⁵ These virtual tokens are distributed among users exclusively through the internet.¹⁶ The value of cryptocurrencies are determined by market forces created by users seeking to purchase and sell them.¹⁷ Cryptocurrencies are created through a process called “mining,” where computers are used to solve complex mathematical problems to earn these virtual coins.¹⁸ Cryptocurrencies can also be purchased from cryptocurrency exchanges.¹⁹ There are many advantages and disadvantages of cryptocurrencies that stem from the currency’s unique features, which has created an attractive, yet risky reputation for the currency in the eyes of new users and investors.²⁰

b. BRIEF HISTORY OF BITCOIN AND CRYPTOCURRENCIES

Bitcoin has existed since 2009, and the technology platform it is built on dates back even further.²¹ Even though Bitcoin was the first established cryptocurrency, there were previous

¹³ Jake Frankenfield, *Cryptocurrency Explained With Pros and Cons for Investment*, INVESTOPEDIA (Feb. 4, 2023), <https://www.investopedia.com/terms/c/cryptocurrency.asp>.

¹⁴ *What is Cryptocurrency? A beginner’s guide to digital currency*, COINTELEGRAPH, <https://cointelegraph.com/blockchain-for-beginners/what-is-a-cryptocurrency-a-beginners-guide-to-digital-money>.

¹⁵ Frankenfield, *supra* note 13.

¹⁶ Kate Ashford, *What Is Cryptocurrency*, FORBES (Feb. 16, 2023), <https://www.forbes.com/advisor/investing/cryptocurrency/what-is-cryptocurrency/>.

¹⁷ *What is Cryptocurrency? A beginner’s guide to digital currency*, *supra* note 14.

¹⁸ *Id.*

¹⁹ Frankenfield, *supra* note 13.

²⁰ Frankenfield, *supra* note 13.

²¹ Bernard Marr, *A Short History of Bitcoin and Crypto Currency Everyone Should Read*, FORBES (Dec. 6, 2017), <https://www.forbes.com/sites/bernardmarr/2017/12/06/a-short-history-of-bitcoin-and-crypto-currency-everyone-should-read/?sh=5c58811c3f27>.

attempts that were never fully developed.²² Units of cryptocurrency were traded for the first time in 2010.²³ As bitcoin increased in popularity, alternative and competing cryptocurrencies emerged.²⁴ There are currently more than 1,000 cryptocurrencies in circulation, including Bitcoin and Ether.²⁵ Bitcoin has become the most well-known cryptocurrency in the world, inspiring the development of other forms of cryptocurrencies.²⁶

c. KEY CHARACTERISTICS OF BITCOIN LEADING TO ISSUES

Bitcoin's decentralized nature and pseudo-anonymity has driven its rise to popularity.²⁷ The decentralized design of bitcoin stemmed from its creator's distrust in financial institutions which oversee every online transaction.²⁸ Bitcoin has many safeguards in place to ensure the decentralized nature of the currency.²⁹ Since Bitcoin acts as a form of payment outside of the control of any entity, there is no need for third-party involvement in financial transactions.³⁰ Every transaction is initiated with the information of the transaction being sent to the "bitcoin network."³¹ The bitcoin network is a compilation of every computer that uses the same communication network in managing bitcoin.³² The transaction is then verified by the network, which makes it effectively permanent.³³ Every transaction is available to any member of the

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jake Frankenfield, *What is Bitcoin? How to Mine, Buy, and Use It*, INVESTOPEDIA (Oct. 14, 2022), <https://www.investopedia.com/terms/b/bitcoin.asp>.

²⁷ Carmine DiPiero, Note, *Deciphering Cryptocurrency: Shining a Light on the Deep Dark Web*, 2017 Univ. Ill. L. Rev. 1267, 1270 (2017).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Frankenfield, *supra* note 26.

³¹ Nicholas Galunic, *The (Private) Key to Unlocking Bitcoin Legal Issues*, Law360, Feb. 19, 2015, at 8.

³² *Id.*

³³ *Id.*

network through a ledger containing a collection of recorded transactions, called “blockchain.”³⁴ Due to the publicly available nature of blockchain and the candid transactional oversight, every user of bitcoin can oversee every transaction, completely decentralizing the currency.³⁵ Additionally, every user participating in the network has the ability to send and receive bitcoin using “addresses” which are not connected with any person or entity, giving rise to its pseudo-anonymity.³⁶ Although these characteristics gave rise to Bitcoin’s popularity, the digital asset provides criminals the opportunity to hide behind private and anonymous transactions as the market for cryptocurrencies grows.³⁷

d. RISKS OF THE DIGITAL ASSETS MARKET

The lack of regulation over this flourishing industry has created an opening for widespread fraud.³⁸ Given the pseudo-anonymity of transactions and lack of market regulation, the industry quickly became a lucrative market for criminal activity.³⁹ These characteristics have led to grave implications for the market’s integrity and for consumer protection. Market integrity issues flow back to 2013 when Bitcoin’s transactional pseudo-anonymity made huge waves as the currency for the dark web market, Silk Road, which hosted illegal drug transactions, money laundering activities, and other illegal and unethical transactions.⁴⁰ The Securities Exchange Commission (“SEC”) became weary that the lack of regulation in the market could lead to manipulative

³⁴ DiPiero, *supra* note 27.

³⁵ *Id.*

³⁶ *Id.* at 1271.

³⁷ Seshi Kethineni & Ying Cao, *The Rise in Popularity of Cryptocurrency and Associated Criminal Activity*, 30 SAGE J. 1.

³⁸ *Id.*

³⁹ Marr, *supra* note 21.

⁴⁰ Jake Frankenfield, *Silk Road (Website)*, INVESTOPEDIA (July 26, 2011), <https://www.investopedia.com/terms/s/silk-road.asp>.

behaviors such as scams or Ponzi schemes disguised as legitimate investments.⁴¹ Other manipulative behaviors within the market emerged, posing threats to consumer protection in the market. Such manipulative behaviors include the dissemination of false or misleading market information, pump and dump schemes, rug pull schemes, and stop hunting, creating a high potential for exploitation of market participants.⁴² Additionally, tax evasion has become an increasing issue in the industry since the lack of regulatory and taxation framework of cryptocurrencies has led to unreported taxes and a dramatic increase in the tax gap.⁴³ These illegal uses of cryptocurrencies justify the need for stronger legal frameworks so regulators can effectively detect and prevent harmful activities.⁴⁴ Additionally, the most widely traded digital assets are considered commodities, largely being purchased and sold on platforms that are not subject to any federal regulation.⁴⁵

Despite the onslaught of criminal implications of digital assets, there are plenty of other risks in investing in cryptocurrencies, as well. Prices of digital assets have shown to be extremely volatile.⁴⁶ This is largely due to the fact that nothing is backing up the value of cryptocurrencies.⁴⁷ It has no government authorities backing it, nor is there a system of intermediary banks to promote its use.⁴⁸ The market value for cryptocurrencies is based on speculative interest—finding value in its restricted demand and supply.⁴⁹ For example, the rise

⁴¹ Marr, *supra* note 21.

