



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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September 9, 2022

The Honorable Debbie Stabenow
Chairwoman
U.S. Senate Committee on Agriculture,
Nutrition, and Forestry
328A Russell Senate Office Building
Washington, D.C. 20510

The Honorable John Boozman
Ranking Member
U.S. Senate Committee on Agriculture,
Nutrition, and Forestry
328A Russell Senate Office Building
Washington, D.C. 20510

The Honorable David Scott
Chair
U.S. House Committee on Agriculture
1301 Longworth House Office Building
Washington, D.C. 20515

The Honorable Glenn Thompson
Ranking Member
U.S. House Committee on Agriculture
1010 Longworth House Office Building
Washington, D.C. 20515

Re: NASAA's Position on S. 4760/ H.R. 8730, the Digital Commodities Consumer Protection Act of 2022

Dear Chairwoman Stabenow, Chair Scott, and Ranking Members Boozman and Thompson:

On behalf of the North American Securities Administrators Association (“NASAA”),¹ I am writing to provide NASAA’s preliminary feedback on the Digital Commodities Consumer Protection Act of 2022 (herein, the “DCCPA”). In short, NASAA respectfully disagrees as a matter of policy and law with the approach taken in this legislation. As explained below, we (i) oppose the definition of “digital commodity” in this bill as too prescriptive and overly complicated; (ii) oppose the preemption provision in this bill as imprudent; and (iii) urge augmentation of the preservation of the state authority provision. In addition, while we are taking no position at this time on which federal regulator should oversee the cryptocurrency spot markets, we would oppose Congress providing a mandate to any federal agency that lacks the resources and infrastructure necessary to carry out the mandate fully.

The Scope of NASAA’s Preliminary Feedback

At the outset, we should clarify who NASAA represents with respect to federal legislation relating to the regulation of digital assets and associated technologies. As a general

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grassroots investor protection and responsible capital formation.

matter, the scope of NASAA’s comments on such legislation is informed by the regulatory functions of our members.

Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA is the voice of state securities agencies responsible for administering state laws enacted to protect investors and facilitate responsible capital formation. Our membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands.

At NASAA, we seek to preserve state *securities* laws among other reasons because these laws are a critical component of the century-old state regulatory framework to protect investors and administer laws designed to promote responsible capital formation. As a general matter, NASAA will weigh in on the preservation of state authority where contemplated federal legislation could interfere or diminish state authority in ways that potentially could harm the ability of state securities regulators to protect investors. In recent years, individual investors increasingly have sought the help of state securities regulators to address frauds and other forms of misconduct that involve investments in digital assets.²

NASAA’s Main Concerns Regarding the Pending and Anticipated Federal Legislation

We, as state securities regulators, are concerned that much of the pending or anticipated federal legislation relating to digital assets would create unnecessary complexities for the well-established securities regulatory framework in the United States. Ultimately, investors and taxpayers, many of whom perceive that our capital markets favor wealthier investors, would bear the costs of these unjustifiable changes.³

² Of note, many states regulate commodities and commodity transactions to limited degrees. In some states, the regulation of commodities and commodity transactions falls within the scope of the states’ securities laws. Further, state regulators cooperate with the U.S. Commodity Futures Trading Commission (“CFTC”) to combat frauds involving commodities. *See, e.g.*, NASAA, [The CFTC and 27 State Securities Regulatory Agencies Charge Los Angeles Area Precious Metals Dealer in Ongoing \\$68 Million Fraud Targeting the Elderly](#) (Feb. 1, 2022); [CFTC, NASAA Sign Agreement for Greater Information Sharing Between Federal Commodities and State Securities Regulators](#) (May 21, 2018); [Regulators Join Forces to Warn Public of Foreign Currency Trading Frauds](#) (May 7, 2007); [Testimony of Bradley W. Skolnik](#), Indiana Securities Commissioner and NASAA President Before U.S. Senate Committee on Banking, Housing, and Urban Affairs (“Senate Banking Committee”) (May 8, 2000) (testifying regarding the regulatory framework of the future for the options, futures and equities markets); [Testimony of A. Duane Fry](#), Georgia Securities and Business Regulation Division Office of the Secretary of State, Chairman of the Commodities Committee of NASAA (Apr. 29, 1997) (testifying regarding certain provisions of the Commodity Exchange Act Amendments of 1997). As a general matter, NASAA would not weigh in on the preservation of state money transmitter laws. Instead, we typically defer to peer associations such as the Conference of State Bank Supervisors and the Money Transmitter Regulators Association on related policy decisions.

