BETTER MARKETS

August 5, 2025

Senator Tim Scott
Chairman
Senate Banking, Housing, and Urban Affairs Committee
534 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Scott:

Better Markets[1] appreciates the opportunity to comment on the request for information (RFI) on the Discussion Draft related to digital asset market structure (Discussion Draft) recently released by the Chairman and certain majority members of the U.S. Senate Committee on Banking, Housing and Urban Affairs.

Introduction

The Discussion Draft, if enacted, would represent an existential threat to American investors and the United States' standing in the world as the preeminent place to raise capital and grow a business. Our capital markets have become the deepest and most liquid in the world because of the rule of law, not despite it. The Discussion Draft takes a bulldozer to the very foundation that has given investors confidence to hand over their retirement savings and trust that the firms that receive and manage their money do so honestly. And if those firms are not honest, investors trust that the government stands by to pursue recourse on their behalf or that they can access the courts to recover their money.

The Discussion Draft allows companies to raise more money, with fewer, lower-quality disclosures, using more misleading mass advertising, with less of an ability for federal and state government enforcers to halt misconduct, and a diminished ability of investors to sue when they're subject to omissions, misstatements or fraud. It will distort capital formation by pushing companies, through the lure of deregulation, to raise money through particular types of fundraising on a blockchain – regardless of how useful the offering structure or the blockchain record-keeping system is to their operations. To be clear, the changes contemplated in this Discussion Draft – if enacted – will not remain quarantined to the crypto market. These exemptions will quickly swallow our wider capital markets.

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies— including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

Investors deserve better. They deserve the protections that, for example, equity investors have enjoyed for 90 years, and in fact may even need *more protection* give the unique risks of the crypto market. While representing around 2 percent of the capital markets in 2024, crypto represented a staggering 20 percent of the investor complaints received at the Securities and Exchange Commission (SEC or Commission).[2] Moreover, crypto transactions remain the payment method of choice for criminal ransomware actors.[3] There is a reason why a reported 98 percent of ransomware payments demanded by criminals was in the form of Bitcoin and not, say, duffle bags of cash, Rolex watches or Picasso paintings.[4] The Federal Bureau of Investigation's most recent data showed a 66 percent year-over-year spike in total crypto-related losses to consumers and investors, now totaling $9.3 billion annually.[5] And these facts are not lost on the American people: polling from the Pew Charitable Trusts demonstrates that as individuals gain more familiarity with crypto, they become less trusting of the asset.[6]

So if this Discussion Draft is so flawed, why is it being pursued? It is not because this legislation will bring transparency, rigor and order to an otherwise deeply conflicted and fraud-ridden market. Instead, it is because this legislation provides permanent legal immunity for past misconduct and seeks to build the law around a pre-existing business model that, due at least in part to its widespread non-compliance with current law, is deeply profitable for incumbent companies. There is a reason why Robinhood's CEO bragged that running the crypto arm of his trading app was ten times cheaper than running the equities arm of his trading app.[7] It is because his firm is not paying for disclosures, or insurance against the brokerage's failure, or limits around conflicts of interest.

In this respect, the story of crypto is familiar to observers of financial history. Large firms adopt an approach of "catch me if you can" and develop non-compliant business models that they hope establish enough incumbency, profitability and political power that Congress is coerced to

[2] Comparing the roughly $2.4 trillion crypto market in 2024 compared to the $100 trillion capital markets. See CoinGecko "Crypto Market Overview: October 2024," available at: https://coinmarketcap.com/academy/article/crypto-market-overview-october-2024 and Eva Su. "Capital Markets and Securities Regulation: Overview and Policy Issues." *Congressional Research Service*. May 2, 2005, available at: https://www.congress.gov/crs-product/R48521#:~:text=Securities%20issuers%2C%20intermediaries%2C%20and%20investors,primary%20regulator%20overseeing%20capital%20markets. This is juxtaposed with the U.S. Securities and Exchange Commission, FY2024 Complaint Data, available at: https://www.sec.gov/data-research/sec-markets-data/investor-complaints-questions

[3] Oosthoek, Kris, Jack Cable and Georgios Smaragdakis. "A Tale of Two Markets: Investigating the Ransomware Payments Economy." *Communications of the ACM*. August 1, 2023, available at: https://cacm.acm.org/research/a-tale-of-two-markets-investigating-the-ransomware-payments-economy/#R30

[4] Fuhrman, Thomas. "Ransomware: Paying Cyber Extortion Demands in Cryptocurrency." *Marsh McLennan Companies*, available at: https://www.marshmclennan.com/web-assets/insights/publications/2020/november/ransomware-cryptocurrency.pdf

[5] U.S. Federal Bureau of Investigation. "2024 Internet Crime Report." April 2024, available at: https://www.ic3.gov/AnnualReport/Reports/2024_IC3Report.pdf

[6] Faverio, Michelle, Wyatt Dawson and Olivia Sidoti. "Majority of Americans Aren't Confident in the Safety and Reliability of Cryptocurrency." *Pew Research Center*. October 24, 2024, available at: https://www.pewresearch.org/short-reads/2024/10/24/majority-of-americans-arent-confident-in-the-safety-and-reliability-of-cryptocurrency/

[7] Interview with Robinhood CEO Vlad Tenev. *CNBC*. December 5, 2024, available at: https://www.youtube.com/watch?v=YmGI5be0NUo

rewrite the law to retroactively bless them. For example, in 1998, Citicorp purchased Travelers Insurance through a temporary legal loophole and then successfully persuaded Congress to repeal the New Deal-era Glass-Steagall Act prohibitions that would have blocked Citi's permanent ownership.[8] The largest banks likewise swooped in and, in 2000, successfully persuaded Congress to pass the Commodity Futures Modernization Act, which stopped the Commodity Futures Trading Commission's (CFTC) early stage efforts to regulate over-the-counter financial derivatives.[9] During this same period, large banks appealed to the White House and regulators to preempt national banks from anti-predatory lending laws in states like North Carolina and Georgia.[10] But of course instead of framing these efforts as gutting the existing regulatory framework, lobbyists described the effort as the Office of the Comptroller of the Currency through new federal rules "eliminat[ing] much of the uncertainty for national banks, thereby facilitating better planning and delivery of financial services" and said that the effort would "[drive] new product innovation" and "[help] to reduce excessive regulatory costs."[11] These efforts and the arguments that undergird them are indistinguishable from the crypto industry's tactics in recent years.

Given all the investor harm in crypto markets, the desire for policymakers to *enact something* is understandable. This is particularly true in light of the fact that the SEC has capitulated on virtually all ongoing enforcement activities under the securities laws, including against alleged fraudsters like Binance and Justin Sun.[12] But this Discussion Draft codifies, rather than reforms, the existing crypto business model. It is much more similar to the late 1990s and early 2000s examples cited above – in which Congress passed legislation to ensconce industry preferences rather than remake them – than it is to the Wall Street Reform Act of 2010 or other reform efforts.