⁴² *Market Integrity Considerations for Digital Assets*, DELOITTE, Dec. 2021, at 3.

⁴³ See Laura Davison & Bloomberg, *The IRS says it has a \$ 1 trillion tax cheat problem*, FORTUNE (Apr. 13, 2021), <https://fortune.com/2021/04/13/tax-evasion-avoidance-irs-us-cryptocurrency-offshore-illegal-income-underreporting-taxes-chuck-rettig/>.

⁴⁴ Lindsay Sain Jones, *Beyond the Hype: A Practical Approach to CryptoReg*, 25 Va. J.L. & Tech. 175, 195 (2022).

⁴⁵ Stabenow & Boozman, *supra* note 7.

⁴⁶ *Id.*

⁴⁷ Nicole Lapin, *Explaining Crypto's Volatility*, FORBES (Dec. 23, 2021), <https://www.forbes.com/sites/nicolelapin/2021/12/23/explaining-cryptos-volatility/?sh=38517eab7b54>.

⁴⁸ John P. Kelleher, *Why do Bitcoins Have Value?*, INVESTOPEDIA (March 15, 2022), <https://www.investopedia.com/ask/answers/100314/why-do-bitcoins-have-value.asp>.

⁴⁹ *Id.*

and fall of the price of Bitcoin is based on investor speculation.⁵⁰ As a result, violent swings in the price of the cryptocurrency can unfold in one day.⁵¹ There has been a recent onslaught of bankruptcy cases in the crypto sphere. In early 2022, the industry reached a peak, with bitcoin reaching record-high prices, leading investors to make what crypto critics saw as, “irrational amounts of money.”⁵² As the Federal Reserve began to raise interest rates, investors predicted an even greater rise in bitcoin’s value.⁵³ Instead, bitcoin’s value plummeted, deeming this time span a “crypto winter.”⁵⁴ Crypto winters are impossible to predict and they affect a large majority of cryptocurrencies.⁵⁵ In May 2022, during this particular crypto winter as the overall market was experiencing a major crash, one of the most popular crypto coins in the world, Luna, suffered a total collapse, losing 99.9% of its value.⁵⁶ As a result, in July 2022, Voyager Digital and Celsius Network, two major crypto trading platforms, filed for bankruptcy, as well.⁵⁷ Then in November 2022, FTX, once the world’s third-largest centralized cryptocurrency exchange, filed for bankruptcy.⁵⁸ Following, another crypto lender, BlockFi, filed for bankruptcy, as well.⁵⁹ Specifically following the FTX collapse, the SEC has been attempting to make a greater

⁵⁰ Hannah Smith, *Bitcoin Crash: What’s Behind Crypto Collapse*, THE TIMES: MONEY MENTOR, (Nov. 14, 2022), <https://www.thetimes.co.uk/money-mentor/article/is-bitcoin-crash-coming/#Why-is-bitcoin-so-volatile?>.

⁵¹ *Id.*

⁵² David Gura, *2022 Was the Year Crypto Came Crashing Down to Earth*, NPR (Dec. 29, 2022), <https://www.npr.org/2022/12/29/1145297807/crypto-crash-ftx-cryptocurrency-bitcoin>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Eric Rosenberg, *Crypto Winter*, INVESTOPEDIA (Aug. 31, 2022), <https://www.investopedia.com/crypto-winter-5496605>.

⁵⁶ Sakshat Kolhatkar, *Why Did Terra Luna Crash? Understand How UST and Luna Lost All Value*, BQPRIME (Oct. 25, 2022), <https://www.bqprime.com/crypto/pfx-why-did-terra-luna-crash-understand-how-ust-and-luna-lost-all-value>.

⁵⁷ Eric Rosenberg, *What Happens When A Crypto Exchange Goes Bankrupt? (Website)*, INVESTOPEDIA (Dec. 21, 2022), <https://www.investopedia.com/crypto-bankruptcy-affecting-investors-6274367>.

⁵⁸ Timothy Smith, *FTX: An Overview of the Exchange and Its Collapse (Website)*, INVESTOPEDIA (Jan. 5, 2023), <https://www.investopedia.com/ftx-exchange-5200842>; Rosenberg, *supra* note 55.

⁵⁹ Dietrich Knauth, *Factbox: Crypto Companies Crash Into Bankruptcy*, REUTERS (Dec. 1, 2022), <https://www.reuters.com/technology/crypto-companies-crash-into-bankruptcy-2022-12-01/>.

push in its enforcement in the crypto industry.⁶⁰ The SEC has since begun investigations focusing on crypto exchanges.⁶¹ These bankruptcy cases have revealed larger, systematic issues in the industry, exposing crypto firms that had poor risk management and had engaged in fraudulent activity.⁶²

Due to the criminal implications of the market and the inherent volatility of digital assets, this market has led to a lack of transparency and fairness that United States consumers typically expect from our financial systems.⁶³ If proper regulation and oversight are not established, investors will remain vulnerable to fraud and manipulation implications, and market participants will lack regulatory certainty necessary to grow.⁶⁴ Increasing regulatory challenges have been even further exacerbated by the growing public awareness of and popularity of cryptos.⁶⁵

e. PRIOR REGULATORY ATTEMPTS

Over the years, there have been few large-scale attempts toward the enforcement of the industry.⁶⁶ Enforcement of cryptocurrencies has been largely attacked through the judicial system for individual cases of criminal conduct.⁶⁷ Although, as of recently, with the rise and fall of cryptocurrencies and the greater impact digital assets have on our economy, there has been a greater push for concrete and solidified regulation of digital assets.⁶⁸ For example, the CFTC

⁶⁰ Dave Michaels, *SEC Faces Calls to Boost Crypto-Exchange Enforcement After FTX Collapse*, WALL STREET JOURNAL (Dec. 8, 2022), <https://www.wsj.com/articles/sec-faces-calls-to-boost-crypto-exchange-enforcement-after-ftx-collapse-11670474070>.

⁶¹ *Id.*

⁶² Gura, *supra* note 52.

⁶³ Stabenow & Boozman, *supra* note 7.

⁶⁴ *Id.*

⁶⁵ Susannah Hammond & Todd Ehret, *Cryptos on the rise 2022*, THOMSON REUTERS, <https://www.thomsonreuters.com/en/reports/cryptos-on-the-rise-2022.html>.

⁶⁶ *See id.*

⁶⁷ Skye Witley, *Crypto Hack Lawsuits Rise as Theft Victims Try Untested Claims*, BLOOMBERG LAW (Jan. 3, 2023) <https://news.bloomberglaw.com/privacy-and-data-security/crypto-hack-lawsuits-rise-as-theft-victims-try-untested-claims>.

