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Comparison of digital asset legislative proposals

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Introduction

— Digital asset legislation is on the (perhaps distant) horizon. We have started to see legislative proposals, some of which are meant to create a regulatory framework for all digital assets and others for certain classes of digital assets such as cryptocurrency or stablecoins.

— Since there have been many summaries of these proposals, we think we can be most helpful by comparing the bills to each other so that market participants can begin to understand the common themes emerging through the legislative process.

— We don't expect any of these bills to be signed into law in their current form. Based on our experience, however, early proposals often provide the building blocks for future proposals that ultimately become law. We think that comparisons like this one can be helpful in seeing the flaws in the current proposals and where consensus starts to emerge.

— We intend to update this comparison as new bills are introduced.

— The following overview chart identifies eight pending congressional digital asset bills, which we describe in greater detail in subsequent charts that compare, in each case, the provisions for (1) stablecoins, (2) any broader range of digital assets and (3) approaches to digital asset classification.

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Overview of legislative proposals

	Lummis-Gillibrand Responsible Financial Innovation Act	Thompson Digital Commodity Exchange Act of 2022	Toomey Stablecoin TRUST Act of 2022	Hagerty-Hollingsworth Stablecoin Transparency Act	Gottheimer Stablecoin Innovation and Protection Act of 2022	Beyer Digital Asset Market Structure and Investor Protection Act	Emmer Securities Clarity Act	Davidson Token Taxonomy Act
Focus	Comprehensive digital asset regulation	Comprehensive digital asset regulation	Payment stablecoins	Fiat currency-backed stablecoins	Stablecoins issued by insured depository institutions or other qualified issuers	Comprehensive digital asset regulation	Digital assets sold pursuant to investment contracts—overrides the *Howey* test	Digital tokens—excluded from definition of security
Status	Discussion draft released by Sen. Lummis (R-WY) and Gillibrand (D-NY)	Introduced by Rep. Thompson (D-CA)	Discussion draft released by Sen. Toomey (R-PA)	Introduced by Sen. Hagerty (R-TN); companion bill HR 7328 introduced by Rep. Hollingsworth (R-IN)	Discussion draft released by Rep. Gottheimer (D-NJ)	Introduced by Rep. Beyer (D-VA)	Introduced by Rep. Emmer (R-MN)	Introduced by Rep. Davidson (R-OH)
Date	June 7, 2022	April 28, 2022	April 6, 2022	March 31, 2022	February 15, 2022	July 28, 2021	July 16, 2021	March 8, 2021

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Regulation of stablecoins

Bill	100% stablecoin reserve requirement	Reserve disclosure requirement	New FDIC insurance scheme	Priority of claims over depository institution (**DI**) creditors	Issuer access to Federal Reserve payment system	Interoperability requirement
Lummis-Gillibrand Responsible Financial Innovation Act	✓	✓ CFO must disclose on monthly basis for all issuers	✗	✓	✓* For DI issuers	✗
Thompson Digital Commodity Exchange Act of 2022	✓ For fixed-value digital commodity operators	✓ Frequency to be determined by CFTC	✗	✗	✗	✗
Toomey Stablecoin TRUST Act of 2022	✓ For National Limited Payment Stablecoin Issuers (**NLPSIs**)	✓ Monthly basis, for insured depository institutions (**IDIs**) and non-IDIs	✗	✓	✓* For NLPSIs	✗
Hagerty-Hollingsworth Stablecoin Transparency Act	✗	✓ Monthly basis for all fiat currency-backed stablecoin issuers	✗	✗	✗	✗
Gottheimer Stablecoin Innovation and Protection Act of 2022	✓ For Nonbank Qualified Stablecoin Issuers (**NBQSIs**)	✓ Terms applicable to NBQSIs to be determined by OCC	✓	✓* Assuming IDIs are permitted to issue qualified stablecoins through separately incorporated NBQSIs	✗	✓
Beyer Digital Asset Market Structure and Investor Protection Act	✗	✗* Not explicitly required, but may be mandated by Treasury Secretary	✗	✗	✗	✗

