

# The Distributed Ledger

## Blockchain, Digital Assets and Smart Contracts

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If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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## House Bill on Digital Asset Market Structure Would Significantly Change SEC's Jurisdiction

On May 5, 2025, several House committees jointly released a discussion draft of a bill to establish a regulatory framework for digital assets. Notably, this proposed Act would clarify the jurisdictional boundaries between the Commodity Futures Trading Commission (CFTC) and the Securities Exchange Commission (SEC) and grant the CFTC exclusive jurisdiction under the Commodity Exchange Act (CEA) over most digital commodities transactions, including spot markets. Accordingly, the bill defines the “digital commodities” that this Act covers and creates new types of CFTC-registered entities specifically for digital commodity activities.

The bill leaves a meaningful role for the SEC, as primary market activity such as fundraising through the sale of digital commodities is still under its jurisdiction. However, the bill makes a significant change to the SEC's primary market jurisdiction for digital assets by differentiating digital commodities sold as investment contracts from other types of investment contracts. Specifically, digital commodities that are sold pursuant to an investment contract are not themselves a security; they are instead considered an “investment contract asset” and excluded from the definition of investment contracts under existing securities laws. Additionally, the bill provides a framework for blockchain systems to avoid certain SEC reporting requirements by becoming certified as “mature” blockchain systems, according to criteria described in the bill.

Rep. French Hill, chairman of the House Financial Services Committee, has reportedly set June 10, 2025, as the markup date for this bill. This update details key points from the proposed legislation.

### Defining Digital Commodities

At the heart of the bill is the definition of digital commodities, which are defined as a commodity where the value is, or is reasonably expected to be, derived from the relationship of the commodity to a blockchain system (§ 103). A digital commodity “relates to” a blockchain system, which is defined as a distributed ledger technology with open-source code and automated distribution, if it is intrinsically linked to the blockchain system (§ 103). The bill contains four ways a digital commodity can be intrinsically linked to a blockchain system: (i) the value of the digital commodity is generated by the programmatic functioning of the system, (ii) the digital asset grants voting rights in the decentralized governance system, (iii) the digital asset was issued through the programmatic functioning of the system or (iv) the digital asset can be used or removed from circulation to pay fees or otherwise validate transactions (§ 103).

The bill also describes what a digital commodity is not. A digital commodity does not include securities, permitted payment stablecoins, certain financial contracts (*e.g.*, swaps, security futures, commodity options and leveraged transactions), digital assets that reference or represent an interest in a commodity pool or pooled investment vehicle, tokenized assets, or assets functionally equivalent to other types of commodities (§ 103).

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## CFTC Jurisdiction

If passed, this market structure Act would see the CFTC take the lead on digital commodities regulation. Subject to a few exceptions, the bill would grant the Commission exclusive jurisdiction pursuant to the CEA with respect to any account, agreement, contract or transaction involving a contract of sale of a digital commodity, including in digital commodity cash or spot markets, if those are offered, traded, cleared or otherwise dealt by a CFTC-regulated entity or subject to the rules of a CFTC-regulated entity (§ 401). Trading facilities that offer a cash or spot market in at least one digital commodity, subject to a few exceptions, will need to register with the Commission (§ 404). A system is a trading facility if it gives multiple participants the ability to execute binding trades through the system's nondiscretionary trade matching system of multiple bids or offers, or allows participants to accept bids open to multiple participants.

The CFTC would additionally have limited jurisdiction (for regulating the offer, execution, solicitation, or acceptance) over cash and spot transactions in permitted payment stablecoins that are offered by or executed by a CFTC-registered registered entity (§ 401). Registrants that are new types of entities created by this Act are similarly under the CFTC's exclusive jurisdiction except for certain exemptions which are discussed below.

The bill also modifies the CEA's subsection on retail commodity transactions. The CFTC has long held that certain retail transactions in commodities that are entered into on a leveraged or margined basis are treated as futures contracts and, as such, must be traded on a registered futures exchange. This bill modifies the exceptions to retail commodity transactions to clarify that digital commodities transactions that result in actual delivery within two days or are executed with a digital commodity dealer are excluded from the definition of retail commodity transactions, and thus will not have to trade on an exchange. However, if a retail trader enters into a digital commodity transaction on a margined basis without using a digital commodity dealer or receiving actual delivery, that would be treated as a futures contract under CEA Section 2(c)(2)(D) and be required to trade on an exchange.

## Jurisdictional Exemptions and Exclusions

While the proposed Act provides the CFTC with a broad purview over the digital assets space, the CFTC does not have jurisdiction over custodial or depository activities for a digital commodity of an entity regulated by a federal banking agency or state bank supervisor, nor does the Commission have jurisdiction over securities offers or investment contracts involving a digital commodity (including, in most cases, mixed asset transactions) (§ 401).