⁶⁸ *Id.*

imposed its first “pump and dump” enforcement action in the digital asset market in 2021.⁶⁹

Regulators have begun to develop guidance around properly governing risks that stem from digital assets and its market participants.⁷⁰ For example, the Digital Asset Market Structure and Investor Protection Act of 2021 was implemented to provide legal and regulatory certainty for digital assets and provide fundamental investor protections.⁷¹

In addition to developing a regulatory framework for the industry, regulators are actively involved in enforcing regulatory guidelines.⁷² The SEC is insistent on pursuing misconduct within the crypto asset sphere.⁷³ Additionally, the CFTC has expressed its intentions in aggressively policing the cryptocurrency markets.⁷⁴ Many countries have outright banned cryptocurrencies altogether, while some countries have developed forms of regulation.⁷⁵ Only one country has declared it legal tender.⁷⁶ Various regulatory bodies around the world are focusing on shaping the regulatory environment for digital assets.⁷⁷ Consistent and reliable regulation, however, has proven to be far from easy.⁷⁸

While the SEC views cryptos as securities, the CFTC sees them as commodities, the Financial Crimes Enforcement Network (“FinCEN”) views them as a form of money, and the International Revenue Services (“IRS”) determines them to be property.⁷⁹ Currently, both the CFTC and SEC assert their jurisdiction over digital assets; however, disagreement rests in the

⁶⁹ Market Integrity Considerations for Digital Assets, *supra* note 42.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Pableen Bajpai, *Countries Where Bitcoin Is Legal and Illegal (Website)*, INVESTOPEDIA (Dec. 14, 2021), <https://www.investopedia.com/articles/forex/041515/countries-where-bitcoin-legal-illegal.asp>.

⁷⁶ *Id.*

⁷⁷ Market Integrity Considerations for Digital Assets, *supra* note 42.

⁷⁸ Jones, *supra* note 44, at 182.

⁷⁹ *Id.*

question of whether commodities include all digital assets—subjecting them to the CFTC’s regulation—or whether securities include all digital assets—subjecting them to the SEC’s regulation.⁸⁰

Additionally, there are some concerns that new regulation of the market could further plummet the price of cryptocurrencies.⁸¹ Although, studies examining the effects of regulation on trading activity of cryptocurrencies have found little evidence that regulatory announcements generate negative effects on cryptocurrency exchanges.⁸² The question of which federal regulator will be primarily responsible for regulating the use of cryptos and their related activities remains largely unresolved.⁸³

i. REGULATION BY THE SEC

The SEC is responsible for maintaining the orderly function of the securities markets and protecting investors within the markets, as well.⁸⁴ The SEC has made clear that it intends to be the primary federal regulator of the United States crypto market.⁸⁵ In declaring its jurisdiction over the market, the SEC has indicated that it believes most tokens are securities that should be subjected to registration and regulation under the SEC.⁸⁶ The SEC generally has the authority to

⁸⁰ Cheryl L. Isaac, et al., *CFTC AND SEC PERSPECTIVES ON CRYPTOCURRENCY AND DIGITAL ASSETS—VOLUME I: A JURISDICTIONAL OVERVIEW*, K&L GATES (May 6, 2022), <https://www.klgates.com/CFTC-and-SEC-Perspectives-on-Cryptocurrency-and-Digital-Assets-Volume-I-A-Jurisdictional-Overview-5-6-2022>.

⁸¹ Andrew Griffin, *Bitcoin Price Recovers After Crash, but Threat of New Regulation Looms Over Cryptocurrencies*, THE INDEPENDENT (Jan. 18, 2018) (explaining that new international regulatory announcements could "shove the price [of bitcoin] down even further").

⁸² Brian D. Feinstein & Kevin Werbach, *The Impact of Cryptocurrency Regulation on Trading Markets*, 7 J. FIN. REG. 48, 52 (2021).

⁸³ Isaac, et al., *supra* note 80.

⁸⁴ James Chen, *Securities and Exchange Commission (SEC) Defined, How It Works*, INVESTOPEDIA (April 27, 2022) <https://www.investopedia.com/terms/s/sec.asp>.

⁸⁵ Mark Bini & Joanna Howe, *Here’s Why the SEC Will Likely Be the Primary Cryptocurrency Cop*, BLOOMBERG LAW (Oct. 17, 2022) <https://news.bloomberglaw.com/us-law-week/is-the-sec-the-new-crypto-sheriff-in-town>.

⁸⁶ *Id.*

oversee “securities.”⁸⁷ Therefore, the SEC asserts its jurisdiction to regulate cryptocurrencies that are deemed to be securities.⁸⁸ To determine whether a digital asset is considered a “security,” the SEC relies on the “Howey Test.”⁸⁹ The Howey Test is a four-pronged test that helps to clarify whether a transaction is classified as a security.⁹⁰ Each of the following four elements must be met in order for the transaction to be considered a security. There must be (1) an investment of money (2) in a common enterprise (3) with expectations of a profit (4) to be derived from the efforts of others.⁹¹ The SEC intends to aggressively police crypto tokens and its intermediaries, indicating that the SEC believes most crypto tokens are securities based on the Howey Test.⁹²

There have been significant consequences regarding the SEC’s regulation of cryptocurrencies. First, although the SEC has pioneered its dominance in the regulatory sphere, the SEC has not been a successful measure of regulation as it has failed to keep up as thousands of tokens and digital currencies have been introduced and new companies and platforms have begun to store and trade them.⁹³ Disappointment in the SEC is rooted in the Commission’s inaction in the proactive use of its authorities to regulate cryptos effectively.⁹⁴ For example, the SEC has persistently refused to engage productively with users and developers of cryptocurrencies, which has caused confusion in regard to the Commission’s approach to regulation.⁹⁵

⁸⁷ Isaac, et al., *supra* note 80.

⁸⁸ *Id.*

⁸⁹ Paul Kim, *The Howey test: A set of rules the determine if an investment is a security*, BUSINESS INSIDER, (May 31, 2022), <https://www.businessinsider.com/personal-finance/howey-test>.

⁹⁰ *Id.*

⁹¹ SEC v. W. J. Howey Co., 328 U.S. 293, 300 (1946).

⁹² Bini & Howe, *supra* note 85.

⁹³ Sheelah Kolhatkar, *The Challenges of Regulating Cryptocurrency*, N.Y. TIMES, (Oct. 6, 2021), <https://www.newyorker.com/business/currency/the-challenges-of-regulating-cryptocurrency>.

⁹⁴ Pierce, *supra* note 1.