Key aspects of comprehensive digital asset regulation schemes

Bill	Supervision and regulation	Consumer protection	AML/CFT and economic sanctions	SROs	State sandboxes	Other provisions
Lummis-Gillibrand esponsible Financial Innovation Act	**CFTC**. Gives the CFTC primary authority over most types of digital assets and digital asset activities. Digital asset securities primarily regulated by the SEC. **Digital Asset Exchanges**. Amends the CEA to permit digital asset trading platforms to register with the CFTC as Digital Asset Exchanges. Digital Asset Exchanges subject to CFTC core principles—modelled off of the CFTC's core principles for Designated Contract Markets (17 CFR Part 38). Digital Asset Exchanges may offer for trading any digital asset that is not "readily susceptible to manipulation." **Similarity to other bills**. Similar to Digital Commodity Exchange Act of 2022.	**Insolvency risk**. Customer assets safeguarded in the event of Digital Asset Exchange insolvency. **Disclosure**. Digital asset service providers must disclose terms of service to customers, such as: — material digital asset source code version changes — whether customer assets are segregated from other customer assets — bankruptcy treatment and risks of loss — redemption rights — dispute resolution process — fees — policies for re-pledging customer digital assets — details on digital asset lending arrangements	**AML/CFT**. DIs subject to existing AML/CFT requirements. Directs the FFIEC, in consultation with FinCEN, to publish final guidance for DIs on AML and customer identification with respect to digital asset activities. **Economic sanctions**. Directs the Treasury Secretary to adopt final guidance clarifying the sanctions compliance responsibilities and liability of payment stablecoin issuers with respect to downstream transactions relating to the payment stablecoin.	**SROs**. Directs the CFTC and SEC to propose an SRO regime for digital assets.	**State sandboxes**. Establishes a state financial regulatory sandbox system for innovative financial products and services. Financial companies operating in a state sandbox may do business nationally—subject to states opting out—for up to two years, under the standards of this program upon approval by the applicable state and federal financial regulator.	**Accounting**. Specifies that digital assets properly held in a custodial account are not assets or liabilities of the custodian and shall be maintained on an off-balance sheet basis. Overturns the SEC's recent Staff Accounting Bulletin No. 121. **Custody and customer protection rules**. Requires the SEC to adopt final rules relating to: (1) the modernization of custody and customer protection rules for digital assets and securities and (2) permitting broker-dealers to perform trading and custodial activities for both security and non-security digital assets and traditional securities and custody client assets within the same legal entity. **Satisfactory control location**. Directs the SEC to issue guidance providing that the satisfactory control location requirement of Exchange Act Rule 15c3-3 may be satisfied for digital asset securities by "protecting the digital asset through commercially reasonable cybersecurity practices to maintain control of sufficient private key material . . .", including by means of a smart contract. Does not address digital assets that are not securities. **State money transmitter laws**. Directs the states to ensure uniform treatment of digital assets for the purposes of state money transmission laws.

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Key aspects of comprehensive digital asset regulation schemes

Bill	Supervision and regulation	Consumer protection	AML/CFT and economic sanctions	SROs	State sandboxes	Other provisions
Thompson Digital Commodity Exchange Act of 2022	**CFTC**. Gives the CFTC primary authority over most types of digital assets and digital asset activities. Digital asset securities primarily regulated by the SEC. **Digital Asset Exchanges**. Amends the CEA to permit digital asset trading platforms to register as Digital Commodity Exchanges (**DCEs**). DCEs must register with the CFTC if they offer leveraged trading or list for sale digital commodities that were distributed to individuals before being available to the public. DCEs regulated by the CFTC similar to the regulation of Designated Contract Markets and Swap Execution Facilities. To list new digital commodities for trading, a DCE may self-certify that it has analyzed the mechanics of the digital commodity and that the digital commodity complies with the requirements of the CEA, including that the digital commodity is "not readily susceptible to manipulation." DCEs subject to CFTC core principles, modelled off of the CFTC's core principles for Designated Contract Markets (17 CFR 38). **Digital commodity developers**. Digital commodity developers may voluntarily register with the CFTC and make certain disclosures, to facilitate potential future public trading of the digital commodity. **Similarity to other bills**. Similar to Lummis-Gillibrand Responsible Financial Innovation Act.	**Same protections**. Digital commodities subject to the consumer protections of the commodity and derivatives laws and digital asset securities subject to the consumer protections of the securities laws. **Insolvency risk**. Customer assets safeguarded in the event of DCE insolvency.	**MSB registration**. Registered DCEs must register with FinCEN as money services businesses, formalizing the regulatory requirements for DCEs to comply with anti-money laundering, recordkeeping, and reporting requirements.	✗	✗	**Custodians**. Unless exempted by CFTC, registered DCEs must hold customer digital commodity assets in a custodian recognized by the CFTC as appropriately regulated and adequately supervised by a state, federal or international banking regulator. **Pre-sold digital commodities**. Defines a "digital commodity presale" to consist of a delivery, or promise to deliver, a digital commodity by a developer to certain individuals as part of a securities offering or investment contract. Recipients of pre-sold digital commodities are limited to selling them on a DCE, through a securities offering or to an accredited investor. Holders of pre-sold digital commodities may also use them for their intended purpose (e.g., as a utility token), or seek a public interest exemption from these trading restrictions from the CFTC.

