

**Testimony of Matthew B. Kulkin**

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**Before the House Agriculture Committee and  
House Financial Services Committee**

**Subcommittee on Commodity Markets, Digital Assets, and Rural Development  
Subcommittee on Digital Assets, Financial Technology, and Inclusion**

***The Future of Digital Assets:  
Measuring the Regulatory Gaps in the Digital Asset Markets***

**May 10, 2023**

Dear Subcommittee Chairs Johnson and Hill, Ranking Members Lynch and Caraveo,

My name is Matthew Kulkin. I am a partner in the Washington, DC office of Wilmer Cutler Pickering Hale and Dorr LLP, where I am Chair of the Futures and Derivatives Practice. Previously, I had the honor of serving as the Director of the Division of Swap Dealer and Intermediary Oversight (now Market Participants Division) at the U.S. Commodity Futures Trading Commission (“CFTC”).

The views I share are my own and do not represent those of my colleagues, my law firm, our clients, or any other person or organization.

Thank you for inviting me to support your work to bring much needed regulatory clarity and certainty to these markets in the United States. I commend the House Agriculture and Financial Services Committees working together to explore potential paths forward towards digital asset market regulation. Digital asset market regulation and policy cannot be successfully developed by any individual committee, legislative chamber, or regulatory agency.

Today, I wish to address three important points:

- First, the definition of a “commodity” under the Commodity Exchange Act (“CEA”) is broad and includes a wide range of items. To date, the CFTC and the Securities and Exchange Commission (“SEC”), as well as Federal courts, have treated many of the largest, most frequently traded digital assets as commodities.
- Second, the CFTC has been effective at exercising its regulatory authority over digital commodity derivatives markets and, despite limited enforcement authority, digital commodity spot market activity for fraud and manipulation. The CFTC has developed institutional expertise with digital commodities. The CFTC’s regulatory framework makes it well suited to regulate digital commodities spot trading and further protect market participants.
- Third, following Congressional direction, the CFTC and the SEC have a long and constructive history of coordination and collaboration with respect to the regulation of new products and new markets that can be leveraged for digital asset regulation.

**I. Digital asset policymaking requires a sophisticated understanding of digital assets and digital asset markets.**

Before I begin, I believe it is important to recognize that digital asset regulatory policy is complicated and cannot be developed in a vacuum.

Digital asset regulatory policy is nuanced. Laws and regulations cannot be made solely on the basis of any perceived jurisdictional expansion or contraction; nor can it be

developed by picking “winners” or “losers” - whether that means individuals, agencies, or private companies.

Any absolute recommendation to “ban” digital assets or “give” jurisdiction to one agency or self-regulatory organization fails to appreciate the legislative precedent and market structure implications that require a more sophisticated, holistic approach to successful policy development for these issues.

Only Congress can provide Federal regulatory agencies with the statutory clarity necessary to protect investors, on the one hand, and attract and retain the innovation that has made U.S. capital markets the deepest, most transparent, and competitive in the world.

## **II. Most of the largest digital assets by market size and trading volume are commodities.**

Congress defined a commodity in the Commodity Exchange Act as:

wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, *Solanum tuberosum* (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13–1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.<sup>1</sup>

The CFTC has implemented this definition into its regulations in a substantially similar manner.<sup>2</sup> As a result, the CFTC, and courts, have taken an expansive view of what may be considered a commodity.<sup>3</sup> Even Congress has deemed the definition of a commodity to be a “term of art.”<sup>4</sup>

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<sup>1</sup> 7 U.S.C. § 1a(9).

<sup>2</sup> 17 C.F.R. § 1.3.

<sup>3</sup> See Matthew Kulkin, Meredith Manuel, and Emma Staats, *Of Onions and Movie Tickets: The Evolving Definition of a ‘Commodity’, Futures and Derivatives*, 42 *Futures & Derivatives L. Rep. NL* 1 (Sept. 2022).

<sup>4</sup> See John H. Stassen, *The Commodity Exchange Act In Perspective A Short And Not-So-Reverent History Of Futures Trading Legislation In The United States*, 39 *Wash. & Lee L. Rev.* 825, 832 (1982), <https://scholarlycommons.law.wlu.edu/wlulr/vol39/iss3/3>.