⁹⁵ *Id.*

Second, the SEC does not attempt to regulate all forms of cryptocurrency. The SEC has adopted an *ad hoc* approach, determining that *some*, not all, cryptocurrencies are securities.⁹⁶ In the course of determining which cryptos are securities, the SEC has been inconsistent in its application of the Howey Test, finding some cryptocurrency networks to be decentralized when in fact, they were not.⁹⁷ The SEC has been accused of creating red taping in its selective enforcement of bad behavior and deterring innovation.⁹⁸

Third, some of the most widely traded digital assets, such as Bitcoin and Ether, are not considered securities; therefore, they are being bought and sold on platforms without being subjected to federal regulation.⁹⁹

Additionally, if the SEC finds that certain cryptos are regarded as securities, a potential issue regarding broker-dealer registration may arise. The Securities Exchange Act requires that any person “engaged in the business of effecting transactions in securities for the account of others” or “engaged in the business of buying and selling securities for [their] own account” is required to register as a broker or dealer and to join a Self-Regulatory Organization, such as FINRA.¹⁰⁰ Yet, platforms operating crypto exchanges have held the belief that they are not included in the definition of an “exchange” by arguing that either they do not perform common functions of exchanges or that crypto exchanges do not facilitate transactions for the accounts of others, among other arguments.¹⁰¹ In doing so, these crypto platforms circumvent the requirement to

⁹⁶ Jones, *supra* note 44, at 182–83.

⁹⁷ Jones, *supra* note 44, at 181.

⁹⁸ Mark Lurie, *The DCCPA Proposes a Better Way to Regulate Crypto*, SHIPYARD SOFTWARE (Sept. 29, 2022), <https://www.shipyardsoftware.org/post/dccpa-proposal>.

⁹⁹ Stabenow & Boozman, *supra* note 7.

¹⁰⁰ 15 U.S.C. §§ 78c(a)(3)(4)(A), 78c(a)(3)(5)(A) (1934); Mica Miller, *Crypto Exchanges & the SEC’s Proposed Redefinition of an “Exchange”* (June 13, 2022), <https://www.jdsupra.com/legalnews/crypto-exchanges-the-sec-s-proposed-9029987/>.

¹⁰¹ Miller, *supra* note 100.

register as a broker-dealer under the Securities Exchange Act.¹⁰² Without a strong regulatory system in place, cryptocurrencies will remain underregulated, will continue to be a vehicle for fraud, and will continue to put consumers at risk.

ii. REGULATION BY THE CFTC

The regulation of commodities in the United States began in the agricultural realm with grains.¹⁰³ The Commodity Exchange Act of 1936 (CEA) is the statute that currently governs commodities, defining the term broadly to include “all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.”¹⁰⁴ The CFTC regulates the derivative markets, with its primary goal of promoting competitive and efficient markets while protecting “investors against market manipulation, abusive trade practices, and fraud in the commodities markets.”¹⁰⁵ Since the introduction of the Dodd-Frank Act in 2010, the CFTC has expanded its anti-fraud mission by aggressively pursuing wrongdoing around the world.¹⁰⁶ The CFTC first established its intent to assert its jurisdiction over digital assets in 2015, earlier than the SEC, which has only recently stepped into the crypto regulatory scene.¹⁰⁷

There are many implications regarding the CFTC’s authority to regulate the market. First, contrary to the SEC’s ad hoc approach, the CFTC determined that *all* cryptocurrencies are commodities, providing the CFTC with the opportunity to oversee the entire market.¹⁰⁸ Unlike

¹⁰² Miller, *supra* note 100.

¹⁰³ Jones, *supra* note 44, at 210.

¹⁰⁴ *What is a Commodity*, WILLKIE COMPLIANCE, <https://complianceconcourse.willkie.com/resources/cftc-overview-what-is-a-commodity>; 7 U.S.C. § 1a(9) (2015).

¹⁰⁵ The Investopedia Team, *Commodity Futures Trading Commission (CFTC)*, INVESTOPEDIA (Sept. 26, 2021) <https://www.investopedia.com/terms/c/cftc.asp>.

¹⁰⁶ Press Release, CFTC, Statement of Commissioner Caroline D. Pham on SEC v. Wahi, (July 21, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072122>.

¹⁰⁷ Isaac, et al., *supra* note 80; Jones, *supra* note 44, at 182.

¹⁰⁸ Jones, *supra* note 44, at 183.

the SEC, the CFTC has primary regulatory authority over derivatives transactions which includes swaps, futures, and options.¹⁰⁹ Although, the Dodd-Frank Act assigns the SEC to regulate ““security-based swaps,”” which are derivatives transactions with security values based on cash flows rather than based on a specific asset.¹¹⁰

Second, in 2016, the CFTC established an important position in an enforcement action, stating that “[b]itcoin and other virtual currencies are encompassed in the definition [of commodity] and properly defined as commodities, and are subject as a commodity to the applicable provisions of the [Commodity Exchange] Act and [CFTC] Regulations.”¹¹¹ Since Bitcoin and Ether are the two most popular digital currencies traded via online exchanges, the CFTC has the power to regulate a large portion of the market by defining those cryptocurrencies as commodities.¹¹² Although the CFTC maintains the jurisdictional authority to regulate the most popular virtual currencies as commodities, this does not preclude other agencies, such as the SEC, from exercising regulatory authority over virtual currencies that may function differently than derivative commodities.¹¹³

Further, the CFTC’s current regulatory jurisdiction does not include spot trades within spot markets.¹¹⁴ Spot trading, which occurs in “spot markets,” is the direct purchase or sale of financial instruments and assets such as cryptocurrencies and stocks.¹¹⁵ In spot markets, the

¹⁰⁹ Isaac, et al., *supra* note 80.

¹¹⁰ Press Release, SEC, Defining Swaps-Related Terms (Feb. 6, 2017), <https://www.sec.gov/opa/press-release-2012-67-related-materials>; Steven Nickolas, *Derivatives vs. Swaps: What’s the Difference?*, (Sept. 29, 2022) <https://www.investopedia.com/ask/answers/060215/what-difference-between-derivatives-and-swaps.asp>.

¹¹¹ BFXNA, Inc. d/b/a BITFINEX, C.F.T.C. No. 16–19 (2016).

¹¹² Nathan Reiff, *Bitcoin vs. Ethereum: What’s the Difference?*, INVESTOPEDIA (Oct. 4, 2022), <https://www.investopedia.com/articles/investing/031416/bitcoin-vs-ethereum-driven-different-purposes.asp>.

¹¹³ Isaac, et al., *supra* note 80.

¹¹⁴ Scott Diamond & Tyler Cobb, *New Bill Proposes CFTC Should Regulate Spot Digital Currency Markets*, (Aug. 10, 2022) <https://www.ballardspahr.com/Insights/Alerts-and-Articles/2022/08/New-Bill-Proposes-CFTC-Should-Regulate-Spot-Digital-Currency-Markets>; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(n) (2022).

¹¹⁵ *What Is a Spot Market and How to do Spot Trading?*, BINANCE ACADEMY (Nov. 11, 2022), <https://academy.binance.com/en/articles/what-is-a-spot-market-and-how-to-do-spot-trading>.