To the extent Congress desires to act, the Financial Stability Oversight Council during the Biden Administration wrote a comprehensive report detailing legislative recommendations for the spot crypto market for assets that are not securities.[13] Likewise, testimony from Corey Frayer of the Consumer Federation of American lays out a number of commonsense recommendations for how policymakers could adjust existing securities law to better address the unique risks and

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[8] Wilmarth, Art. "The Road to Repeal of the Glass-Steagall Act." *CLS Blue Sky Blog*. October 3, 2017, available at: https://clsbluesky.law.columbia.edu/2017/10/03/the-road-to-repeal-of-the-glass-steagall-act/

[9] Cantrell, Dumas. "The CFTC's Role in Financial Stability from Deregulation to Reform, and a Warning for the Future." *Better Markets*. July 21, 2025, available at: https://bettermarkets.org/analysis/the-cftcs-role-in-financial-stability-from-deregulation-to-reform-and-a-warning-for-the-future/

[10] Ritholtz, Barry. "Study: Federal Pre-Emption of State Anti-Predatory Lending Laws Led to More Mortgage Defaults." *The Big Picture* Blog. October 7, 2009, available at: https://ritholtz.com/2009/10/pre-emption-of-state-anti-predatory-lending-laws-led-to-more-foreclosures:

[11] McLaughlin, James. "Testimony Before the U.S. Senate Committee on Banking, Housing and Urban Affairs." Hearing entitled, "Review of National Bank Preemption Rules." April 7, 2004, available at: https://www.banking.senate.gov/hearings/review-of-the-national-bank-preemption-rules

[12] Schiffrin, Ben. "Having Won Almost 100% of Its Cases Against the Crypto Industry, the SEC Baselessly Surrenders." *Better Markets*. March 12, 2025, available at: https://bettermarkets.org/wp-content/uploads/2025/03/Better_Markets_Fact_Sheet_Crypto_Enforcement-3.12.25.pdf

[13] Financial Stability Oversight Council. "Report on Digital Asset Financial Stability Risks and Regulation." September 30, 2022, available at: https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf

opportunities of crypto.[14] Exploring these recommendations would prove to be much more protective of investors, supportive of American capital formation, and durable such that a future Congress will not be compelled to enact emergency crisis-induced re-regulation.

I. Feedback on the Ancillary Asset Framework

A. Background

The Discussion Draft seeks to establish and define the new concept of an "ancillary asset." While the drafting of this new definition and related sections raises technical questions (more on this later), it appears that the authors are endeavoring to define ancillary assets as the tradeable crypto tokens[15] that are sold to investors as the product of an investment contract securities offering. The Discussion Draft then:

- creates a new, light-touch offering framework for ancillary assets under a new Regulation (Reg DA);

- allows originators to self-certify that the ancillary assets qualify under the new definition and do not include "disqualifying financial rights." With this self-certification, originators can benefit from a safe harbor from SEC enforcement under Reg DA that will be legally and logistically difficult for the SEC to rebut;

- requires another self-certification as a condition of using Reg DA that mandates originators stipulate that the "digital network" on which the ancillary asset trades is not subject to "common control" of related persons (this self-certification also frees up related persons to sell more of their crypto token holdings into the market); and

- permits originators to terminate disclosures to investors upon a final self-certification that the asset is no longer subject to "entrepreneurial or managerial" control of the originator.

Upon this last certification being submitted, and absent invocation of a rushed process by which the SEC can contest these certifications, the ancillary assets are thereafter free from federal and state securities laws and presumably subject to a CFTC regime that will be revealed at a later date in a separate piece of legislation.

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[14] Frayer, Corey. "Testimony Prepared for the U.S. House Committee on Ways and Means Subcommittee on Oversight." Hearing entitled, *Making America the Crypto Capital of the World: Ensuring Digital Asset Policy Built for the 21st Century*. July 16, 2025, available at: https://waysandmeans.house.gov/wp-content/uploads/2025/07/Frayer-Testimony.pdf

[15] For ease of understanding, we use the term "crypto tokens" here to mean the ancillary asset that is the product of an investment contract securities offering. Technically, the Discussion Draft allows any asset that is the product of an investment contract offering to fall within the ancillary asset definition, though for the purposes of this RFI response we focus on crypto tokens.

B. A Faulty Threshold Premise

Before discussing the infirmities of the above-described policy approach, it should be noted that the technical drafting of the section related to ancillary assets is confused. The SEC has never contended that the tradeable crypto assets that were created as the byproduct of an investment contract offering were themselves securities. Instead, the SEC has contended that *the totality of an investment contract offering* – or the promises made by the crypto entrepreneur that the crypto token's value would rise or fall based on the expertise and effort of the issuer – constitutes a security whose promises would carry forward into the secondary market if and when the crypto token is traded.[16] While the SEC has been cited by one court for a "semantics error" in referring to crypto tokens themselves as "crypto asset securities," the same court held that the nomenclature used by the Commission "does not obscure the SEC's theory of liability" and that "the meat of the SEC's pleadings alleges that during their initial offerings and throughout subsequent transactions on [one crypto trading platform], those assets were offered as, or sold as, investment contracts…This is an acceptable framing, and one that the SEC has repeatedly advanced in other cases."[17]

In other words, while lawyers for crypto firms invoke the investment contract namesake case of *Howey* to argue that the federal securities laws can't possibly apply to secondary market trading of crypto tokens because "oranges aren't securities,"[18] it is a red herring. No one, including the SEC or the courts, has ever argued as such. Instead, the Commission – with the assent of many federal courts – has argued that the secondary market trading of crypto tokens falls within the securities laws when investors in those crypto tokens rely on the promises from the original crypto token issuer. The court in the SEC's litigation against Coinbase noted[19]:

> *[T]here is little logic to the distinction Defendants attempt to draw between the reasonable expectations of investors who buy directly from an issuer and those who buy on the secondary market. An investor selecting an investment opportunity in either setting is attracted by the promises and offers made by issuers to the investing public. Accordingly, the manner of sale "has no impact on whether a reasonable individual would objectively view the [issuers'] actions and statements as evincing a promise of profits based on their efforts."*

A more appropriate modern-day version of the *Howey* case would have Mr. Howey fractionalizing shares of the leaseback arrangement in his citrus farm, with investors able to trade those shares on the secondary market, and with Mr. Howey tweeting that because he was so

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[16] See just a few examples, including SEC v. Coinbase, Inc., 726 F. Supp. 3d 260 (2024); SEC v. Wahi, No. 2:22-CV-01009-TL, 2024 WL 896148 (W.D. Wash. Mar. 1, 2024); SEC v. Binance Holdings Ltd., No. CV 23-1599 (ABJ), 2024 WL 3225974 (D.D.C. June 28, 2024); SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170 (S.D.N.Y. 2023); SEC v. LBRY, Inc., 639 F. Supp. 3d 211 (D.N.H. 2022); SEC v. Payward, Inc. and Payward Ventures, Inc., No. 3:23-cv-06003-WHO (N.D. Cal. filed Nov. 20, 2023))
[17] Id, SEC v. Payward, Inc. and Payward Ventures, Inc.
[18] Paul Grewal, Chief Legal Officer of Coinbase, Inc., *LinkedIn* (2023), available at https://www.linkedin.com/posts/paul-grewal-288978b4_if-i-grow-oranges-myself-and-harvest-them-activity-7031035290282545156-59QH/?originalSubdomain=mu
[19] See SEC v. Coinbase, Inc., supra note 16

expert at growing, harvesting and marketing oranges, surely the value of those shares on the hypothetical CitrusExchange would rocket "to the moon!"