³ A concerning amount of distrust in our regulated capital markets exists. In a survey conducted in July 2022 by *Morning Consult*, the percentages of Gen Z, Millennial, Gen X, and Baby Boomer respondents who expressed trust in Wall Street were 33%, 32%, 34%, and 36%, respectively. In a survey conducted in March 2021 by *Bankrate*, among those invested in the stock market (including those invested through retirement plans), 56% agreed the market is rigged against individual investors (20% strongly agreed and 35% somewhat agreed). Moreover, distrust of our regulated markets appears to be higher among communities of color than among white Americans. *See* Taylor Nicole Rogers, [Crypto Collapse Reverberates Widely Among Black American Investors](#), *Financial Times* (July 5, 2022); *Morning Consult*, [Tracking Trust in U.S. Institutions](#) (July 2022); Ariel-Schwab Black Investor Survey,

Currently, four types of proposals in pending federal legislation are of particular concern to NASAA. In short, they would make it more difficult for state securities regulators to carry out their longstanding efforts to protect investors, promote responsible capital formation, and promote inclusion and innovation in our capital markets.⁴

First, we oppose the creation of new terms for the securities laws that are redundant of existing ones such as “security,” “investment contract,” “broker,” “dealer,” and “investment adviser.”⁵ Creating terms—or entire new frameworks—unique to digital assets but redundant of and possibly contradictory to the well-established securities regulatory framework would have costly consequences for everyone, including investors, legislators, regulated entities, regulators, and taxpayers. Costs would stem from, among other sources, the resultant time-consuming processes associated with amending regulations, rules, and resources to incorporate this new approach and educate market participants on the changes.

Second, we oppose the establishment of a new self-regulatory organization (“SRO”) or other regulatory body specific to digital assets.⁶ SROs, which are inherently conflicted, divert resources away from the public regulatory agencies such as state securities regulators and exacerbate the communication and coordination challenges that regulators and registrants already face. Even if conflicts and resources were not of concern, the record is clear—given the extent of the investor losses through bankruptcy, fraud, hacking, and theft—that the digital assets industry is not ready to regulate itself. By way of example, in early 2018, we organized a task force, called Operation Cryptosweep, that over the course of several years brought many enforcement actions relating to initial coin offerings and other cryptocurrency-related investment products.⁷ Fast forward to 2022, and on top of the issues occurring with platforms such as

[Report of Findings](#) (Apr. 2022); Lorie Konish, [Why U.S. Minority Communities May Turn to Cryptocurrencies to Pay Their Bills](#), CNBC (Feb. 8, 2022); Bankrate, [Survey: More Than Half of Investors Think the Stock Market Is Rigged Against the Individual](#) (Mar. 24, 2021); P. Sapienza and L. Zingales, [Financial Trust Index](#) (Feb. 5, 2020).

⁴ See, e.g., [NASAA Testimony](#) before the Senate Banking Committee (July 28, 2022); [NASAA Letter](#) to the Leadership of the Senate Banking Committee Regarding NASAA’s Core Principles for Evaluating Federal Legislation Relating to Digital Assets (Jan. 28, 2022).

⁵ See, e.g., [S. 4356](#), Responsible Financial Innovation Act (“RFIA”) (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; 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 regulators); [H.R. 1628](#), Token Taxonomy Act of 2021 (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).

⁶ See, e.g., [S. 4356](#), RFIA (directs the CFTC and U.S. Securities and Exchange Commission (“SEC”) to propose an SRO regime for digital assets). To be clear, we fully support regulated firms and individuals engaging with public regulatory agencies. At NASAA, we regularly engage with a wide range of stakeholders, including academics, industry representatives, investors, and other stakeholders.

⁷ See, e.g., [NASAA Testimony](#) before the Senate Banking Committee (July 28, 2022); Amanda Senn, Alabama Securities Commission Chief Deputy Director and NASAA Cybersecurity Committee Chair, [Cybercriminals and Fraudsters: How Bad Actors Are Exploiting the Financial System During the COVID-19 Pandemic](#) (June 16, 2020);

BlockFi, Celsius, and Voyager,⁸ we are still seeing unregistered sales of digital securities including in the “metaverse.”⁹ Indeed, over a decade into existence, members of the digital assets industry seem to struggle with, ignore, or even evade regulatory requirements.