CFTC only has the authority to take enforcement action against fraud and market manipulation, lacking the ability to oversee virtual currency transactions or exchanges.¹¹⁶ As a result, the CFTC’s ability to prevent fraud and manipulation in cryptocurrency markets is hindered since the Commission currently does not have full regulatory authority over the spot markets.¹¹⁷

III. ANALYSIS OF THE LEGISLATION

The Digital Commodities Consumer Protection Act of 2022 is an Amendment to the Commodity Exchange Act (CEA), proposed to provide the CFTC jurisdiction to oversee the spot digital commodity market, and for other purposes.¹¹⁸ This bill is the latest attempt by Congress to oversee a currently decentralized industry that has experienced a dramatic collapse recently.¹¹⁹ In comparison to other recent proposals, this bill goes further in creating a comprehensive managerial scheme for digital asset platforms, and it places a greater focus on market integrity and consumer protection.¹²⁰ It is a bi-partisan attempt at establishing a comprehensive regulatory framework for digital assets.¹²¹ This legislation would help to settle the ongoing debate between the SEC and the CFTC over which would have the primary regulatory jurisdiction over cryptocurrency.¹²² “In terms of jurisdiction, the Bill would amend Section 2(c)(2) of the Commodity Exchange Act (CEA) to include a new paragraph (F) granting the CFTC exclusive jurisdiction over any account, agreement, contract, or transaction involving a ‘digital commodity trade.’”¹²³ However, this exclusive jurisdiction would not

¹¹⁶ Jones, *supra* note 44, at 183; Isaac, et al., *supra* note 80.

¹¹⁷ Jones, *supra* note 44, at 183.

¹¹⁸ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 3(i) (2022).

¹¹⁹ Behar, et al., *supra* note 3.

¹²⁰ *Id.*

¹²¹ *The Digital Commodities Consumer Protection Act—A Bullet Point Summary*, AKIN GUMP SRAUSS HAUER & FELD LLP (Aug. 9, 2022).

¹²² *Id.*

¹²³ Behar, et al., *supra* note 3.

extend to any digital commodity transaction by a merchant or consumer who uses a digital commodity solely for the purchase or sale of a good or service.¹²⁴ The bill authorizes the CFTC to have jurisdiction in regulating cryptocurrencies that fall under the definition of a “digital commodity—‘a fungible digital form of personal property that can be possessed and transferred person-to-person without necessary reliance on an intermediary’”—rather than a “security.”¹²⁵ The bill creates a new digital commodity asset class that excludes securities,—and therefore the SEC—furthering the CFTC’s jurisdiction to underlying commodities in the digital asset space.¹²⁶ The CFTC’s current jurisdiction over spot commodity markets is limited to general anti-fraud and anti-manipulation authority.¹²⁷

a. PROS OF THE LEGISLATION

There are a multitude of potential benefits of the proposed legislation that will help foster one regulatory body and help diminish market manipulation, further protect consumers, and enforce a more centralized future for cryptocurrencies. First, the statute explicitly prohibits fraud, deception, and manipulation, which has been an ongoing problem for cryptocurrencies since the emergence of digital assets.¹²⁸ In doing so, the legislation requires that “a digital commodity platform shall establish governance arrangements that are transparent to fulfill public interest requirements.”¹²⁹ The legislation requires digital commodity platforms to adhere to advertising standards and disclose information about digital commodities and their risks, bringing greater transparency and accountability to the marketplace, which will help prevent

¹²⁴ *Id.*

¹²⁵ The Digital Commodities Consumer Protection Act—A Bullet Point Summary, *supra* note 121; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(18)(A) (2022).

¹²⁶ The Digital Commodities Consumer Protection Act—A Bullet Point Summary, *supra* note 121.

¹²⁷ Behar, et al., *supra* note 3.

¹²⁸ Behar, et al., *supra* note 3; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(e) (2022).

¹²⁹ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(h) (2022).

fraud and misrepresentation, and increase consumer protection.¹³⁰ Second, the bill was introduced by senators representing both parties, reaching an idea that all parties support.¹³¹ Democratic Senator Debbie Stabenow, and Republican Senator John Boozman, have pioneered their parties to formulate this bill to oversee the multibillion-dollar industry.¹³² The senators have aggressively moved the timeline for the bill, and it seems to be an attempt to move oversight in the space quickly to the CFTC after recent enforcement activity by the SEC.¹³³ Third, the bill recognizes that there are specific laws and regulations for virtual currency that vary state-to-state, and it accounts for the potential overlap of laws.¹³⁴ The proposed legislation would preempt state laws, favoring the federal Act concerning the registration requirements for money transmission, virtual currency, and commodity brokers.¹³⁵ Fourth, the bill includes language designed to enhance consumer protection.¹³⁶ The bill explicitly provides conduct standards for business, explaining that a “broker shall conform with such business conduct standards as may be prescribed by the Commission by rule or regulation that relate to fraud, manipulation, and other abusive practices involving digital commodity trades.”¹³⁷ Since 2014, the CFTC has brought almost sixty enforcement cases related to digital assets.¹³⁸ Without

¹³⁰ Deanna R. Reitman, et al., *How the Digital Commodities Consumer Protection Act of 2022 would broaden the CFTC’s authority to regulate cryptocurrencies and other digital assets*, DLA PIPER (Aug. 17, 2022) <https://www.dlapiper.com/en/us/insights/publications/2022/08/how-the-digital-commodities-consumer-protection-act-of-2022/>; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(h) (2022).

¹³¹ Edmund P. Daley, Article, *Senate Bill Defines Bitcoin, Ether as Digital Commodities to be Regulated By CFTC*, 12 Nat. L. Rev. 216 (2022).

¹³² Hussein & Sweet, *supra* note 11.

¹³³ Budofsky, et al., *supra* note 5.

¹³⁴ *Cryptocurrency Laws and Regulations by State*, BLOOMBERG LAW (May 26, 2022), <https://pro.bloomberglaw.com/brief/cryptocurrency-laws-and-regulations-by-state/>.

¹³⁵ Diamond & Cobb, *supra* note 114; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(n) (2022).

¹³⁶ Diamond & Cobb, *supra* note 114; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(g) (2022).

¹³⁷ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(b)(3)(C)(i) (2022).

¹³⁸ *The Digital Commodities Consumer Protection Act: Hearing on S.4760 Before the S. Comm. on Agric., Nutrition, and Forestry*, 117th Cong. (2022) (statement of Rostin Behnam, Chairman, Commodity Futures Trading Commission).

complete insight into the digital commodity asset market, the CFTC has leaned primarily on tips and complaints from the public to identify fraud and manipulation, including submissions to its Whistleblower Program.¹³⁹ In addition to the bill's explicit regulation of fraud in the market, the bill also subjects digital commodity trading to the Bank Secrecy Act of 1970 and its anti-money laundering protections.¹⁴⁰ The Bank Secrecy Act requires U.S. financial institutions to assist government agencies in the detection and prevention of money laundering by requiring financial institutions to keep records and reports of cash purchases, cash transactions exceeding \$10,000, and suspicious activity that might indicate money laundering, tax evasion, or other criminal activities.¹⁴¹ Fifth, the bill will bring greater transparency and accountability to the market by requiring digital commodity platforms to adhere to advertising and disclosure standards.¹⁴² By requiring participants to register with the CFTC in a manner like existing commodity businesses, this bill would revolutionize the digital asset market.¹⁴³ In order to remain registered, digital commodity platforms will be required to comply with certain "core principles," which include maintaining records of all business-related activities, maintaining responsibility of the platform, and establishing risk analysis programs.¹⁴⁴ Additionally, by amending the CEA to provide the CFTC with the jurisdiction to oversee the spot digital commodity market,¹⁴⁵ the cryptocurrency spot markets will be subject to comply with the core principles, as well, enabling the CFTC to adequately prevent fraud and manipulation.¹⁴⁶ Finally, the DCCPA would facilitate a more

¹³⁹ *Id.*

¹⁴⁰ Diamond & Cobb, *supra* note 114; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(n) (2022); Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5(g)(1) (2022).

