

Landmark Bipartisan Legislation Attempts To Create Long-awaited Regulatory Framework for Digital Assets

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Governments and regulators have struggled to keep pace as new digital asset classes and other blockchain applications have risen to prominence. This regulatory uncertainty has caused confusion in the markets and impeded greater adoption of distributed ledger technologies in the United States. However, on June 7, 2022, United States Senators Kirsten Gillibrand (D-NY) and Cynthia Lummis (R-WY) introduced the [Responsible Financial Innovation Act](#) (RFIA), the first major piece of U.S. federal legislation to provide a reasonably comprehensive regulatory framework for digital assets. The nearly seventy-page RFIA addresses Commodity Futures Trading Commission (CFTC) and Securities and Exchange Commission (SEC) jurisdiction over digital assets, the regulation of stablecoins, tax treatment of cryptocurrencies, and other important and unresolved issues.

Generally, the bill is largely designed to integrate digital assets thoughtfully and more clearly into the existing regulatory framework, with the objective of promoting innovation while also protecting consumers. It also appears to represent something of compromise between industry advocates and skeptics, in acknowledgement of the fact that Bitcoin and its extensive progeny of assets and systems are here to stay.

Some of RFIA's most significant provisions are as follows:

1. The creation of definitions for several significant terms, including “digital asset,” “virtual currency,” “payment stablecoins,” and “smart contracts,” among other important terms, that are designed to enable consistent discussions regarding regulations and facilitate consumer understanding of terms used in the digital asset space.
2. Providing clearer distinction between digital assets that are securities and commodities by examining the rights or powers conveyed to the consumer. Essentially, the bill would place many digital assets under the oversight of the CFTC through the definition of “ancillary asset”: an “intangible, fungible asset” that is sold as an “investment contract.” The bill, however, excludes from the term “ancillary assets” those digital assets that provide a debt or interest in an entity or other rights that more typically resemble the rights of holders of securities. Those types of assets would remain under the jurisdiction of the SEC.
3. Requiring tailored disclosures relating to “ancillary assets” that ensure consumers have the information they need to make sound financial decisions, as well as requiring certain disclosures to the SEC from companies that raise funds through digital asset sales.

4. Establishing a new framework for banks and credit unions to issue stablecoins and providing that those stablecoins are neither a commodity, nor a security. Issuers of stablecoins would not have to become depository institutions, though the bill stipulates that any depository institution with a state charter would be entitled to an account at a Federal Reserve bank, regardless of whether they are federally insured or supervised. Significantly, the bill also establishes digital asset exchanges as “financial institutions” under the Bank Secrecy Act.
5. Assigning the CFTC exclusive spot market jurisdiction over all fungible digital assets which are not securities, including ancillary assets, in addition to the agency’s current jurisdiction over leveraged transactions. The bill permits futures commission merchants to conduct digital asset activities and provide strong custody and customer protection requirements.
6. Creating a workable structure for the taxation of digital assets. The bill provides a *de minimis* exclusion of up to \$200 per transaction from a taxpayer’s gross income so that consumers can make purchases with virtual currency without having to account for and report income. The bill also clarifies the tax treatment of different actors and actions in the digital asset industry, including that miners and other validators are not “brokers” for income tax purposes and that their rewards shall not be income until redeemed for cash.
7. Creating an advisory committee composed of diverse stakeholders to develop guiding principles, empower regulatory agencies, and advise lawmakers on fast-developing technology in order to ensure that regulations remain relevant and effective.
8. Requiring a study on digital asset energy consumption intended to determine the best ways in which technology used for energy-intensive virtual currency mining can be leveraged for deploying more renewable and clean energy and reducing energy waste.
9. Providing a regulatory sandbox for state and federal regulators to collaborate with financial technology companies and permit them to introduce innovative products into the market on a limited basis. This would allow regulators to become more familiar with the financial technology products in a controlled environment, and to participate in the consumer education and financial literacy work that is important to help them engage safely with the market.
10. Directing the Government Accountability Office (GAO) to conduct an analysis of the potential opportunities and risks associated with investing retirement savings in digital assets and to report its findings to Congress, the Department of Treasury, and the Department of Labor in order to avoid limiting consumers’ opportunities to benefit from the digital asset and cryptocurrency markets while also ensuring that investments can be made safely.

In a statement, Senator Gillibrand said, “digital assets, blockchain technology and cryptocurrencies have experienced tremendous growth in the past few years and offer substantial potential benefits if harnessed correctly. It is critical that the United States play a leading role in developing policy to regulate new financial products, while also encouraging innovation and protecting consumers.” Ultimately, the bill seeks to spark innovation and develop clear standards, define jurisdictional boundaries, and protect consumers.

While the RFA is a positive step toward remedying uncertainty in the digital asset space, it must make its way through multiple committees of jurisdiction, and the fate of the bill remains to be seen. With Senator Lummis on the Senate Banking Committee that oversees the SEC and Senator Gillibrand on the Agriculture Committee that oversees the CFTC, the bill is poised, at least, to engender significant discussion and debate.

Winston & Strawn is closely monitoring these developments. We will provide our clients and friends of the firm with more information on this topic as it becomes available.

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Authors

[Daniel T. Stabile](#)

[Kimberly A. Prior](#)

[Gabriela Plasencia](#)

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Daniel T. Stabile



Kimberly A. Prior



Gabriela Plasencia

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