Third, we oppose restrictions on the authority of state securities regulators to protect investors and promote responsible capital formation. These restrictions can occur in a few ways, including the use of definitions that effectively restrict the scope of the state regulators’ authority and express preemption provisions.¹⁰ Further restricting the authority of state securities regulators would be a gigantic step backwards for entrepreneurs, investors, and capitalism generally. Among other contributions to state and local communities across the United States, state securities regulators protect investors from financial fraud and abuse, educate investors working to build secure financial futures, support responsible capital formation by businesses, and help ensure the integrity and efficiency of the capital markets that power our economies.

Last, we do not believe that legislation should attempt to define a category of financial assets either by relying on common knowledge or by citing example products because doing so could have unintended consequences, could elevate terminology over substance, and could unfairly give competitive advantages to certain products or businesses by carving them out of possibly applicable regulatory requirements.¹¹ Today, most digital assets that are securities are

[NASAA Updates COVID-19 Enforcement Task Force Actions](#) (June 16, 2020); Christopher W. Gerold, then-Chief of New Jersey Bureau of Securities and 2019-2020 NASAA President, [Examining the Impacts of the COVID-19 Pandemic on U.S. Capital Markets](#) (May 26, 2020); [NASAA Forms COVID-19 Enforcement Task Force](#) (Apr. 28, 2020); Daniel Kuhn, [Maryland Targets Trading Platform Fraud as It Joins ‘Cryptosweep’ Effort](#), CoinDesk (Aug. 15, 2019); [NASAA Updates Coordinated Crypto Crackdown](#) (Aug. 7, 2019); [NASAA Updates Coordinated Crypto Crackdown](#) (Aug. 28, 2018); Joseph P. Borg, Alabama Securities Commission Director and former NASAA President, [Ensuring Effectiveness, Fairness, and Transparency in Securities Law Enforcement](#) (June 13, 2018); NASAA, [State and Provincial Securities Regulators Conduct Coordinated International Crypto Crackdown](#) (May 21, 2018).

⁸ See, e.g., Jay Zhuang, [Zac Prince Confronts Claims Comparing BlockFi to Celsius and Voyager](#), CryptoPotato (July 13, 2022). Prior to 2022, state securities regulators initiated a comprehensive review and investigation of BlockFi focused on the sale of unregistered securities to retail investors through BlockFi interest accounts. This work, which the SEC later assisted with, ultimately led to a settlement with BlockFi. See [NASAA and SEC Announce \\$100 Million Settlement with BlockFi Lending, LLC](#) (Feb. 14, 2022).

⁹ In April 2022, the Alabama Securities Commission and the Texas State Securities Board entered cease-and-desist orders against Sand Vegas Casino Club and its cofounders, Martin Schwarzberger and Finn Ruben Warnke. The orders accused the respondents of illegally offering securities in the form of non-fungible tokens (“NFTs”) to fund the development of a virtual casino in the metaverse. See [Sand Vegas Casino Club Located in the Metaverse Is Soliciting Investors to Invest Real Money in Un-Registered Investments](#) (Apr. 13, 2022). Sand Vegas Casino Club has no affiliation with the Las Vegas Sands Corporation. In May 2022, the Alabama Securities Commission, Kentucky Department of Financial Institutions, New Jersey Bureau of Securities, Texas State Securities Board, and Wisconsin Department of Financial Institutions simultaneously filed cease-and-desist orders against Flamingo Casino Club. The enforcement actions accused Flamingo Casino Club of scamming people through fraudulently selling NFTs that purport to convey ownership of a metaverse casino with alleged ties to Russia and give investors a right to share in the profits of the casino when other users play virtual games such as craps, blackjack, or roulette. See [Five States File Enforcement Actions to Stop Russian Scammers Perpetrating Metaverse Investment Fraud](#) (May 11, 2022). Flamingo Casino Club has no relationship or affiliation with Flamingo Las Vegas.

¹⁰ See, e.g., [S. 4760](#), the DCCPA (preempts registration requirements under state law relating to money transmission, virtual currency, and commodity brokers); [H.R. 1628](#), Token Taxonomy Act of 2021 (amends the federal securities laws to exclude digital tokens from the definition of security and preempts state laws requiring, or with respect to, registration or qualification of digital tokens).