Key aspects of comprehensive digital asset regulation schemes

Bill	Supervision and regulation	Consumer protection	AML/CFT and economic sanctions	SROs	State sandboxes	Other provisions
Beyer Digital Asset Market Structure and Investor Protection Act	**CFTC**. Digital assets primarily regulated by the CFTC and digital asset securities primarily regulated by the SEC.	**Same protections**. Virtual asset service providers subject to the consumer protection rules of the commodity and derivatives laws with respect to digital assets and the consumer protection rules of the securities laws with respect to digital asset securities.	**AML/CFT**. Adds digital assets and digital asset securities to the statutory definition of "monetary instruments" under the Bank Secrecy Act, formalizing the regulatory requirements for digital assets and digital asset securities to comply with AML, recordkeeping, and reporting requirements. **Treasury rules**. Directs Treasury to adopt rules banning anonymizing services, money mules and anonymity-enhanced convertible virtual currencies.	✖	✖	**Makes Fed CBDC legal tender**. Amends the Federal Reserve Act to authorize digital federal reserve notes (U.S. dollars) in addition to physical bills. These are given legal tender status. Provides that digital assets and digital asset securities are not legal tender.

Approaches to digital asset classification

Bill	Key defined terms	Securities / commodities classifications
Lummis-Gillibrand Responsible Financial Innovation Act	**Ancillary asset**. Defines "ancillary asset" as an intangible, fungible asset that is offered, sold or otherwise provided to a person in connection with the purchase and sale of a security through an arrangement or scheme that constitutes an investment contract, subject to various exclusions. **Payment stablecoin**. Defines "payment stablecoin" as a digital asset that is redeemable on demand on a one-to-one basis for instruments denominated in U.S. dollars or a foreign currency (excluding digital assets), is accompanied by a statement from the issuer that the asset is so redeemable by the issuer or another identified person, is issued by a business entity, is backed by financial assets (excluding other digital assets) and is intended to be used as a medium of exchange.	*Howey* **test**. Retains elements of the *Howey* test to classify the contracts pursuant to which digital assets are sold as investment contract securities and the underlying digital assets as ancillary assets. Ancillary assets are subject to periodic disclosure requirements and presumed to be commodities and not securities; presumption can be rebutted by the courts (but not CFTC or SEC). **CFTC**. Gives the CFTC exclusive jurisdiction over a contract of sale for a digital asset, with certain exclusions that preserve the SEC's jurisdiction. **Payment stablecoins**. Payment stablecoins issued by DIs are classified as an identified banking product, meaning they are exempted from certain provisions of the federal securities and commodities laws. But they are not flatly excluded from the terms "security" or "futures contract" under the federal securities and commodities laws.
Thompson Digital Commodity Exchange Act of 2022	**Digital commodity**. Defines "digital commodity" as any form of fungible intangible personal property that can be exclusively possessed and transferred person to person without necessary reliance on an intermediary.	**Not a "security"**. Digital assets that do not convey rights and obligations typically associated with a security are considered digital commodities and subject to CFTC, rather than SEC, oversight.
Toomey Stablecoin TRUST Act of 2022	**Payment stablecoin**. Defines "payment stablecoin" as a convertible virtual currency that is designed to maintain a stable value relative to a fiat currency, is convertible into fiat currency, is designed to be widely used as a medium of exchange, is issued by a centralized entity, does not inherently pay interest and is distributed on a public distributed ledger	**Not a "security"**. Amends the definition of security under federal securities laws to exclude payment stablecoins. **Not an "investment company" or "investment adviser"**. Amends the investment company and investment adviser definitions under the Investment Company Act and the Investment Advisers Act, respectively, to exclude payment stablecoin issuers.
Gottheimer Stablecoin Innovation and Innovation Protection Act of 2022	**Qualified stablecoin**. Defines "qualified stablecoin" as any cryptocurrency redeemable on demand on a one-to-one basis for U.S. dollars and issued by an IDI or a NBQSI—i.e., any person other than an IDI that notifies the OCC of its election to become a NBQSI.	**Not a "security" or "commodity"**. Provides that a qualified stablecoin is not a security or commodity for purposes of state and federal securities and commodities laws.