As courts have noted, Congress seemed to intend to “focus on categories—not specific items” noting that, for example, the CEA “classifies ‘livestock’ as a commodity without enumerating which particular species are the subject of futures trading.”<sup>5</sup>

As other experts have noted in recent hearings before these subcommittees, while some digital assets are undoubtedly securities, many digital assets are used and traded like commodities.<sup>6</sup> In particular, the CEA definition includes the clause “all other goods and articles . . . and all services, rights, and interest. . . in which contracts for future delivery are presently or in the future dealt in,” which suggests that this definition is intended to be applied broadly.<sup>7</sup>

In addition, when considering actions taken by the CFTC and SEC, each as a Commission,<sup>8</sup> certain digital assets have been recognized as commodities. As discussed in a recent hearing, digital assets that have been recognized as commodities by the CFTC and SEC include the largest digital assets by market capitalization: Bitcoin, Ether, and Tether, which account for 71% of the digital asset market.<sup>9</sup> This means that the CFTC currently does not have regulatory authority over the activity in at least 71% of digital asset spot activity, except for fraud and manipulation. In other words, at least 71% of the digital asset spot market includes digital commodity activity that is unregulated at the federal level. It is not subject to the CFTC’s rules that would require, among other things, segregation of customer funds, registration and regulation by the CFTC, customer disclosures, and regular examination.

Given these factors, there appears to be a natural delineation between digital assets that are securities and digital assets that are commodities, both in terms of the characteristics of these products and the regulatory jurisdiction over these assets. As discussed below, the CFTC and SEC have successfully allocated jurisdictional oversight over other products and markets before. Given these factors, Congress should consider a similar approach for digital assets, recognizing the inherent differences between digital assets that are securities and digital assets that are commodities.

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<sup>5</sup> See *Commodity Futures Trading Commission v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, Comm. Fut. L. Rep. (CCH) P 34,345 (D. Mass. 2018), *leave to appeal denied*, 2020 WL 6363885 (D. Mass. 2020).

<sup>6</sup> Testimony of Purvi R. Maniar, Deputy General Counsel, FalconX, Before the H. Comm. on Agriculture (Apr. 27, 2023), <https://docs.house.gov/meetings/AG/AG22/20230427/115803/HHRG-118-AG22-Wstate-ManiarP-20230427.pdf>.

<sup>7</sup> See Letter from Senator Elizabeth Warren to the Honorable Rostin Behnam, Acting Chairman, CFTC (June 28, 2021), <https://www.warren.senate.gov/download/letter-to-cftc-re-google-project-bernanke-warren> (suggesting that online advertising rates may be a commodity subject to the CEA).

<sup>8</sup> As a Commission, such as an enforcement case, entity registration, or product certification. As opposed to staff action, staff statements, or an individual Commissioner’s speeches or public statements.

<sup>9</sup> Testimony of Mr. Daniel Davis, Partner, Co-Chair, Financial Markets and Regulation, Katten Muchin Rosenman LLP, Before the H. Comm. on Agriculture (Apr. 27, 2023), <https://docs.house.gov/meetings/AG/AG22/20230427/115803/HHRG-118-AG22-Wstate-DavisD-20230427.pdf>.

To be clear, when discussing digital commodity spot market oversight, I am only referring to digital commodities, and not agricultural commodities, energy commodities, or other non-digital commodities. Those products and markets have existed for much longer periods of time and have developed robust regulatory frameworks to address the unique characteristics of those markets.

### **III. The CFTC’s existing regulatory framework for digital commodities: regulatory authority vs. enforcement authority.**

The CFTC is a markets regulator. Its mission is to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation.<sup>10</sup> Importantly, the CFTC has two forms of authority - regulatory authority and enforcement authority.<sup>11</sup>

Under the CEA, the CFTC regulates futures contracts, options on futures contracts and swaps transactions.<sup>12</sup> The CFTC also has jurisdiction over certain retail foreign exchange and retail commodity transactions.<sup>13</sup> This authority is commonly referred to as “regulatory” authority and includes, among other things, requirements that entities register with the CFTC in certain capacities, comply with associated regulations, retain records, respond to inquiries, as well as examinations by CFTC auditors.

The CFTC also has authority to pursue charges for fraud or manipulation in the “spot,” or underlying market.<sup>14</sup> This authority, which was added to the CEA in the Dodd-Frank Act, applies equally to all commodities, whether soybeans, oil, interest rates, or Bitcoin. This authority is commonly referred to as “enforcement” authority and is limited in scope to commodity market activity that impacts the related derivative market. In 2015, the CFTC determined that Bitcoin and other digital assets are within the definition of “commodity” under Section 1a(9) of the CEA.<sup>15</sup> The CFTC has since declared in enforcement cases that Ethereum, Litecoin, and several stablecoins like USDC are commodities in interstate commerce, as defined under the CEA.<sup>16</sup>

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<sup>10</sup> See CFTC Mission Statement, <https://www.cftc.gov/About/AboutTheCommission>.