¹¹ See, e.g., [S. 4356](#), RFIA.

structured the same way. Entrepreneurs seek to raise money from the public by selling assets to investors who expect profits from the efforts of the entrepreneurs. To allow digital asset-issuers more time to disclose material facts to investors and otherwise provide them special treatment under state and federal securities laws would undermine the public securities markets, disaggregate regulation of essentially identical securities offerings, and give certain businesses an unfair competitive advantage. Such an approach would be contrary to the longstanding fundamentals of both investor protection and fair markets.

NASAA’s Preliminary Feedback on S. 4760/ H.R. 8730, the Digital Commodities Consumer Protection Act of 2022

The DCCPA, if enacted as introduced, would authorize the CFTC to regulate spot markets for a newly created asset class termed “digital commodities.” The CFTC’s current jurisdiction over the spot commodity markets is limited to its general anti-fraud and anti-manipulation authority. Of note, the legislation would expand the jurisdiction of the CFTC by providing that the CFTC, not the SEC, would have exclusive jurisdiction over any account, agreement, contract, or transaction involving a digital commodity trade; requiring certain entities to register with the CFTC; and preempting state law registration requirements relating to money transmission, virtual currency, and commodity brokers.

Congress Should Make the Definition of Digital Commodity in the DCCPA Less Prescriptive and Complicated. The DCCPA expands the definition of “commodity” in the Commodity Exchange Act to include “digital commodity.” The DCCPA defines this term to mean a “fungible digital form of personal property that can be possessed and transferred person-to-person without necessary reliance on an intermediary.” The DCCPA then explains that the term “includes property commonly known as cryptocurrency or virtual currency, such as Bitcoin and Ether....but does not include...a security”.

NASAA strongly opposes the definition of “digital commodity” as written.¹² First, NASAA requests that Congress strikes “or virtual currency, such as Bitcoin and Ether” from the definition in the text of the DCCPA. If the purpose of this bill is to provide certainty to the regulation of digital assets created through encryption and traded by means of distributed ledger technology, “virtual currency” should not be in this definition. Instead, Congress should use “cryptocurrency” in the definition and then replace all instances of “virtual currency” in the DCCPA with “cryptocurrency.” Cryptocurrency is a more precise and recognized term for these

¹² The language reads as follows: “(18) DIGITAL COMMODITY.—(A) IN GENERAL.—The term ‘digital commodity’ means a fungible digital form of personal property that can be possessed and transferred person-to-person without necessary reliance on an intermediary. (B) INCLUSIONS.—The term ‘digital commodity’ includes property commonly known as cryptocurrency or virtual currency, such as Bitcoin and Ether. (C) EXCLUSIONS.—The term ‘digital commodity’ does not include—(i) an interest in a physical commodity; (ii) a security; (iii) a digital form of currency backed by the full faith and credit of the United States; (iv) except as provided in subparagraph (D), an instrument regulated by the Commission pursuant to any provision of this Act other than section 2(c)(2)(F); or (v) any other instrument that the Commission determines not to be a digital commodity. (D) EXCEPTION.—The exclusion described in subparagraph (C)(iv) shall not apply to a commodity transaction that is subject only to Commission antimanipulation, antifraud, or false reporting authority.”

assets.¹³ Moreover, if Congress shares NASAA’s concerns around unfair competitive advantages, then Bitcoin and Ether should not be in this definition. NASAA opposes the use of specific products in federal legislation, especially where such products are subject to changes in their fundamental structures. Further, while Bitcoin and Ether have been in existence for many years, neither of them is generally accepted by merchants for payment of goods and services. While the intent of citing them in the statute may be educational, the result is preferential treatment of certain products over others.

Second, NASAA urges Congress to strengthen the exclusion of securities from the definition of digital commodity by adding the following underlined clause: “a security as defined under federal law;”. The purpose of adding this clause is to ensure that future changes to federal securities laws are carried over to this exclusion.

Congress Should Preserve More State Authority. NASAA opposes the preemption provision and preservation of state authority provision as written.¹⁴ First, the preemption provision uses the term “virtual currency.” For reasons previously stated, Congress should replace “virtual currency” with the term “cryptocurrency.”

Second, the preservation of state authority provision is too narrow. Importantly, to ensure the preemption provision in the DCCPA cannot be read to interfere with state securities laws that reach beyond anti-fraud enforcement, Congress should add the following underlined clause: “shall not affect the applicability of State antifraud laws, or State laws pertaining to securities regulation.” Such state securities laws include, without limitation, laws in such critical areas as the licensing and registration of investment professionals, the regulation of market intermediaries such as broker-dealers and investment advisers, and the registration of certain securities offerings.