Additionally, the bill specifies that the Commission's exclusive jurisdiction remains subject to sections of the CEA that limit its jurisdiction, namely Section 6d (maintaining jurisdiction of states) and Section 12(e) (specifying the CEA does not preempt federal criminal prosecutions or the application of federal or state statutes for transactions not subject to the rules of a registered entity) (§ 401). These sections would allow for states to bring suits in law or equity against persons, other than digital commodity contract markets, clearinghouses, and floor brokers and traders, who violate the CEA or CFTC rules when trading or offering digital commodities (7 U.S.C. § 13a-2(1)). It also means that states retain jurisdiction to enforce state laws against digital asset activity that is conducted by an entity that has failed to register with the CFTC (7 U.S.C. § 16(e)).

This bill also has a savings clause stating that, except as expressly provided in the proposed Act, nothing in the proposed Act applies to commodities for future delivery, swaps, security futures, options under CEA Section 4c, retail commodity transactions or leveraged transactions. The bill also includes a new addition to the CEA, Section 5k, which limits the Commission's jurisdiction over alternative trading systems and broker-dealers registered with the SEC — as long as those entities do not offer retail commodity transactions covered by CEA Section 2(c)(2)(D) (§ 411).

## New CFTC Entities

Along with the jurisdiction the proposed Act grants to the CFTC over digital commodities, the bill would create three new types of entities that have to register with the CFTC: digital commodity exchanges, digital commodity dealers and digital commodity brokers. It also introduces "qualified digital commodity custodians" and provides several registration options for those entities.

## Digital Commodity Exchanges

Trading facilities that offer or seek to offer a cash or spot market in at least one digital commodity would have to register with the CFTC and National Futures Association (NFA) as a digital commodity exchange, subject to limited exceptions (§ 404). Digital commodity exchanges would have self-certification and core principle requirements similar to (but not identical to) digital contract markets and swap execution facilities (§ 404). Some requirements would be specific to the digital commodity space, such as the requirement that exchanges hold customer funds with a "qualified digital commodity custodian" (§ 404).

Subject to a few exceptions, the CFTC would have exclusive jurisdiction over these exchanges (§ 404). However, an alternative trading system (ATS) would be able to offer digital

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commodities while subject to oversight primarily from the SEC if it does not list retail commodity transactions subject to CEA Section 2(c)(2)(D), does not list any contracts of sale of commodities except for digital commodities and is in good standing with the SEC (§ 411).

## Digital Commodity Broker-Dealers

The bill would define “digital commodity brokers” and “digital commodity dealers” in a fashion similar to the definition of broker-dealer under the Securities Acts — but as applied to parties engaging in digital commodity transactions (§ 103). Specifically:

- A person is a digital commodity broker if they, in the regular course of business, are engaged in soliciting or accepting orders from customers for the purchase or sale of a digital commodity. Hallmarks of digital commodity broker activity include accepting and maintaining control of customer funds, or exercising discretion over the quantity, quality, timing, or other attribute of the customer's order (§ 103).
- A person is a digital commodity dealer if they, in the regular course of business, stand ready to buy and sell digital commodities (§ 103). The draft bill includes a provision that dealers accept and maintain control of the funds of the customer or exercise discretion of the order of the customer. This is typically considered broker activity and differs from the Exchange Act's definition of a securities dealer, which requires that the dealer buy or sell securities for their own account (§ 103). This definition may change in future drafts of the bill to conform more closely with the Exchange Act's dealer definition.

Digital commodity broker-dealers would have to register with the CFTC and NFA and follow numerous rules and requirements, including meeting minimum capital requirements, maintaining daily trading records, establishing risk management procedures, filing annual chief compliance officer reports, holding customer assets using a qualified digital commodity custodian and not comingling customer property with its own funds (§ 406).

The CFTC would have exclusive jurisdiction, with a few exceptions, over digital commodity broker-dealers with respect to their digital commodity activities (§ 406). Similar to the ATS exception, however, broker-dealers registered with the SEC who deal in digital commodities would be able to notice-register with the CFTC and be subject primarily to SEC jurisdiction — though the CFTC would retain supervisory and enforcement powers for obligations imposed under this proposed Act (§ 411). Additionally, the digital commodity broker definition does not include persons solely because the person accepts orders from eligible contract participants, enters into digital commodity transactions for the primary purpose of facilitating payments (whether through a payment service provider or peer-to-peer),

validates digital commodity transactions, or acts as bank engaging in certain banking activities (§ 103).