The bottom line is that by creating the concept of an ancillary asset and exempting it, but not the investment contract itself, from the securities laws, the bill authors fail to accomplish their intent and cascade a series of confusions throughout the Discussion Draft's other provisions. The remainder of this RFI response will not engage this threshold problem, though it is relevant to many other provisions in the Discussion Draft.

C. Concerns With the "Disqualifying Financial Rights" Exclusion

The Discussion Draft seeks to exclude from the ancillary asset definition a series of features of an offering that one presumes are meant to be indicia of a securities offering. In other words, there are some features of an offering that the authors presumably want to remain under securities law. These include, "(i) debt or equity interest; (ii) liquidation rights; (iii) an entitlement to an interest, dividend, or other payment; and (iv) any other express or implied financial interest in (including a limited partner interest or interest in intellectual property of), or provided by, that person, as provided by notice and comment rulemaking of the Commission."

Many of the terms in (i) through (iv) have no precedent in securities law, and in some cases no connection to being an indicia of a security and therefore are left open to vagueness. For example, if an originator promised their crypto token will appreciate in value does that constitute an "implied… financial interest" in the originator under (iv)? After all, the investor has a financial interest in the originator continuing to exist, especially since that originator may take up to 4 years to self-certify that the crypto token's underlying blockchain is not subject to their "common control." Conversely, does an "implied… financial interest" in the intellectual property of the originator provide evidence that the offering is a security? How are liquidation rights relevant indicia for any type of security? How is an entitlement to a dividend or an entitlement to an interest payment different from the definition of equity or debt? All of these questions merit further consideration and stakeholder input. It also highlights the dangerousness and even impossibility of trying to surgically remove certain types of securities offerings from securities law.

Additionally, the Discussion Draft gives the SEC six months to propose and one year to finalize Reg DA rules, which would govern how originators could structure investment contract offerings to ensure that the product of those offerings were eligible ancillary assets (and therefore did not display the qualities of a "disqualifying financial right"). But the rulemaking to define what constitutes an investment contract in the first instance is required in a separate section of the Discussion Draft and given a two-year timetable at the SEC. These two provisions seem discordant.

II. Further Feedback on the Policy Framework

A. Background

Setting aside drafting concerns, the underlying policy embodied in Title I of the Discussion Draft is faulty. The 1946 Supreme Court decision in *Howey* has stood the test of time. As the Court noted in that opinion, Congress deliberately wrote the Securities Act of 1933 to define the term "security" broadly to embody a "flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[20] In the subsequent decades, courts have found novel or unique investment vehicles to be investment contracts, including those involving animal breeding programs, cattle embryos, mobile phones, and enterprises that exist only on the internet.[21]

Under both Republican and Democratic Administrations, the SEC has subsequently brought cases to enforce the securities laws with respect to crypto token offerings.[22] More than 8 years ago, in the SEC's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (DAO Report), the SEC clearly explained how crypto offerings could constitute securities offerings and how intermediaries trading in crypto assets could be implicated by the securities laws.[23] The SEC issued this report to warn and to educate the market about the clear implications of existing law. After the DAO Report but before the start of the Biden Administration, the Commission brought dozens of settled and litigated cases reiterating as much.[24]

The Discussion Draft's attempt to undo that bipartisan precedent stands to upend not just the long history of crypto enforcement but the entire framework that has protected investors from violations of law for almost 80 years.

B. Crypto Is Not Incompatible With Securities Laws

What's worse, there is very little reason to nullify or narrow the *Howey* decision in service to the crypto industry because there is no technological reason why crypto assets cannot comply with existing securities laws. Under existing authority, the SEC has wide latitude to iterate with issuers to develop a disclosure regime bespoke to their offering. For example, the SEC in years past registered fractionalized works of art, sculpture and even elite racehorses without any action from Congress.[25] More recently, the SEC released guidance – again, without any act from

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[20] SEC v. Howey Co., 328 U.S. 293 (1946)
[21] Gurbir S. Grewal. "What's Past is Prologue: Enforcing the Federal Securities Laws in the Age of Crypto." *Speech at the William and Mary Business Law Review*. July 2024, available at https://www.sec.gov/newsroom/speeches-statements/grewal-remarks-age-crypto-070224
[22] U.S. Securities and Exchange Commission. "Enforcement Actions: Crypto Assets," available at: https://www.sec.gov/about/divisions-offices/division-enforcement/cyber-crypto-assets-emerging-technology/enforcement-actions#crypto
[23] SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, 117 SEC Docket 745 (July 25, 2017)
[24] Supra note 22
[25] See, for example, the Masterworks fractionalized art and sculpture investing platform, available at: https://www.masterworks.com/about/how-it-works and also a fractional race horse investing platform, available at www.myracehorse.com/us

Congress – instructing issuers of crypto offerings on how to comply with disclosure obligations under securities laws.[26]

Moreover, the trading regime for crypto need not deviate from the Securities Exchange Act of 1934. After all, the vast majority of crypto customers don't trade on blockchains at all but instead turn to centralized exchanges that use internal databases to track customer orders – the same as any existing securities business. For those investors that do trade directly on blockchains, they often would have no need for a broker, dealer, exchange or other intermediary – since they can transact directly peer-to-peer, according to the original promise of crypto.

Finally, crypto projects have in fact already raised capital while in compliance with SEC rules. In 2018, one *MarketWatch* analysis found nearly 300 separate crypto projects raised money through existing exempt offerings via the SEC, mostly using Regulation D (Reg D).[27] In other words, the market was booming for crypto projects to get early-stage, SEC-compliant funding even years ago. However, large crypto trading platforms – which colloquially call themselves "exchanges" – threw caution to the wind in an environment of enforcement forbearance and started listing these exempt offerings and making them available for retail customers to trade. They did this even though the issuers explicitly acknowledged they were offering securities, even filing Form D notices with the SEC attesting to as much. These trading platforms relied not on the law, but rather on the prevailing sentiment at the time that the SEC would only crack down on fraudster Initial Coin Offerings (ICOs) and not the venues that propelled those ICOs into the hands of retail investors.