¹⁴¹ *The Bank Secrecy Act*, FINANCIAL CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/resources/statutes-and-regulations/bank-secrecy-act>.

¹⁴² Reitman, et al., *supra* note 130.

¹⁴³ Diamond & Cobb, *supra* note 114; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(a)(1) (2022).

¹⁴⁴ Behar, et al., *supra* note 3.

¹⁴⁵ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. (2022).

¹⁴⁶ Jones, *supra* note 44, at 229.

centralized framework for the cryptocurrency market. The bill would eliminate the creator of bitcoin's intention of creating the platform with the lack of third-party financial institutions to moderate transactions, as the legislation will establish digital commodity platforms as financial institutions for purposes of the Bank Secrecy Act.¹⁴⁷ In doing so, the proposed legislation will close regulatory gaps between state and federal regulation of cryptocurrencies.¹⁴⁸

b. CONS OF THE LEGISLATION

Even though the DCCPA is crafted in a bipartisan manner to centralize the cryptocurrency market and to prevent further fraud and market manipulation, there remains several ambiguities and potential interpretive quagmires.¹⁴⁹ One issue is whether the CFTC has the resources and the availability to handle such an expansive and volatile market. The CFTC is far smaller than its competing regulatory body, the SEC, having only about a sixth of its budget.¹⁵⁰ Additionally, the enactment of the Dodd-Frank Act in 2010, which was aimed at promoting the financial system's market integrity, granted partial jurisdiction to the CFTC over over-the-counter derivatives.¹⁵¹ This gave the CFTC massive new jurisdiction and responsibility over derivatives, but it did not provide a means to fund the CFTC to do so.¹⁵² However, this bill, in granting the CFTC greater jurisdiction, aims to solve this issue through its creation of a funding instrument by imposing a fee on digital commodity platforms when they register with

¹⁴⁷ Daley, *supra* note 131.

¹⁴⁸ Reitman, et al., *supra* note 130.

¹⁴⁹ Behar, et al., *supra* note 3.

¹⁵⁰ Tory Newmyer, *Crypto industry scores a big win under long-anticipated Senate Bill*, WASHINGTON POST (June 7, 2022), <https://www.washingtonpost.com/business/2022/06/07/crypto-lummis-gillibrand-regulation/>.

¹⁵¹ HSBC, *Dodd-Frank Act*, <https://www.gbm.hsbc.com/financial-regulation/dodd-frank> (last updated Oct. 7 2021).

¹⁵² Cf. CFTC, *Dodd-Frank Act*, <https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm> (explaining that after the 2008 financial crisis, the Dodd-Frank Act increased the CFTC's regulatory authority to oversee more than \$400 trillion swaps market.).

the CFTC.¹⁵³ The registration fees would be determined based on the volume of business of the digital commodity platform.¹⁵⁴

Second, the proposed legislation does not resolve the issue of how jurisdiction over digital assets would be allocated between the CFTC and the SEC since securities are not included within the jurisdiction of the CFTC.¹⁵⁵ The biggest discrepancy with this issue stems from the definition of a “digital commodity.”¹⁵⁶ The bill’s definition may be too narrow and vague to draw a clear dividing line between the jurisdiction of CFTC and the SEC.¹⁵⁷ The term “digital commodity” in the DCCPA explicitly includes “property commonly known as cryptocurrency or virtual currency, such as Bitcoin and Ether.”¹⁵⁸ However, the CFTC’s exclusive jurisdiction would not extend to digital commodity transactions by a consumer who uses the virtual currency solely for purchases and sales of goods or services.¹⁵⁹ Other financial agencies have a role in regulating digital assets that are not commodities, but function more like securities or forms of payment.¹⁶⁰ Also, the legislation explicitly excludes securities.¹⁶¹ By excluding securities, the definition of “digital commodity” within the Act fails to clarify when a digital asset would constitute a security.¹⁶²

¹⁵³ The Digital Commodities Consumer Protection Act—A Bullet Point Summary, *supra* note 121.

¹⁵⁴ Behar, et al., *supra* note 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Blockchain Association Calls for Revisions to the Digital Commodities Consumer Protection Act (DCCPA)*, BLOCKCHAIN ASSOCIATION (Sept. 15, 2022), <https://theblockchainassociation.org/blockchain-association-calls-for-revisions-to-the-digital-commodities-consumer-protection-act-dccpa/>.

¹⁵⁸ *Id.*; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(18)(B) (2022).

¹⁵⁹ Behar, et al., *supra* note 3; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(18)(C)(ii) (2022).

¹⁶⁰ Reitman, et al., *supra* note 130.

¹⁶¹ Behar, et al., *supra* note 3; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(18)(C)(ii) (2022).

¹⁶² Reitman, et al., *supra* note 130.

Therefore, the legislation leaves it to the discretion of the SEC and its application of the Howey Test to determine this issue.¹⁶³ This exclusion may take away a portion of the market for the CFTC to have jurisdiction over since more of this asset class could be classified as securities.¹⁶⁴ The legislation is arriving at a moment where these two regulators are in competition over the right approach to regulating the digital assets markets, with the CFTC's growing frustration towards the SEC's propensity for "regulation by enforcement" rather than joint rulemaking.¹⁶⁵

Third, the proposed bill does not address the status of decentralized finance (also known as DeFi) transactions.¹⁶⁶ DeFi uses emerging technology to remove centralized institutional from financial transactions.¹⁶⁷ As Bitcoin carries qualities of decentralization, DeFi expands on those qualities to offer additional capabilities to alternative cryptocurrencies other than Bitcoin.¹⁶⁸ By utilizing traditional definitions from prior legislation, the bill sidesteps around the question of whether decentralized platforms and transactions are within its scope and jurisdiction.¹⁶⁹ This could lead to the interpretation that the bill imposes a ban on DeFi, resulting from the bill implementing rules applicable to centralized intermediaries to decentralized protocols.¹⁷⁰ As the Head of Policy of the Blockchain Association, Jake

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Behar, et al., *supra* note 3.

¹⁶⁶ *Id.*

¹⁶⁷ Rakesh Sharma, *What Is Decentralized Finance (DeFi) and How Does It Work?*, INVESTOPEDIA (Sept. 21, 2022) <https://www.investopedia.com/decentralized-finance-defi-5113835>.