## Digital Commodity Custodians

The bill also addresses how existing registrants may need to comply with new requirements for storing customer's digital asset property with qualified digital commodity custodians. For example, futures commission merchants would need to use qualified digital commodity custodians for customer property that is a digital commodity (§ 402). Qualified digital commodity custodians need to be supervised by a federal banking agency, the National Credit Union Administration, state bank or credit union supervisors, an appropriate foreign governmental authority, the SEC or the CFTC (§ 405). These custodians would have to share information with the CFTC, and the Commission may prescribe rules for certifying qualified digital commodity custodians under its supervision (§ 405).

## SEC Jurisdiction

The SEC would retain authority over digital assets that are offered as investment contracts. However, this comes with a significant change, as the bill creates a new term in securities laws: an “investment contract asset” (§ 201). An investment contract asset is a digital commodity that can be exclusively possessed and transferred, person to person, without necessary reliance on an intermediary, recorded on a blockchain, and is sold or transferred pursuant to an investment contract issued in an offering under Securities Act Section 6 or under an applicable exemption (§ 201). An investment contract is an investment of money in a common enterprise, with a reasonable expectation of profits derived from efforts of others (§ 203). Intermediaries acting in connection with the offer or sale of investment contract assets need to register with the SEC as a broker or dealer (§ 203). Importantly, “investment contract assets” are not investment contracts under existing securities laws, even if the digital commodity was originally sold pursuant to an investment contract (§ 201).

For the purposes of determining whether a digital commodity is an investment contract asset, an issuer can establish that a blockchain system is not under common control if the blockchain system, together with its related digital asset, meets several requirements:

- The digital commodity has a market value substantially derived from programmatic functioning of the system;
- The blockchain has a functional system for transmitting or storing value;
- The blockchain is composed of open source code and operates a rules-based system based on that source code; and

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- No person beneficially owns more than 20% of the digital commodity or its voting power, and no person possesses unique permission to alter functionality or determine rules of the system (§ 205).

The bill also says that digital commodities and permitted payment stablecoins are not included in the definition of “securities” set forth in the Securities Act, Exchange Act, Investment Company Act and Investment Advisers Act, and therefore are not subject to those provisions (§ 301). Even so, the SEC would still have anti-fraud authority over digital commodities and permitted payment stablecoins for transactions engaged in by a broker-dealer or through an ATS or national securities exchange (§ 302). Lastly, the bill proposes trading restrictions for related and affiliated persons of blockchain systems (§ 204).

## Additional Digital Commodity Activities Not Included or Exempt From Securities Laws

The proposed Act also describes how a few important types of digital commodities are either not included in the definition of securities and investment contracts, or are exempt from it:

- Secondary sales of digital commodities by non-issuers are not treated as investment contracts, provided the sale does not confer an ownership or revenue interest in the issuer or another entity (§ 202).
- The bill provides a specific exemption from securities registration for offers and sales of digital commodities that relate to “mature” blockchain systems, meaning that the blockchain is not controlled by any single person or group, is open source, operates programmatically and has been certified by the SEC as “mature” (§ 205). That certification process requires filing with the SEC information about the blockchain’s source code, transaction history, supply process, governance, development plan and related disclosures (§ 203). Then, on a continuing basis, mature blockchains need to file semiannual reports and current reports. Trading restrictions for affiliated persons differ

depending on whether the SEC has certified the system as mature (§ 204).

- The bill orders the SEC to issue rules to determine whether to exempt from registration requirements digital commodities issued before the enactment of this bill (§ 204).

## DeFi Exemption

The bill also addresses the role of decentralized finance (DeFi). It would define a DeFi protocol as a blockchain system that enables users to engage in a financial transaction in a self-directed manner so that no other person is necessary to execute the financial transaction or take custody of the digital assets of the user during any part of the financial transaction (§ 103). The bill clarifies that no person would be subject to the proposed Act based on the following activities relating to the operation of a DeFi protocol: compiling network transactions, conducting computational work, providing user interface technology, developing a blockchain system, publishing or maintaining a messaging system to be used on the platform, participating in a liquidity pool to execute a contract of sale of a digital commodity, or developing software (§§ 309, 409). However, this section of the bill does not take away the SEC or CFTC’s antifraud, antimanipulation, or false reporting enforcement authorities for transactions through DeFi protocols (§§ 309, 409).

## Proposed Next Steps

The proposed Act calls for several joint rulemakings and memorandums of understanding between the CFTC and SEC. The SEC and CFTC would also have the flexibility to grant relief from duplicative or unduly burdensome requirements (§§ 406, 408, 411). Additionally, the bill would commission several studies (§§ 504-507) and create a new group in the CFTC called “LabCFTC,” which would serve to promote technology innovation, inform the Commission about these innovations and communicate with FinTech market participants (§ 503).

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