

April 2024

Encourage Innovators to Engage with State Securities Regulators and Comply with the Securities Regulatory Framework

- *Well-intentioned efforts to pass federal legislation related to so-called digital assets may unnecessarily undermine decades of well-established investor protections and further erode trust in our markets.*
- *The U.S. Securities and Exchange Commission (“SEC”) and Commodity Futures Trading Commission (“CFTC”), in consultation with state regulators, should develop a joint taxonomy using established terms and, if needed, new terms, and then inform Congress of the need for legislation if any. In doing this work, regulators should preserve as much of the existing regulatory framework as possible. Ultimately, taxpayers and investors, as well as more seasoned market participants, would bear the costs of unnecessary legislation.*

Background on the Regulation of Self-Titled Digital Assets

NASAA has not endorsed a definition of “digital assets.” Like many, NASAA has used the term as an aid for communicating. However, we recognize that this misleading marketing term has injected unnecessary complexity and confusion into our collective understanding of the law and regulation. Nearly all securities in the United States are issued and traded digitally. In the coming decade, more securities, including ‘traditional securities,’ probably will be traded using blockchain or other distributed ledger technology (“DLT”).

NASAA strongly opposes efforts to establish a new, redundant, and bespoke regulatory framework for self-titled digital assets that are securities (“digital asset securities”). Federal and state governments have long used our adaptable regulatory framework to maintain markets that are fair to veteran securities market participants and new or newer market entrants and products. To the extent regulators observe the same activities and risks to our markets presented by new practices, products, or professionals, we use the elasticity of existing regulations and rules whenever possible to regulate new market elements. This approach promotes fairness and often can minimize the overall costs of regulation.

Importantly, the SEC has interpreted its existing authority to extend to the offer, sale, and trading of, and other financial services and conduct relating to, digital assets to the extent they are securities. Platforms on which digital asset securities are traded in the secondary market generally must register as national securities exchanges or operate pursuant to an exemption from registration, such as the exemption under SEC requirements for alternative trading systems, and report information about their operations and trading to the SEC. Meanwhile, certain digital assets-related activities may trigger registration and other obligations with the SEC and a national securities association, primarily the Financial Industry Regulatory Authority (“FINRA”). For example, the securities laws would require an institution to register with the SEC as a broker if it were in the regular business of effecting transactions in digital asset securities at key points in the distribution chain. Such key points could include the solicitation and recruitment of investors, the regular advertisement of digital asset securities, and the receipt of transaction-based compensation for the trading of digital asset securities.

State regulators similarly have interpreted their authorities to extend to the offer, sale, and trading of, and other financial services and conduct relating to, digital assets to the extent they are securities. For example, a

person that facilitates the exchange of a digital asset security between persons or between a person and a platform, provides trade execution, and engages in the private placement of digital asset securities is a broker-dealer. State governments, the SEC, and FINRA regulate broker-dealers. Moreover, a person who, for compensation, advises others as to whether they should invest in digital asset securities or issues reports concerning digital asset securities must register as an investment adviser. Investment advisers are regulated by the SEC or one (1) or more states, depending on the assets under management (if less than \$100 million, the adviser is regulated by one (1) or more state securities regulators).

The Rationale to Fund and Require Enhanced Regulatory Coordination

NASAA strongly opposes proposals to weaken investor protections and preempt efforts by securities regulators to promote responsible capital formation. Respectfully, we believe that well-intentioned proposals such as the Lummis-Gillibrand Payment Stablecoin Act, the Clarity for Payment Stablecoins Act, the Financial Innovation and Technology for the 21st Century Act, and the Securities Clarity Act would undermine decades of well-established investor protections and further erode trust in our securities and other markets. Further, bespoke amendments to SEC and CFTC legal authorities over a particular asset class would be costly, anti-competitive, counterproductive, and unwarranted.

In lieu of a costly bespoke framework, NASAA urges Congress to direct the SEC and CFTC, in close consultation with state securities regulators, to prepare a joint rulemaking to address any regulatory gaps. In particular, Congress should direct the regulators to develop a joint taxonomy using established terms and, if needed, new terms, and then inform Congress of the need for legislation if any to make additions or adjustments to statutory definitions. In doing this work, regulators should preserve as much of the existing regulatory framework as possible. Ultimately, taxpayers and investors, as well as more seasoned market participants, would bear the costs of unnecessary changes to the framework. Normally, it is far less expensive for regulators and regulated entities to make additional improvements to an existing regulatory regime than to establish a new one and then make corresponding changes to related or affected laws, regulations, rules, forms, education resources, and other communications.¹

Key Points

- *NASAA has not endorsed a definition of “digital assets.” Nearly all securities in the United States are issued and traded digitally. In the coming decade, more securities, including ‘traditional securities,’ probably will be issued and traded using blockchain or other DLT.*
- *The SEC and the CFTC, in consultation with state regulators, should develop a joint taxonomy before Congress rushes into a new costly, bespoke regulatory framework.*
- *We should encourage compliance with existing securities laws and, if needed, engagement with regulators on requests for limited relief.*

¹ See, e.g., NASAA, [Letter to Congress Regarding H.R. 4766, Clarity for Payment Stablecoins Act of 2023](#) (July 27, 2023); NASAA, [Letter to Congress Regarding the Draft Financial Innovation and Technology for the 21st Century Act](#) (June 20, 2023); NASAA, [Letter to Congress Regarding Our Core Principles and Positions on Various HFSC Discussion Drafts Related to Digital Assets](#) (Apr. 11, 2023); NASAA, [Written Testimony of 2021-2022 NASAA President Melanie Senter Lubin before the U.S. Senate Committee on Banking, Housing, and Urban Affairs](#) (July 28, 2022).