<sup>11</sup> See Statement of Commissioner Dawn D. Stump on the CFTC’s Regulatory Authority Applicable to Digital Assets (Aug. 23, 2012), <https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement082321>.

<sup>12</sup> 7 U.S.C. § 2.

<sup>13</sup> *Id.* § 2(c)(2)(C) & (D).

<sup>14</sup> *Id.* § 6(c); 17 C.F.R. § 180.1.

<sup>15</sup> See *In re Coinflip, Inc.*, CFTC No. 15-29, 2015 WL 5535736, at \*2 (Sept. 17, 2015), <https://www.cftc.gov/sites/default/files/idc/groups/public/@Irenforcementactions/documents/legalpleading/enfcoinfliporder09172015.pdf>.

<sup>16</sup> See, e.g., Compl., *CFTC v. Eisenberg*, No. 1:23-cv-00173 (S.D.N.Y. Jan 9, 2023).

Relying on this position, and other authorities, the CFTC has brought a significant number of enforcement actions regarding alleged misconduct in digital commodity markets.<sup>17</sup> In Fiscal Year 2022 (ending September 30, 2022), the CFTC brought 18 actions involving conduct related to digital commodities, representing more than 20% of all actions filed during the year.<sup>18</sup>

As CFTC Chair Behnam recently explained to Congress, “[t]he CFTC does not have direct statutory authority to comprehensively regulate cash digital commodity markets. [The CFTC’s] jurisdiction is limited to its fraud and manipulation enforcement authority. In the absence of direct regulatory and surveillance authority for digital commodities in an underlying cash market, [the CFTC’s] enforcement authority is, by definition, reactionary; [the CFTC] can only act after fraud or manipulation has occurred or been uncovered.”<sup>19</sup>

This is an important point. As Chair Behnam recently observed, “Congress did provide the CFTC with authority to police cash markets when there is fraud or manipulation . . . and it’s a very powerful tool.”<sup>20</sup> He noted that, unlike regulatory authority, where the CFTC has oversight of a registered exchange, intermediary, or clearinghouse, enforcement authority doesn’t provide the CFTC with the statutory authority to conduct “institutional reviews of participants, . . . data reporting, . . . or real-time surveillance of markets,” in the spot market, noting that these tools “are the key components . . . to an effective impactful regulatory system.”<sup>21</sup>

#### **IV. The CFTC is well positioned to regulate digital commodity spot market trading and further protect customers.**

The CFTC has shown it can successfully implement the Commodity Exchange Act in a way that provides regulatory flexibility to market participants of all sizes and sophistication, while remaining vigilant in its mission to protect customers and promote the integrity, resilience, and vibrancy of the U.S. derivatives markets. With these fundamental elements in place, the CFTC has proven to be an innovative agency

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<sup>17</sup> WilmerHale, *CFTC 2022 Enforcement and Regulatory Developments and a Look Forward* (Feb. 2, 2023), <https://www.wilmerhale.com/en/insights/client-alerts/20230202-cftc-2022-enforcement-and-regulatory-developments-and-a-look-forward>.

<sup>18</sup> CFTC Press Release, *CFTC Releases Annual Enforcement Results*, Release No. 8613-22 (Oct. 20, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8613-22> (“This FY 2022 enforcement report shows the CFTC continues to aggressively police new digital commodity asset markets with all of its available tools.”).

<sup>19</sup> CFTC, Testimony by Chairman Rostin Behnam Before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies Committee on Appropriations, U.S. House of Representatives (Mar. 28, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam35>.

<sup>20</sup> Milken Institute, *Moving Digital Assets Forward Part 1: A Conversation with CFTC Chairman Rostin Behnam* (May 1, 2023), <https://milkeninstitute.org/panel/14605/part-1-conversation-cftc-chairman-rostin-behnam>.