¹⁶⁸ *What is DeFi? A beginner's guide to decentralized finance*, COINTELEGRAPH, <https://cointelegraph.com/defi-101/defi-a-comprehensive-guide-to-decentralized-finance>.

¹⁶⁹ Behar, et al., *supra* note 3.

¹⁷⁰ Blockchain Association Calls for Revisions to the Digital Commodities Consumer Protection Act (DCCPA), *supra* note 157.

Chervinsky, said in respect to the bill and its implications for DeFi, “regulation should be tailored at risk, but the bill isn’t tailored to DeFi at all.”¹⁷¹

Fourth, the definitions for “digital commodity platform” can be seen as too broad.¹⁷² Digital commodities platforms include market participants such as digital commodities brokers, custodians, dealers, and trading facilities, and “associated persons” of brokers and dealers, who would all be required to register with the CFTC.¹⁷³ The bill may impose onerous requirements on some parties that are not justified by the minimal degree of risk they pose.¹⁷⁴ For example, some digital commodity custodians may already be overseen by other prudential regulators, with this bill imposing even stricter oversight that is not necessary or helpful.¹⁷⁵

Fifth, the bill fails to clearly address whether non-fungible tokens (NFTs) are within its scope, which are tokens that are closely connected with Bitcoin and Ether.¹⁷⁶ NFTs are digital assets that come in unique forms, which are bought and sold online, sharing the same kind of programming as cryptocurrencies like Bitcoin.¹⁷⁷ The definition of “digital commodity” is limited to “fungible digital forms of personal property,” which on the surface allude to the idea that “non-fungible tokens” are excluded.¹⁷⁸ The ambiguities resulting from language excluded from the bill may create many unknown implications if the bill is enacted.

¹⁷¹ Jake Chervinsky (@jchervinsky), TWITTER (Sep. 15, 2022, 12:35 PM), <https://twitter.com/jchervinsky/status/1570451273585135618>.

¹⁷² Blockchain Association Calls for Revisions to the Digital Commodities Consumer Protection Act (DCCPA), *supra* note 157.

¹⁷³ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(22)(A)(i-iv) (2022); Proposed Stabenow-Boozman Bill Falls Short in Bringing Regulatory Certainty to Digital Assets Space, *supra* note 176.

¹⁷⁴ Blockchain Association Calls for Revisions to the Digital Commodities Consumer Protection Act (DCCPA), *supra* note 157.

¹⁷⁵ Jake Chervinsky (@jchervinsky), TWITTER (Sep. 15, 2022, 12:35 PM), <https://twitter.com/jchervinsky/status/1570451276718084098>.

¹⁷⁶ *Proposed Stabenow-Boozman Bill Falls Short in Bringing Regulatory Certainty to Digital Assets Space*, JONES DAY (Aug. 2022), <https://www.jonesday.com/en/insights/2022/08/proposed-stabenowboozman-bill-falls-short>.

¹⁷⁷ Robyn Conti & John Schmidt, *What Is An NFT? Non-Fungible Tokens Explained*, FORBES (April 8, 2022) <https://www.forbes.com/advisor/investing/cryptocurrency/nft-non-fungible-token/>.

¹⁷⁸ Proposed Stabenow-Boozman Bill Falls Short in Bringing Regulatory Certainty to Digital Assets Space, *supra* note 176.

IV. BILL AMENDMENTS

There are a few amendments needed in order to make the legislation sound and to make the regulation of cryptocurrencies more bulletproof. The language of the bill may lead to ambiguities in the digital asset market.

a. PROVISION DELEGATING AUTHORITY OVER DEFI TRANSACTIONS AND NFTS

First, the bill needs to amend for its failure to recognize many key concepts in the cryptocurrency sphere and how they will be impacted by CFTC regulation (i.e., NFTs and DeFi transactions). In excluding these concepts from the language of the bill, there is plenty of ambiguity in their regulation. The inclusion of a provision that expressly delegates the regulatory authority of DeFi transactions and NFTs to another regulatory body, the DCCPA will create much needed clarity in regard to DeFi and NFTs, while also relieving itself of complications in overseeing these issues.

Given that the SEC is the government oversight agency for regulating securities markets, centralizing transactions and exchanges,¹⁷⁹ it may be wise for the bill to grant jurisdiction to the SEC for regulatory authority over decentralized transactions. By expanding the definition of an “exchange” to require all platforms with a certain threshold transaction volume to register as an exchange, the SEC may be most suitable to encapsulate DeFi projects under their authority.¹⁸⁰ To make it explicit that the CFTC should not have regulatory authority over DeFi transactions, the DCCPA should include language as follows:

¹⁷⁹ Chen, *supra* note 84.

¹⁸⁰ Prashant Jha, *DeFi Regulations: Where US Regulators Should Draw the Line*, COINTELEGRAPH (Sept. 6, 2022) <https://cointelegraph.com/news/defi-regulations-where-us-regulators-should-draw-the-line>.

SEC. 3. COMMISSION JURISDICTION OVER DIGITAL COMMODITY TRADES.

Section 2 of the Commodity Exchange Act (7 U.S.C. 2) is amended—

(2) in subsection (c)(2), by adding at the end the following:

“(F) COMMISSION JURISDICTION OVER DIGITAL COMMODITY TRADES.—

“(i) IN GENERAL.—Except as provided in clause (ii), this Act applies to, and the Commission shall have exclusive jurisdiction over, any account, agreement, contract, or transaction involving a digital commodity trade.

“(ii) EXCEPTION.—Nothing in this Act applies to, and the Commission shall not have jurisdiction over, any digital commodity transaction by a merchant or consumer that uses a digital commodity solely for the purchase or sale of a good or service.

*“(a) the term ‘digital commodity transaction’ excludes a transaction that utilizes peer-to-peer transactions where two parties agree to exchange digital assets for goods or services without third party involvement.”*¹⁸¹

In the case of NFTs, the DOJ and the SEC are the government agencies which have been most aggressively pursuing NFTs.¹⁸² The SEC recently announce its intent to expand its Crypto Assets and Cyber Unit to focus on NFTs.¹⁸³ Given the SEC’s pursuit in regulatory authority over NFTs, and the DCCPA’s lack of express authority over NFTs, the DCCPA should include language as follows to show its explicit rejection in regulating NFTs:

SEC. 2. DEFINITIONS.

(a) In General.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

“(18) DIGITAL COMMODITY.—

“(A) IN GENERAL.—The term ‘digital commodity’ means a fungible digital form of personal property that can be possessed and transferred person-to-person without necessary reliance on an intermediary.

¹⁸¹ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 3(c)(2)(F)(ii) (2022); Sharma, *supra* note 167.

¹⁸² *How to Keep Up With DOJ and SEC Regulation of NFTs*, BLOOMBERGLAW (Nov. 21, 2022) <https://news.bloomberglaw.com/us-law-week/how-to-stay-off-of-the-doj-secs-radar-when-dealing-with-nfts>.