C. Reg DA – Putting a Thumb on the Scale for Certain Favored Offering Types

Beyond providing retroactive immunity to the crypto industry and special favors for a light-touch regulatory regime moving forward, the Discussion Draft would also pervert capital formation by creating a lopsided regime of deregulation. The new Reg DA established in the bill is so permissive that any company looking to raise money to fund their operations and growth would be foolish not to do so via an investment contract offering and via a blockchain.[28]

Appendix A includes a chart showing how the new Reg DA regime created by the Discussion Draft stacks up to other exempt offering frameworks created by Congress. As the chart demonstrates, compared to other ways to raise capital, issuers can raise more money, soliciting more investors, using general advertising, with fewer disclosures and no financial statements and with wide legal immunity from federal or state regulatory actions or private litigation. Congress has no rationale for privileging investment contract offerings over, say, exempt offerings that

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[26] U.S. Securities and Exchange Commission. "Offerings and Registration of Securities in the Crypto Asset Markets." Division of Corporation Finance. April 10, 2025, available at: https://www.sec.gov/newsroom/speeches-statements/cf-crypto-securities-041025

[27] McKenna, Francine. "SEC action threatens billions raised in initial coin offerings that ostensibly targeted only wealthy investors." *MarketWatch*. July 8, 2019, available at: https://www.marketwatch.com/story/sec-action-threatens-billions-raised-in-initial-coin-offerings-that-ostensibly-targeted-only-wealthy-investors-2019-06-07

[28] Though admittedly the regulatory privilege given to investment contracts whose ownership is recorded on a blockchain rather than another type of database is stronger in the House of Representatives' CLARITY Act compared to the Discussion Draft.

provide investors with an equity interest in a company. There is no reason that a company should be incented to grow their business with one particular securities transaction over another.

One particular problem with the offering framework in Reg DA is the ability of originators to raise up to "10 percent of the total dollar value of those ancillary assets that are outstanding, as of the date of that offer or sale." As an example: originators could blow through the $75 million otherwise applicable offering cap by minting ten billion tokens, selling one billion of them for $1, and thereby raise $1 billion in one offering to the public. Given how easy it is to create crypto tokens out of thin air, this is not a theoretical concern. Further, there appears to be no requirement in the Discussion Draft for originators to use the proceeds of the offering exclusively for the development of the crypto token or the underlying blockchain.

D. Feedback on Disclosure Framework

i. Content of Disclosures: The Discussion Draft provides that "rules promulgated [by the SEC as it relates to disclosures] shall not require the inclusion of financial statements of an ancillary asset originator or any information purporting to have been prepared on the authority of an expert." As Appendix A demonstrates, this prohibition is discordant with any other exempt offering framework. In fact, every other exempt offering framework that allows sales to non-accredited investors requires that some form of financial statement be provided to investors. By contrast, the Discussion Draft *prohibits* it.

ii. De Minimis and Gratuitous Distribution Loopholes: The Discussion Draft permits a $5 million de minimis exception for *any disclosures* when crypto tokens are being sold to non-accredited investors. This is irresponsible and without precedent in any other existing exempt offering.

Additionally, the "gratuitous distribution" loophole in the Discussion Draft is concerning and inconsistent with existing securities law. For example, in a spate of "free stock cases" in the 1990s the SEC considered whether the distribution of free shares of traditional stock were offerings under the Securities Act.[29] According to one summary, "in each case, prospective recipients of stock were required to sign up on the respective issuer's website and provide personal information including their names, physical addresses and email addresses, in order to receive free shares. Additional free shares were offered in exchange for referrals and, in one case, with the purchase of a service."[30] The SEC's analysis in these cases evaluated whether the "free stock" (or "gratuitous distribution" by another name) generated some form of economic benefit for the investment scheme, and in many cases that answer was "yes."[31] In the case of crypto gratuitous distributions (also known as "airdrops"), they may be employed by crypto issuers to create a market for the tokens, generate

[29] WilmerHale, "SEC Cracks Down on Internet Stock Giveaways." October 12, 1999, available at : https://www.wilmerhale.com/en/insights/publications/sec-cracks-down-on-internet-stock-giveaways-october-12-1999

[30] *Bloomberg Law*, "Are Free Tokens Free From Regulation?" July 2018, available at https://www.bloomberglaw.com/external/document/X3SPR1KG000000/capital-markets-professional-perspective-airdrops-are-free-token

[31] Id

promotional benefits for the related blockchain platform, or perhaps create more interest in a related token sale. All of these indicia might cause the offering to meet the *Howey* test, though the Discussion Draft wholesale exempts these transactions.

iii. Foreign Originator Loophole: The Discussion Draft creates a large carveout from the ancillary asset framework for any crypto token offering done by a "foreign originators." This term is drafted to broadly include not just originators organized outside the U.S., but U.S.-based originators (whose shares are owned in the U.S., executives are located in the U.S. and whose principal business is in the U.S. but that are incorporated abroad). This is a huge loophole to allow nominally-offshore entities to skirt U.S. law. The intent of this provision is presumably to exempt so-called decentralized autonomous organizations (DAOs) from any of the Discussion Draft's requirements, even though the SEC and CFTC have both established that decentralized and supposedly non-hierarchical unincorporated organizations can be held liable under applicable law.[32]

E. Concerns With Various Self-Certifications

i. Background

The Discussion Draft includes three self-certifications to be submitted by originators: 1) to self-certify that the ancillary assets qualify under the new definition and do not include "disqualifying financial rights" and thereby can benefit from a safe harbor from SEC enforcement; 2) to self-certify, as a condition of using Reg DA, that the "digital network" on which the ancillary asset trades is not subject to "common control" of related persons (this self-certification also frees up related persons to sell more of their crypto token holdings into the market); and 3) to self-certify that the ancillary asset is no longer subject to "entrepreneurial or managerial" control of the originator, thereby terminating disclosure requirements.

First, as a general matter, the concept of self-certification does not exist elsewhere in the federal securities laws. Instead, it is borrowed from the CFTC, where the self-certification process has been met with challenges. In fact, CFTC Acting Chair Pham gave a speech in June citing the extreme limitations of the CFTC's regime allowing exchanges to self-certify that new products were consistent with regulatory requirements and therefore launch them to the public.[33] This regime is "hands-off" in the words of Acting Chair Pham.[34] Further, she notes, "the CFTC has limited authority to take actions against exchanges" if they launch a product that the CFTC thinks is contrary to the public interest.[35] In fact, Acting Chair Pham noted that in the entire history of the CFTC, the agency has never stopped a designated contract market (essentially a

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[32] In the case of the SEC, see supra note 23. In the case of the CFTC, see CFTC v. Ooki DAO, 3:22-cv-05416, (N.D. Cal.)
[33] U.S. Commodity Futures Trading Commission, Acting Chair Caroline Pham, "Speech: Innovation and Market Structure: Keynote Address." *Piper Sandler Global Exchange and Trading Conference* 2025. June 5, 2025, available at: https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham16
[34] Id
[35] Id

commodities exchange) from launching a new product under the self-certification regime because it is so onerous to take the exchanges to court.[36]

ii. Self-Certifications: A Rushed and Lopsided Process

Importing this self-certification process from the CFTC and into the securities regime is no accident. With the Discussion Draft, the CFTC's non-enforcement approach is likely to migrate to the SEC. Not only are crypto offerings going to glide through this Potemkin SEC review process, but likely other assets – including those with "disqualifying financial rights" – would try to avail themselves of the exemptions given how feeble the SEC's ability to rebut originators' claims is in the Discussion Draft.