<sup>21</sup> *Id.*

across a number of markets and products, including agricultural commodity and energy derivatives, financial derivatives, and digital commodity derivatives. As these subcommittees have heard before, the CFTC staff has spent considerable time studying digital asset markets, identifying risks, and advancing sound policy through its LabCFTC and Office Technology Innovation.<sup>22</sup>

The CFTC's core market oversight functions are broken down by operating divisions. The Division of Market Oversight monitors futures exchanges, swaps trading platforms, foreign exchanges, and trade repositories.<sup>23</sup> The Division of Clearing and Risk focuses on derivatives clearing organizations, or clearinghouses, that facilitate settlement of trades.<sup>24</sup> And the Market Participants Division, my former division, regulates the counterparties to trades - liquidity providers, investment funds, and intermediaries.<sup>25</sup> The Division of Enforcement works closely with each of the operating divisions to ensure compliance with the CFTC's rules.<sup>26</sup>

The CFTC has an existing regulatory framework in place for the registration, regulation, and examination of trading platforms, clearinghouses, intermediaries, liquidity providers, and investment funds that is well suited for oversight of digital commodities spot market activity. In fact, today, the CFTC has already registered and is actively regulating digital commodity derivatives market participants as designated contract markets ("DCMs"), swap execution facilities ("SEFs"), derivatives clearing organizations ("DCOs"), swap dealers ("SDs"), futures commission merchants ("FCMs"), introducing brokers ("IBs"), commodity pool operators ("CPOs"), and commodity trading advisors ("CTAs").

Each of these registrant categories must satisfy a number of requirements to register, and do business, in a manner that meets the CFTC's customer protection rules and ensures the operation of markets with integrity. For example, among other things, FCMs (intermediaries) must separately account for all customer funds at all times and segregate those funds as belonging to customers. Those funds must be deposited under an account name that clearly identifies them as customer funds.<sup>27</sup> DCMs, or exchanges, must demonstrate that its contracts are not readily susceptible to manipulation,<sup>28</sup> establish and maintain appropriate minimum financial standards for its

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<sup>22</sup> See Written Statement of Daniel S. Gorfine, CEO, Gattaca Horizons, LLC, Before the H. Comm. on Financial Services (Apr. 27, 2023), <https://docs.house.gov/meetings/BA/BA21/20230427/115821/HHRG-118-BA21-Wstate-GorfineD-20230427.pdf>.

<sup>23</sup> CFTC, *Division of Market Oversight (DMO)*, <https://www.cftc.gov/About/CFTCOrganization/DMO> (visited May 8, 2023).

<sup>24</sup> CFTC, *Division of Clearing and Risk (DCR)*, <https://www.cftc.gov/About/CFTCOrganization/DCR> (visited May 8, 2023).

<sup>25</sup> CFTC, *Market Participants Division (MPD)*, <https://www.cftc.gov/About/CFTCOrganization/MPD> (visited May 8, 2023).

<sup>26</sup> CFTC, *Division of Enforcement*, <https://www.cftc.gov/About/CFTCOrganization/DOE> (visited May 8, 2023).

<sup>27</sup> 17 C.F.R. § 1.20.

<sup>28</sup> 17 C.F.R. § 38.200.

members,<sup>29</sup> and have rules concerning the protection of customer funds.<sup>30</sup> Finally, DCOs, or clearinghouses, must similarly segregate customer funds and property,<sup>31</sup> maintain financial resources to cover its operating costs for a period of at least one year on a rolling basis,<sup>32</sup> and maintain accurate books and records that the CFTC and Department of Justice can request at any time.<sup>33</sup>

Further, the CFTC has overseen the introduction of digital asset derivatives linked to digital commodities like Bitcoin and Ether. These include futures, swaps, and options listed on CFTC-regulated DCMs and SEFs, with prices made by CFTC-regulated dealers, cleared by CFTC-regulated DCOs, and access provided by CFTC-regulated IBs and FCMs. Before a SEF or DCM can list a product for trading, it must either meet the submission requirements of CFTC Rule 40.2 or the CFTC must approve the product under CFTC Rule 40.3. For digital commodity derivatives, the CFTC's Division of Market Oversight has established a "heightened scrutiny" framework for new products prior to their approval or listing.<sup>34</sup> Further, many of these entities, and their market activities, are subject to additional oversight and examination by the National Futures Association ("NFA") and the exchanges themselves (such as the CME Group) in their capacity as a self-regulatory organization.

Finally, it is important to recognize the important role played by NFA, to which the CFTC has delegated certain authority. NFA, as a member organization or self-regulatory organization, examines its CFTC registrant members for compliance with NFA rules. NFA recently announced that over 100 NFA Members have reported to NFA that they engage in digital asset-related business activities, both in commodity interest and spot markets.<sup>35</sup>

For several decades, NFA has exercised its authority to protect customers, particularly retail customers, from fraud, abuse, and misconduct. Over time, NFA has taken steps to protect customers engaged in retail forex activities, as well as imposing high standards of commercial honor and just and equitable principles of trade on NFA member activities.