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Approaches to digital asset classification

Bill	Key defined terms	Securities / commodities classifications
Beyer Digital Asset Market Structure and Investor Protection Act	**Digital asset security**. Defines "digital asset security" as a digital asset that (1) provides the holder with an equity or debt interest in an issuer; rights to profits, interest, or dividend payments in the issuer; voting rights in major corporate actions of the issuer; or liquidation rights upon an issuer's liquidation or (2) is issued to raise capital where the issuer has "a service, goods, or platform that is not wholly operational at the time off issuing a digital asset." **Stablecoin**. Defines "digital asset fiat-based stablecoin" as a digital asset that is, as determined by the Treasury Secretary, tied, pegged to, or collateralized substantially by the United States dollar or one or more fiat currencies. **Not "deposits"**. Amends the FDI Act to clarify that digital assets and digital asset securities are not deposits for purposes of federal deposit insurance, regardless of whether an IDI, savings association or credit union holds them.	**Bright lines**. Requires the CFTC and SEC—pursuant to joint rulemaking—to classify the top 25 digital assets by market cap and trading volume as either digital assets or digital asset securities. **"Commodities" not "securities"**. Excludes digital assets other than digital asset securities from the definition of security. Instead clarifies that these other digital assets are commodities regulated under the CEA—that is, subject to anti-fraud and anti-manipulation regulation under the CEA. **Limits *Howey* test**. Overrides the *Howey* investment contract test for digital asset securities. **Desecuritization**. A digital asset security that is issued to raise capital where the issuer has "a service, goods, or platform that is not wholly operational at the time off issuing a digital asset", but does not provide the holder with equity, debt, corporate voting, profit or liquidation rights, could be "desecuritized" upon the issuer filing a certification with the SEC, subject to notice and comment, that describes how the service, good or platform associated with the digital asset is operated.
Emmer Securities Clarity Act	**Investment contract asset**. Excludes from the definition of security under federal securities laws any "investment contract asset." This is defined to include any asset, whether in digital form or otherwise, that is sold or transferred pursuant to an investment contract but that is not itself a security.	**Contracts for sale vs. digital assets**. Overrides the *Telegram* case and codifies the position that simple agreements for future tokens (**SAFTs**) and other contracts for the sale of digital assets, that are not themselves securities, are securities and should be regulated as such but that the underlying digital assets should not be treated as securities. Overrides the *Howey* "investment contract" test as to the underlying digital assets themselves.
Davidson Token Taxonomy Act	**Digital token**. Defines "digital token" as a digital unit created by a blockchain protocol based upon detailed technical specifications set out in the statute. The digital token definition excludes digital units that represent financial interests in a company or partnership, such that those tokens would be securities.	**Not "securities"**. Amends the definition of security under federal securities laws to exclude any digital token. **Overrides *Howey* and other tests**. Overrides existing legal tests with respect to digital tokens, such as the *Howey* investment contract test.

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