The Discussion Draft provides the SEC with 60 days to reject and rebut an originator's self-certification, while also providing the originator with a 10-day notice of the SEC's intent to rebut, a hearing before the Commission, and a vote of the Commissioners based on clear and convincing evidence. That leaves the Commission with about 49 days to do the following:

- Receive and process the originators' self-certification;
- Evaluate the originator's "reasonable evidence" within it along with any evidentiary and legal issues;
- Evaluate omissions and other evidence that the asset conveys "disqualifying financial rights" described in a new Securities Act section 4B(a)(1)(B);
- This may include the necessity of obtaining a Formal Order of Investigation, which at present requires an action memo to the Commission (in other words, the Commission must approve of the staff commencing a fact-finding mission)[37]. Unless expedited, Commissioners are typically given at least a week to review;
- Following the Formal Order, the staff would need to collect and evaluate submitted evidence;
- The staff would then need to draft a rebuttal and send a recommendation to the Commission, recommending to them that they issue the rebuttal notice. The action memo process at the SEC is typically six weeks long for Division review and comment, with Commissioners given two weeks for review. Even if the action memo is expedited, it would be aberrant for Commissioners to be afforded less than two weeks of review time; and
- In sum, the receipt, processing, and evidence gathering, if done properly, would itself take more than 60 days – and that is if no investigative Formal Order was required.

[36] Id
[37] Prentice, Chris. "SEC's Republican-led commission tightens oversight of probes, sources say." *Reuters*. February 3, 2025, available at: https://www.reuters.com/world/us/secs-republican-led-commission-tightens-oversight-probes-sources-say-2025-02-02/

After issuing the rebuttal, the Commission would then have to provide notice of a hearing 10 days later. The Discussion Draft indicates that it would be a contested hearing and it is unclear what the record at the hearing would be. It also appears as if the briefing schedule would have to occur in the 10 days before the hearing. The Discussion Draft leaves open many questions about how these hearings would work in practice:

- Is the hearing considering just the original self-certification and "reasonable evidence" provided by the originator and the SEC's rebuttal record?
- What about credibility determinations? Can those be made on the paper record, or does the Commission and/or an Administrative Law Judge (ALJ) need to take testimony?
- If the hearing is before an ALJ and provides for testimony, the Commission's Rules of Practice would have to be rewritten.
- What happens if the ALJ, for example, takes longer than 10 days to complete the hearing. Does the self-certification become automatically effective? Can the ALJ issue stays of effectiveness?
- What if the originator brings a district court action to forestall the SEC's rebuttal to the self-certification before the 60-day deadline? Does the court stay the rebuttal process or can it be allowed to expire by operation of the Discussion Draft?
- The Discussion Draft also does not state whether there is an appeals process to the Commission from a hypothetical ALJ determination. And the Discussion Draft likewise ignores developing law related to the constitutional challenges to ALJ authority, as well as the time needed for the SEC to review and ratify or reject the ALJ's determination.

Finally, note that the "clear and convincing" evidence standard the SEC must reach in rejecting a self-certification is a higher burden than the SEC faces under the Administrative Procedure Act ("substantial evidence"[38]) or in district court ("preponderance"[39]), and is a much higher burden than the originator faces when producing self-certification to the Commission in the Discussion Draft ("reasonable evidence").

iii. Self-Certification: Not Subject to "Common Control"

In the instance of the self-certification noted above at (2), originators must stipulate that they will take "reasonable steps" to establish that a "digital network" on which the ancillary asset trades is not subject to "common control" of related persons, within the next four years, in order to avail themselves of the new Reg DA. This is concerning, especially since this self-certification triggers the ability of related persons to dump more of their crypto tokens into the market.

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[38] APA §§ 7(c) and 10(e)

[39] At the SEC, as in most civil litigation, the standard of proof is "a preponderance of the evidence." This standard requires the jury to return a judgment in favor of the plaintiff if the plaintiff is able to show that a particular fact or event was more than 50 percent likely to have occurred.

First, originators must only stipulate to their *intention* that a "digital network" not be subject to "common control." To rebut this self-certification the SEC would not just need to establish that the digital network is still subject to common control, but that the originator had a state of mind which never "intended" it to be so. Also, the term "digital network" is undefined in the Discussion Draft and appears to be a different term than the separate "distributed ledger" used elsewhere in the Discussion Draft. Additionally, there are no consequences for failure to establish that the digital network is not under common control; in fact, the use of Reg DA is perfectly acceptable even for originators who fail to establish this benchmark.

iv. <u>Self-Certification: No Longer Subject to "Entrepreneurial or Managerial" Control</u>

Finally, the self-certification noted above at (3) is likewise concerning. Originators can terminate disclosures to investors even if they still admit to exercising nominal control over managing the enterprise and the entire category of "administrative" services are excluded from that nominal threshold. When writing rules governing both the disclosures provided to investors and the authority of the SEC to rebut the self-certification allowing for the termination of those disclosures, the SEC can "require only such information as the Commission finds to be necessary and appropriate to protect customers, maintain fair, orderly, and efficient markets, and facilitate capital formation, innovation, and efficiency." This rulemaking, which again relates to the ability of the SEC to bring an enforcement action if an originator engages in fraud, must be completed according to a cost-benefit analysis, essentially subjecting SEC enforcement to that requirement for the first time. And finally, as in the case with self-certifications (1) and (2), the SEC will be severely hampered in any legal or logistical ability to rebut the statements of the originator.

The unworkability of the self-certification timelines in the Discussion Draft cannot be overstated. One SEC Inspector General report on the Commission's Division of Enforcement found that, when considering case data from FY 2016 to FY 2021, the average time from opening an investigation to the first filed enforcement action ranged from 22.8 months to 24.1 months.[40] The Discussion Draft is demanding that that fact-finding and adjudication be confined to 60 days. Inevitably, this will lead to a huge number of assets trading in secondary markets essentially insulated from the federal securities laws where, by definition, the original issuance involved an investment contract.