In the last few years, NFA has been at the forefront of investor protection in the context of digital assets. In 2017, NFA issued an investor advisory to remind investors that, just like any other speculative investment, trading futures on virtual currencies, including

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<sup>29</sup> 17 C.F.R. § 38.600.

<sup>30</sup> 17 C.F.R. § 38.603.

<sup>31</sup> 17 C.F.R. § 39.15.

<sup>32</sup> 17 C.F.R. § 39.11.

<sup>33</sup> 17 C.F.R. § 39.20.

<sup>34</sup> See *Advisory with respect to Virtual Currency Derivatives Product Listings*, CFTC Staff Advisory No. 18-14 (May 21, 2018).

<sup>35</sup> NFA, *Notices to Members* (Mar. 29, 2023), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5552> ("NFA Notice I-23-10").

Bitcoin, have certain benefits and various risks.<sup>36</sup> In 2018, NFA issued a new disclosure requirement for NFA Members engaging in virtual currency products.<sup>37</sup>

Most recently, NFA adopted a new compliance rule, NFA Rule 2-51, for its members which imposes anti-fraud, just and equitable principles of trade, and supervision requirements on NFA Members and Associates that engage in digital commodity activities.<sup>38</sup> NFA determined to adopt this new rule because, with the exception of the disclosure required by Interpretive Notice 9073, NFA does not impose any specific requirements on its members with respect to spot digital commodity activities.<sup>39</sup> NFA Rule 2-51 also requires NFA Members and NFA Supervisory Associates to diligently supervise these activities. This rule, which only applies to digital commodities, becomes effective on May 31, 2023.

**V. With Congressional direction, the SEC and CFTC can build on a history of cooperation and joint regulation, including the implementation of joint rules adopted for new products and markets.**

During the development and implementation of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), I was in private practice, advising financial market participants on the various legislative proposals and, later, proposed and final rules adopted by the CFTC and SEC.

Just as the regulation of swaps and security-based swaps resulted from joint legislative efforts from these two Committees and coordination in the implementation of that law by the CFTC and SEC, I believe digital asset regulatory policy can be successfully developed and implemented by the two Commissions with Congressional direction.

To be clear, I believe legislation is necessary to provide the necessary clarity on how digital asset regulation should be implemented. The best approach should distinguish between the regulation of digital asset securities and digital commodities.

Regulatory cooperation can be modeled off of the SEC and CFTC’s joint adoption of fundamental Dodd-Frank rules that established basic components of each

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<sup>36</sup> NFA, *NFA Investor Advisory—Futures on Virtual Currencies Including Bitcoin* (Dec. 1, 2017), <https://www.nfa.futures.org/investors/investor-advisory.html>.

<sup>37</sup> NFA Interpretive Notice 9073 (eff. Oct. 31, 2018), <https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9073>. The disclosure requires NFA members to include the following:

[NAME OF NFA MEMBER] IS A MEMBER OF NFA AND IS SUBJECT TO NFA'S REGULATORY OVERSIGHT AND EXAMINATIONS. HOWEVER, YOU SHOULD BE AWARE THAT NFA DOES NOT HAVE REGULATORY OVERSIGHT AUTHORITY OVER UNDERLYING OR SPOT VIRTUAL CURRENCY PRODUCTS OR TRANSACTIONS OR VIRTUAL CURRENCY EXCHANGES, CUSTODIANS OR MARKETS.

<sup>38</sup> NFA Compliance Rule 2-51 (eff. May 31, 2023), <https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=4&RuleID=RULE%202-51>.

<sup>39</sup> See NFA Notice I-23-10.

Commission's regulatory regime. This included determining what products were swaps and security-based swaps,<sup>40</sup> as well as what entities qualified as swap dealers and security-based swap dealers.<sup>41</sup> These rules were jointly adopted by the SEC and CFTC in 2012, demonstrating a commitment to establishing baseline rules that both agencies, and market participants, could follow.

At the time, then-CFTC Chair Gensler noted that the adopted rulemaking "provides clarity on the dividing line between 'swaps' and 'security-based swaps,'" noting that "[t]hese dividing lines and the process will benefit market participants, as they will provide greater clarity as to what regulatory requirements apply when they transact in the derivatives markets."<sup>42</sup> Further, when most of the SEC's Dodd-Frank security-based swap rules were adopted after the CFTC's corresponding regulations had been completed, the SEC used the CFTC's implementation experience to inform its rules.<sup>43</sup>

I believe the same principles and approach that worked for over-the-counter derivatives could apply to digital assets, and clear delineation of what constitutes a digital asset security and a digital commodity would equally benefit market participants and provide greater clarity as to the regulatory requirements that will apply when engaged in digital asset market activity.