Congress Should Fund This Mandate. While we are taking no position at this time on which federal regulator should oversee the cryptocurrency spot markets, we urge Congress to consider the options carefully and only provide a mandate to the regulator that has or will receive the resources necessary to carry out the mandate fully. Presently, the SEC is the agency with an investor protection mission and existing infrastructure for educating investors, registering exchanges, products, and professionals associated with digital assets, and, if needed, enforcing the law. The agency has a wide-reaching presence with its 11 regional offices (Atlanta, Boston, Chicago, Denver, Fort Worth, Los Angeles, Miami, New York City, Philadelphia, Salt Lake City, and San Francisco) that allow it to engage in the type of examinations, enforcement, investor education, and investor outreach that is necessary to protect investors. State securities regulators similarly have the infrastructure in place for securities registration, education,

¹³ See White House, [Executive Order on Ensuring Responsible Development of Digital Assets](#) (Mar. 9, 2022) (defining “cryptocurrencies” as “a digital asset, which may be a medium of exchange, for which generation or ownership records are supported through a distributed ledger technology that relies on cryptography, such as a blockchain”).

¹⁴ The language reads: “(n) Preemption of State laws.—(1) IN GENERAL.—The registration of a digital commodity platform, an associated person of a digital commodity broker, or an associated person of a digital commodity dealer under this section—(A) shall preempt any applicable registration requirements under State laws relating to money transmission, virtual currency, and commodity brokers; and (B) shall not affect the applicability of State antifraud laws.”

examination, and enforcement, and have the added benefit of having a presence in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. By contrast, the CFTC presently lacks an investor protection mandate and the infrastructure necessary to oversee the cryptocurrency spot markets. It has limited geographical outreach with only three regional offices (Chicago, Kansas City, and New York City).¹⁵ If Congress were to give authority to the CFTC and not adequately fund the immense responsibility that comes with this mandate, including the many layers of regulatory coordination with state and federal securities regulators, such a decision would likely lead to regulatory arbitrage by market participants that ultimately harms the very investors that we are all trying to protect.

Thank you for your time and consideration. Should you have any questions, please do not hesitate to contact me or Kristen Hutchens, NASAA's Director of Policy and Government Affairs, and Policy Counsel, at khutchens@nasaa.org.

Sincerely,



Melanie Senter Lubin
NASAA President
Maryland Securities Commissioner

CC: The Honorable Sherrod Brown
The Honorable Patrick Toomey
The Honorable Maxine Waters
The Honorable Patrick McHenry

¹⁵ Unlike the industry surrounding futures, the digital assets industry markets itself and its products heavily to the general public and individual investors. In 2022, more digital asset companies enlisted celebrities and sports stars to market their platforms or products. For example, during Super Bowl LVI, an estimated 208 million-plus viewers watched comedy icon Larry David in an FTX commercial and NBA legend LeBron James in a Crypto.com commercial. In addition, they watched a Coinbase ad with a QR code bouncing from corner to corner of the TV screen. When scanned, the code brought viewers to Coinbase's promotional website, offering a limited-time promotion of \$15 worth of free Bitcoin to new sign-ups, along with a \$3 million giveaway that customers could enter. These ads all appeared to work. In the case of Coinbase, it saw installs of its app jump 309% week-over-week after the ad aired on Sunday, February 13, 2022, and then climb by another 286% on February 14. See Francesca Fontana, [The Crypto Firms That Bought Those Super Bowl Ads Aren't So Super Anymore](#) (June 18, 2022); NFL, [Super Bowl LVI Total Viewing Audience Estimated at Over 208 Million](#) (Mar. 1, 2022); Sarah Perez, [Super Bowl Ads Boosted Crypto App Downloads by 279%, Led by Coinbase](#), TechCrunch (Feb. 17, 2022); Chaim Gartenberg, [Coinbase's Bouncing QR Code Super Bowl Ad Was So Popular It Crashed the App](#) (Feb. 13, 2022); [The Moment of Truth | Crypto.com](#) (Feb. 13, 2022); [Don't Miss Out on Crypto: Larry David FTX Commercial](#) (Feb. 13, 2022). In the months that followed, we have seen a dramatic decline in the value of cryptocurrencies and other digital assets. See CoinMarketCap charts, available at <https://coinmarketcap.com/charts/>.