F. Sundry Other Concerns

i. <u>Broad Exemptive Authority</u>

The Discussion Draft amends Section 28 of the Securities Act to add "order" to "rule or regulation" as the means by which the SEC can exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any statute or rule in the

[40] U.S. Securities and Exchange Commission Office of the Inspector General. "Enforcement Investigations: Measures of Timeliness Show Some Improvement But Enforcement Can Better Communicate Capabilities for Expediting Investigations and Improve Internal Processes." February 15, 2023, available at: https://www.sec.gov/files/enforcement-investigat-meas-timeliness-show-some-improvement-enforcement-can-better-comm.pdf

Securities Act. This would allow the Commission to delegate the exemption power to SEC staff. This ceding of authority is remarkable considering the requirement elsewhere in the Discussion Draft that the Commission itself have a hearing and vote on individual self-certification determinations.

ii. Hotel California for Deregulation

The Discussion Draft also does not contemplate the idea of ancillary assets or the networks on which they trade morphing back into being securities offerings, even though crypto industry leaders themselves have admitted that that is a possible outcome.[41] For example, in the Discussion Draft, what if after truthfully self-certifying that the ancillary asset doesn't convey "disqualifying financial rights" or that the originator has ceded "entrepreneurial or managerial control," they decide to readopt those financial rights or control? It is not impossible that the originator or another large holder of the asset might step back into the ecosystem, particularly if the asset price is declining.

III. Legal Liability and State Pre-Emption

The self-certification regime described above should be viewed as the mechanism to thwart SEC enforcement. But the Discussion Draft limits private liability and state enforcement actions in other critical ways.

- **Section 18 Liability:** Section 18 of the Exchange Act provides a private right of action imposing liability for false or misleading statements. In the Discussion Draft, disclosures from originators offering crypto tokens via Reg DA need only be "furnished" to the SEC, which unlike materials "filed" with the SEC, are not subject to Section 18 liability under the Exchange Act. Note that in other exempt offering frameworks – such as Reg A, Reg D, or Regulation Crowdfunding – documents are filed with the SEC and therefore subject to Section 18 liability.

- **Section 12(a)(2) Liability:** Section 12(a)(2) of the Securities Act provides a private right of action imposing liability for material misstatements or omissions in the offer or sale of securities by a prospectus or related oral communication. The Discussion Draft severely narrows the concept of a "statutory seller" under Section 12(a)(2), limiting the liability for misstatements and omissions and in the offering only to the originator, letting third-party promotors off-the-hook. Certain courts across the country have found that third-parties used social media mass communications to promote crypto investments and solicit customers into purchases.[42]

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[41] See Grewal, Paul. Testimony before the U.S. House Committee on Financial Services Subcommittee on Digital Assets, Financial Technology and Inclusion. "Coincidence or Coordinated? The Administration's Attack on the Digital Asset Ecosystem." March 9, 2023, available at: https://www.congress.gov/event/118th-congress/house-event/115389/text. In response to a question from Congressman Torres, Grewal notes, "speaking generally, Congressman Torres, I agree that assets can change character over time, and to be completely fair, I suppose it is equally true that an asset that began as a commodity might evolve into security in some form as well."

[42] Hamilton LLP, "Digital asset litigation defence: Leveraging the statutory seller requirement." October 25, 2024, available at:

Likewise, the Discussion Draft adds a new requirement mandating that investors show reliance on the misstatement or omission when making their decision to buy the crypto token. Unlike the case with other exempt offerings, this adds a new burden upon investors under Section 12(a)(2) to demonstrate directly that they were aware of and read an originator's statement and engaged in the purchase of the crypto token based on that specific misrepresentation.

- **State Preemption:** The Discussion Draft also includes broad preemption of state law. Specifically, it provides that offers and sales of ancillary assets shall not be subject to "any applicable requirement of state law." This could be construed not just to preempt state registration requirements, but also state anti-fraud authority, which is preserved in every other type of exempt offering. Additionally, the Discussion Draft's state preemption relates to "any intangible, fungible asset," meaning the scope of the state carveout exceeds just securities law. Presumably this could include state tax law, laws related to consumer protection and fees at crypto ATMs, or any other number of state provisions related to crypto.

IV. Feedback on the Required Investment Contract Rulemaking

The Discussion Draft at Section 105 requires the SEC to undertake a rulemaking to define an "investment contract," taking the prongs established by the *Howey* test and statutorily narrowing them in several crucial ways. Specifically, the Discussion Draft stipulates that a contract shall be considered an investment contract only if the contract meets the following elements:

(1) **An investment of money by an investor, which shall include more than a de minimis amount of cash (or its equivalent) or services:** This narrows *Howey* precedent regarding "money" to exclude investments denominated in crypto. If originators require payment in stablecoins or Bitcoin but not cash, for example, the offering would not include "more than a de minimis amount of cash" and would therefore be free from the requirements in the Discussion Draft.

(2) An investment described in paragraph (1) is made in a business entity, whether incorporated, unincorporated, organized, or unorganized: This could be read as a giveaway for so-called decentralized finance (DeFi) protocols because many in the industry argue that they are not legally recognizable groups of persons.[43] Therefore, an investment in those enterprises may fall outside the investment contract regime.

(3) An express or implied agreement is required whereby the issuer makes, directly or indirectly, certain promises to perform essential managerial efforts on behalf of the enterprise: Courts that have considered this issue have all rejected the idea that an

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https://www.globallegalinsights.com/practice-areas/blockchain-cryptocurrency-laws-and-regulations/digital-asset-litigation-defence-leveraging-the-statutory-seller-requirement/

[43] Blockchain Association. "Comment Letter on Notice of Proposed Amendments to Exchange Act Rule 3b-16 Regarding the Definition of 'Exchange'; Regulation ATS for ATSs That Trade US Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade US Treasury Securities and Agency Securities (Release No. 34-94062; File No. S7-02-22; Fed. Reg. No. 2022-01975)." April 18, 2022, available at: https://www.sec.gov/comments/s7-02-22/s70222-20124039-280165.pdf

investment contract requires contractual privity between the issuer and the secondary market purchaser.[44] It seems as if the authors are suggesting that an actual contract would be required for an offering to be scoped into this prong and therefore considered an investment contract.

(4) **The investor reasonably expects profits based on the terms of the agreement itself and statements by the counterparty and its agents, when it is clear from the context that such statements are made by or authorized by the enterprise; and (B) are accessible to the investor**: Again, as in above, this seems to read into the investment contract definition the premise that an actual contract is needed. It also creates a requirement that the statements backing the investment contract offering are "authorized" by the issuer. As in other sections, this seems to narrow the responsibilities owed by third-party promotors or even to allow for the originator to disclaim statements of employees. This also requires proof that statements are "accessible" to the investor, seemingly requiring the Commission or investors to prove that investors accessed and relied upon communications.

(5) Profits under paragraph (4) are derived from the entrepreneurial or managerial efforts of the counterparty or its agents on behalf of the enterprise, where such efforts are post-sale and essential to the operation or success of the enterprise; and (B) do not include ministerial, technical, or administrative activities: This is designed to narrow the efforts undertaken by the originator which qualify the offering as an investment contract. Adding the terms "ministerial, technical, or administrative activities" are meant to expand the scope of what can be excluded from entrepreneurial or managerial efforts and to give the crypto industry an opportunity to win easy to evade bright-line rules through rulemaking when courts have used an iterative and fact-based approach to resolve this question. Indeed, there are several instances where crypto firms claimed to only be providing such "ministerial" services but where a court found that such efforts were essential to the investors' expectation of profits.[45] Also the meaning of the term "counterparty" in this context is unclear.