¹⁸³ *Id.*

“(B) INCLUSIONS.—The term ‘digital commodity’ includes property commonly known as cryptocurrency or virtual currency, such as Bitcoin and Ether.

“(C) EXCLUSIONS.—The term ‘digital commodity’ does not include—

“(vi) non-fungible tokens or non-fungible digital forms of personal property.”¹⁸⁴

b. PROVISION DEFINING SECURITIES

Further, the bill poses a grave issue regarding securities. Nothing in the bill discusses what defines a security, and how they will be regulated within the framework of the bill. The definition of a digital asset does not explicitly answer when digital assets might constitute a security.¹⁸⁵ This may create a potential regulatory clash between the CFTC and the SEC over whether a particular digital asset is a commodity or a security.¹⁸⁶ The SEC alleges that dozens of digital assets are securities.¹⁸⁷ By not attempting to distinguish digital assets that are securities from those that are not, the bill relies on courts and the SEC to set the boundaries for which assets can be considered commodities.¹⁸⁸ This may lead to the CFTC having jurisdiction only over Bitcoin and Ether, while the SEC claims jurisdiction over all other digital assets, classifying them as securities. To address this issue, the bill should either explicitly include all digital assets under the definition of a commodity in order to consolidate the regulation of all digital assets under the CFTC, or explicitly define the Howey Test¹⁸⁹ within the bill language. Such measures would significantly help to provide clarity to market participants and to address

¹⁸⁴ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(18)(C) (2022).

¹⁸⁵ Reitman, et al., *supra* note 130.

¹⁸⁶ *Id.*

¹⁸⁷ Budofsky, et al., *supra* note 5.

¹⁸⁸ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(22)(A)(i-iv) (2022); Proposed Stabenow-Boozman Bill Falls Short in Bringing Regulatory Certainty to Digital Assets Space, *supra* note 176.

¹⁸⁹ *Howey*, 328 U.S. at 300.

the gaps in the regulation of cryptocurrencies. For example, the bill should be modified as follows to include such definition:

SEC. 2. DEFINITIONS.

(a) In General.—Section 1a of the Commodity Exchange Act (7 U.S.C. 1a) is amended—

“(C) EXCLUSIONS.—The term ‘digital commodity’ does not include—

“(ii) a security;

“(a) an investment of money in a common enterprise with expectations of a profit to be derived from the efforts of others.”¹⁹⁰

V. CONCLUSION

The current regulatory sphere for cryptocurrencies can be described as a “patchwork of regulations at the state level.”¹⁹¹ The legislation would bring clarity to the digital asset markets, and it would allocate regulatory responsibility in a space that is in need of regulation.¹⁹²

Regulation is necessary to respond to the emerging risks that are stemming from the growth of the industry.¹⁹³ Given the pseudo-anonymity of transactions and decentralized nature of the, the industry poses risks for criminal behavior, fraud, market manipulation, and a lack of transparency and fairness that United States consumers expect from our financial system, among other complications.¹⁹⁴ Although there have been various attempts to regulate parts of the market, such as the SEC expanding the application of the Howey Test to account digital assets falling within the definition of a security, the need for regulatory clarity with respect to cryptocurrencies still exists.¹⁹⁵ This legislation granting exclusive authority to the CFTC to

¹⁹⁰ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 2(a)(18)(C)(ii) (2022); *Howey*, 328 U.S. at 300.

¹⁹¹ Daley, *supra* note 131.

¹⁹² Behar, et al., *supra* note 3.

¹⁹³ Behar, et al., *supra* note 3.

¹⁹⁴ Marr, *supra* note 21; Stabenow & Boozman, *supra* note 7.

¹⁹⁵ Jones, *supra* note 44, at 206.

regulate digital commodities is a crucial first step in filling the regulatory gap that cryptocurrency has thrived in for years.¹⁹⁶

As proposed by this Comment, the CFTC is likely the most ideal regulatory body to oversee the digital asset market. The CFTC has established its jurisdiction over both Bitcoin and Ether, which, as of August, 2022, collectively account for 58.4% of the total cryptocurrency market share.¹⁹⁷ Additionally, the CFTC has utilized a more encompassing approach to regulating cryptocurrencies, unlike the SEC's ad-hoc approach, where it uses its discretion to inconsistently apply the Howey Test.¹⁹⁸ The CFTC's less restrictive approach could deter bad actors from the market, while allowing innovative and well-meaning crypto projects to pursue their plans without uncertainty as to their legal status.¹⁹⁹ Also, the CFTC's primary goal is to promote efficiency while protecting investors against manipulation, abusive trade practices, and fraud in the commodities markets.²⁰⁰

With the introduction of the DCCPA, the CFTC will prove to be a strong, effective, and hopeful source of regulatory power over the market. The proposed legislation will enable the CFTC to diminish market manipulation and further protect consumers by explicitly prohibiting fraud, deception, and manipulation, and by requiring digital commodity platforms to adhere to advertising standards and disclose information about digital commodities and their risks.²⁰¹ In doing so, the bill will bring greater transparency and accountability to the market, requiring

¹⁹⁶ Daley, *supra* note 131.

¹⁹⁷ Reiff, *supra* note 112.

¹⁹⁸ Jones, *supra* note 44, at 182–83.

¹⁹⁹ Lurie, *supra* note 98.

²⁰⁰ The Investopedia Team, *supra* note 105.

²⁰¹ Behar, et al., *supra* note 3; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. §§ 5i(e), (h) (2022).; Reitman, et al., *supra* note 130.

digital commodity platforms to comply with the core principles.²⁰² Also, the bill maintains bipartisan sentiment, which anticipates continued support, regardless of other political pressures.²⁰³

Additionally, the proposed legislation would preempt state laws in favor of the rules implemented by the DCCPA, ensuring clarity with respect to governing federal legislation.²⁰⁴ Also, by providing the CFTC with the jurisdiction to oversee the spot digital commodity market, the cryptocurrency spot markets will be subject to the authority of the CFTC.²⁰⁵ Finally, the DCCPA will eliminate the problematic, decentralized nature of cryptocurrency transactions, as the legislation will treat digital commodity platforms as centralized institutions.²⁰⁶ Even though this bill is a large step in the right direction, the legislation may have some far-reaching implications that will need to be assessed before it is enacted. With the introduction of the proposed additions and changes to the bill, the DCCPA will address certain ambiguities to provide a fortified regulatory framework over the crypto industry.

²⁰² Reitman, et al., *supra* note 130; Behar, et al., *supra* note 3.

²⁰³ Daley, *supra* note 131.

²⁰⁴ Diamond & Cobb, *supra* note 114; Digital Commodities Consumer Protection Act, S.4760, 117th Cong. § 5i(n) (2022).

²⁰⁵ Digital Commodities Consumer Protection Act, S.4760, 117th Cong. (2022).

²⁰⁶ Daley, *supra* note 131.