While serving at the CFTC, I was fortunate enough to participate in the CFTC's revisions to certain Dodd-Frank regulations, including amendments to the definition of "swap dealer."<sup>44</sup> In this capacity, I had the chance to work with my colleagues at the SEC and participate in a very collaborative process, which ultimately resulted in amendments to CFTC rules. The coordination came from the leadership at the top, with Chairmen J. Christopher Giancarlo and Jay Clayton working closely together and encouraging our teams to do the same.<sup>45</sup> In doing so, the Chairmen "recognize[d] that it is important for both Commissions to provide market participants with consistent and comparable regulations to the extent practicable."<sup>46</sup>

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<sup>40</sup> Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208 (Aug. 13, 2012).

<sup>41</sup> Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30,596 (May 23, 2012).

<sup>42</sup> 77 Fed. Reg. at 48,363.

<sup>43</sup> See SEC Press Release, *SEC Adopts Actions to Stand Up Security-Based Swap Regulatory Regime* (Dec. 18, 2019), ("In addition, the rule amendments and guidance reflect consultation with the Commodity Futures Trading Commission (CFTC). Many market participants are active in markets regulated by both the Commission and the CFTC, as such participants may use instruments regulated by the Commission to hedge risks in products regulated by the CFTC, and vice versa.")

<sup>44</sup> De Minimis Exception to the Swap Dealer Definition, 83 Fed. Reg. 56,666 (Nov. 13, 2018).

<sup>45</sup> CFTC, *Joint Statement from Chairmen Giancarlo and Clayton on the IDI Exception to the Swap Dealer Definition* (Dec. 13, 2018), <https://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement121318>.

<sup>46</sup> *Id.*

This message was reinforced by CFTC and SEC Commissioners who led efforts to have CFTC and SEC staff share ideas on how to better reconcile differences in the Commissions' rules.<sup>47</sup>

Successful coordination between the CFTC and SEC extends beyond writing rules for derivatives. The agencies work together in regulating other areas of US financial markets.<sup>48</sup> They also have a shared history of examining digital assets,<sup>49</sup> and have come together in times of unique market challenges.<sup>50</sup> Working with Congress, I believe the same will be true for digital assets in the future.

## **VI. Conclusion**

Chairmen Johnson and Hill, Ranking Members Lynch and Caraveo, I have great optimism that the U.S. can successfully develop and implement a “whole of government” regulatory approach for digital assets and digital asset markets that will foster innovation and protect customers.<sup>51</sup>

Convening a joint hearing with your subcommittees on this very important topic is a productive step in the right direction. I look forward to supporting you, your colleagues in Congress, and at the CFTC and SEC as you continue your work.

I am happy to answer your questions.

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<sup>47</sup> SEC Public Statement, *CFTC-SEC Joint Meeting* (Oct. 22, 2020), <https://www.sec.gov/news/public-statement/peirce-joint-cftc-2020-10-22>.

<sup>48</sup> Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, 87 Fed. Reg. 53,832 (Sept. 1, 2022).

<sup>49</sup> Jay Clayton & J. Christopher Giancarlo, Opinion, *Regulators Are Looking at Cryptocurrency*, Wall St. J. (Jan. 24, 2018), <https://www.wsj.com/articles/regulators-are-looking-at-cryptocurrency-1516836363> (“The CFTC and SEC, along with other federal and state regulators and criminal authorities, will continue to work together to bring transparency and integrity to these markets and, importantly, to deter and prosecute fraud and abuse. These markets are new, evolving and international. As such they require us to be nimble and forward-looking; coordinated with our state, federal and international colleagues; and engaged with important stakeholders, including Congress.”).

<sup>50</sup> SEC Press Release, *Joint Statement on Opportunistic Strategies in the Credit Derivatives Market* (June 14, 2019), <https://www.sec.gov/news/press-release/2019-106> (“[T]he Chairmen and Chief Executive of our respective agencies announce that the agencies will make collaborative efforts to prioritize the exploration of avenues, including industry input which will address these concerns and foster transparency, accountability, integrity, good conduct and investor protection in these markets.”).

<sup>51</sup> See Ensuring Responsible Development of Digital Assets, Exec. Order No. 14067, 87 Fed. Reg. 14,143 (March 14, 2022).