(6) Further Requirements.—The rule adopted under subsection (a) shall provide that an investment contract shall require an investment in an enterprise but does not require commonality

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[44] See all cases noted at supra note 16

[45] See supra note 16, SEC v. Coinbase, Inc. In this case, Coinbase argued that the technical services it provided to staking customers were merely "ministerial." However, the court found that the SEC sufficiently plead that "Coinbase has promised and undertaken significant post-sale managerial efforts, including: retaining third parties to stake participant assets (in addition to its own validators); deploying proprietary software and equipment; maintaining "liquidity pools" (or reserves) to allow for quicker participant withdrawals; drawing 'stake' from pools of investor assets; working to increase the likelihood that a blockchain network will select Coinbase to validate transactions by pooling customer assets across multiple validator nodes; and marshalling its technical expertise to operate and maintain nodes and stake customer assets in a manner that provides maximum server uptime, helps prevent malicious behavior or hacks, and protects keys to staked assets." This is an example of a managerial effort that the crypto industry would prefer to redefine into "ministerial" services if offered an opportunity to reopen existing *Howey* interpretation.

V. Illicit Finance

The Discussion Draft creates a Treasury-led task force to develop a risk-focused examination and review process for financial institutions as it relates to "digital asset"-focused illicit finance risks. Notably, the definition for "financial institutions" includes banks and financial holding companies but not wider non-bank Money Services Businesses (MSBs) registered with the Financial Crimes Enforcement Network (FinCEN), SEC registrants or CFTC registrants. This provision leaves substantial gaps among the entities without prudential supervisors and arguably the least likely to be complying with illicit finance laws.

The Discussion Draft also creates a public-private partnership to share information related to illicit finance risks, though the section is absent a "purposes" subsection. One is to presume it is to reduce the risks of illicit finance to the U.S. financial system, though that is not stated. The section troublingly does not contain any suitability or security clearance requirements for individuals designated to serve within the partnership from private sector entities. There is also a sweeping indemnity provision providing immunity to private sector entities to which confidential information is shared as well as no limit to the government sharing information to private sector entities in which they themselves, or their employees, may be the target of an investigation or enforcement action.

Finally, the entire illicit finance section ignores key infirmities with the current Administration's approach to illicit finance. First, the Discussion Draft establishes an "Independent Financial Technology Working Group to Combat Terrorism and Illicit Financing," which will write a report about digital asset-related illicit finance and how to mitigate its impact. But these risks are already well-understood while at the same time the Administration is retrenching away from enforcement. Very soon after the inauguration of President Trump, the Department of Justice (Department) disbanded its crypto enforcement unit, and in April 2025 issued a memo saying the Department would no longer investigate or bring money laundering or illicit finance cases against crypto firms like trading platforms, digital wallets or online money laundering services known as "mixers" and "tumblers."[46] While the Department says that they will instead prioritize bringing cases against individuals who use crypto company services to engage in crimes, this supposed strategy defies credibility and will only allow crypto crime to proliferate. It is akin to the cops announcing that they'll pursue street level drug dealers but not the banks that help drug cartels launder money. Money laundering, whether at banks or crypto companies, is enabled by companies that look the other way when individuals systematically use their services for illicit purposes. Specifically, trading platforms enable and even encourage criminal behavior by having weak or non-existent anti-money laundering compliance programs. In fact, in the case of Binance, the trading platform and its founder CZ plead guilty to actively soliciting customers to create offshore entities to evade U.S. anti-money laundering laws.[47] While the Department's announcement left open the possibility that they'd enforce the law against companies that

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[46] Fischer, Amanda, "Boom Times for Crypto Crime." *Better Markets*. May 6, 2025, available at : https://bettermarkets.org/wp-content/uploads/2025/05/Better_Markets_Crypto_Crimes_Fact_Sheet-5.6.25.pdf

[47] U.S. Department of Justice. "Binance and CEO Plead Guilty to Federal Charges in $4B Resolution." November 1, 2023, available at: https://www.justice.gov/archives/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution

"willfully" violate it, the memorandum represents what one law firm called "a marked shift from the previous Administration."[48] Further, it is very difficult for prosecutors to prove malicious intent for committing money laundering violations when they're not enforcing threshold registration or policies and procedures requirements to begin with.

While the Administration has gutted illicit finance enforcement related to crypto, it instead has poorly targeted resources elsewhere. At the moment, FinCEN is spending countless resources enforcing requirements which cut the Currency Transaction Reports (CTR) threshold from $10,000 to just $200 for MSBs operating in 30 zip codes across California and Texas.[49] One conservative commentator has described this policy change as "the Trump Administration's push to crack down on penny-ante cash transactions" such as ATM withdrawals.[50]

In short, the Discussion Draft does nothing to address the current misallocation of illicit finance enforcement resources and instead creates more working groups to produce reports about topics that are already well-understood.

VI. Innovation Mandate

The Discussion Draft oddly adds "innovation" to the mission of the SEC, even though innovation should already be encompassed by the other categories in the tripartite mission. For example, innovation should be in service to capital formation or investor protection or orderly and efficient markets, not an end onto itself. This provision could also provide a new basis upon which market participants can challenge SEC rules in court.

The RFI asks about "barriers" to products such as tokenized money market funds. It should be noted that there are none. Several crypto/distributed ledger projects currently operate consistent with securities law and were taken effective during Chair Gensler's term - Franklin OnChain USG Money Fund and BlackRock's BUIDL, as two examples, as well as trading platforms like Securitize and tZERO.[51] And Figure Markets recently launched a blockchain-based FAC (YLDS) for use on their alternative trading system (ATS).[52] This is not an exhaustive list but it is meant to be indicative that motivated market participants have, in fact, worked with the SEC constructively.

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[48] Covington, "DOJ Memo Significantly Narrows Digital Asset Prosecution Priorities." April 11, 2025, available at https://www.cov.com/en/news-and-insights/insights/2025/04/doj-memo-significantly-narrows-digital-asset-prosecution-priorities

[49] U.S. Department of the Treasury Financial Crimes Enforcement Network. "Treasury's Financial Crimes Enforcement Network (FinCEN) Issues Southwest Border Geographic Targeting Order." March 11, 2025, available at: https://home.treasury.gov/news/press-releases/sb0048

[50] Lancaster, Joe. "Taking $200 Out of an ATM Should Not Trigger Federal Financial Surveillance." *Reason*. March 14, 2025, available at: https://reason.com/2025/03/14/taking-200-out-of-an-atm-should-not-trigger-federal-financial-surveillance/

[51] Fischer, Amanda. "Written Submission Before The U.S. House Committee on Financial Services Committee" Hearing entitled, *American Innovation and the Future of Digital Assets: From Blueprint to a Functional Framework*. June 9, 2025, available at: https://democrats-financialservices.house.gov/uploadedfiles/06052025_fischer_clarity_act_house.pdf

[52] Id

The RFI also asks about yield-bearing stablecoins. This has been asked and answered by the GENIUS Act, which prohibits stablecoins that directly pay yield. Such an instrument would be indistinguishable from a money market fund, of which tokenized versions, as described in the preceding paragraph, already exist. If anything, the Committee should consider closing a loophole in the GENIUS Act that allows for affiliate arrangements that permit yield to be paid on stablecoins. This will inevitably undermine the U.S. banking system. Put simply, a dollar of savings "invested" into a stablecoin is a dollar that is not deposited at a bank. Banks are the safest and cheapest source of credit for the economy and the financial system, and – importantly – are able to safely make long-term loans with short-term liabilities due to government support and oversight (e.g., Federal Deposit Insurance Corporation insurance, Federal Reserve liquidity, banking supervision). And although the loophole discussed above effectively allows stablecoin issuers to make loans through affiliate arrangements, these all will be outside the oversight of banking regulators. The loans would also be short-term loans that would primarily benefit the crypto industry and other financial institutions that rely on short-term borrowing, such as hedge funds. In turn, less banking deposits means less availability of long-term loans, which could drive up the cost to borrowers like consumers and small businesses. This could then slow the economy and make the Fed's mission of meeting its dual mandate harder. The Committee should not worsen this problem in the GENIUS Act with this Discussion Draft.

VII. Conclusion

The Discussion Draft suffers from severe infirmities both in its drafting and in the policy outcomes it seeks to advance. The clear result of this draft legislation becoming law would be more predation and fraud in the crypto industry with fewer avenues for federal and state law enforcement to pursue wrongdoing. The changes contemplated in the Discussion Draft go far beyond the crypto asset markets, upending 90 years of securities law precedent that will be used and abused by all manner of bad actors looking to raise quick money from the public for projects of dubious value.

Sincerely,

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cc: Members of the U.S. Senate Committee on Banking
Members of the U.S. Senate Committee on Agriculture

APPENDIX A

					Reg D			
	Reg DA in Senate Discussion Draft	**CLARITY Act Section 202 (creating a new 4(a)(8) offering)**	**Reg A Tier 1**	**Reg A Tier 2**	**506(b)**	**506(c)**	**504**	**Reg Crowdfunding**
Dollar limit on offering	$75 million per year for 4 years	$50 million per year for 4 years	$20 million per year	$75 million per year	None	None	$10 million	$5 million per year
Alternative threshold	10% of of the total dollar value of those ancillary assets that are outstanding	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Inflation adjustment?	Every 2 years	Annually	No	No	N/A	N/A	No	Every 5 years
Special exemptions?	No disclosures required for offerings less than $5 million per year or average daily trading volume is less than $5 million (adjusted for inflation every 2 years); also allows exclusion for "gratuitous distributions" which are crypto "airdrops"	Exclusion for "end user distributions" which are crypto airdops	N/A	N/A	N/A	N/A	N/A	N/A
Sales of the offering limited to accredited investors?	No	No	No	No, but non-accredited investors can only invest up to the greater of 10% of their annual income or net worth.	No, but limit of 35 non-accredited investors in a 90 day period	Yes	No	No, but non-accredited investors are subject to investment caps based on their income and net worth (5% or 10% of income or net worth depending on income bracket); hard cap of $124,000 for all non-accredited investors, annually
Can the issuer advertise the investment to the public?	Yes	Yes	"Testing the waters" to allow issuer to gauge market interest in non-binding ways. Communications must be filed with the SEC.	"Testing the waters" to allow issuer to gauge market interest in non-binding ways. Communications must be filed with the SEC.	No	Yes, but issuer must take reasonable steps to ensure purchasers are accredited investors	No	Yes
Financial statements required?	No (in fact, specific prohibition against the SEC requiring them, use of auditor or any information purporting to be prepared by an "expert")	No	Yes, though financial statements don't need to be audited unless the issuer prepared audited financial statements for another purpose	Yes, audited financial statements	Yes, if non-accredited investors included in the sale. Tiered requirements with unaudited statements for offerings less than $20 million and audited for greater than $20 million.	No	State law controls	Yes, with tiered requirements based on offering size (certifications by CFO/CEO, public accountant or auditor, respectively)
Notice of offering to SEC required?	Permissive, if the issuer wants a safe harbor from SEC enforcement upon attesting to meeting the ancillary asset definition (which the SEC has 60 days to rebut); otherwise, issuer has to furnish to the SEC 30 days before the offering (furnish is lower legal standard than "filed" disclosures)	Filed contemporaneous with the offering	Form 1-A must be filed before the offering	Form 1-A must be filed before the offering	Form D notice filed to SEC 15 days after offering	Form D notice filed to SEC 15 days after offering	Form D notice filed to SEC 15 days after offering	Form C must be filed before the offering
Other requirements	N/A	N/A	N/A	N/A	N/A	N/A	N/A	Offerings must go through registered broker-dealer or intermediary
Is state securities law preempted for registration?	to impose notice or other requirements. State law also pre-empted related to any intangible, fungible asset.	Yes	No, offerings must be registered with the state	Yes	Yes, but notice filings required in many states	Yes, but notice filings required in many states	No	Yes, but notice filings in many states
Consequences for non-compliance	Liability under Section 12 of the Securities Act narrowed to exclude third-party sellers and to require investors show "reliance" on the misstatement; Section 17 of the Securities Act liability remains, as does 10b of the Exchange Act and the private right of action; no Section 18 of the Exchange Act liability; state law liability preempted for registration and arguably for fraud	Liability under Sections 12 and 17 of the Securities Act and Sections 18 and 10b of the Exchange Act (though the legislation tinkers with 10b in slight ways to narrow); private right of action; state law liability for fraud	Liability under Sections 12 and 17 of the Securities Act and Sections 18 and 10b of the Exchange Act; private right of action; state law liability for registration violations and fraud	Liability under Sections 12 and 17 of the Securities Act and Sections 18 and 10b of the Exchange Act; private right of action; state law liability for fraud	Liability under Sections 12 and 17 of the Securities Act and Sections 18 and 10b of the Exchange Act; private right of action; state law liability for fraud	Liability under Sections 12 and 17 of the Securities Act and Sections 18 and 10b of the Exchange Act; private right of action; state law liability for fraud	Liability under Sections 12 and 17 of the Securities Act and 10b of the Exchange Act; private right of action; state law liability for registration violations and fraud	Liability under Sections 12 and 17 of the Securities Act and Sections 18 and 10b of the Exchange Act; private right of action; state law liability for fraud