

August 5, 2025

BY EMAIL

The Honorable Tim Scott
United States Senate
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The Honorable Cynthia Lummis
United States Senate
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The Honorable Bill Hagerty
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The Honorable Bernie Moreno
United States Senate
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Re: Response to Senate Banking Committee Digital Asset Market Structure Request for Information

Dear Chairman Scott, Senator Lummis, Senator Hagerty, and Senator Moreno:

Paradigm, Multicoïn Capital, Chainlink Labs, Electric Capital, Galaxy Digital, Ribbit Capital, and Tribe Capital appreciate the opportunity to respond to the Senate Banking Committee Digital Asset Market Structure Request for Information (“RFI”).¹ The discussion draft of digital asset market structure legislation (“Discussion Draft”)² provides an excellent building block towards bringing regulatory clarity to token classification and market structure for digital assets. Thank you for your leadership and for laying the groundwork for American digital asset markets to become the deepest and most liquid in the world.

¹ U.S. Senate Committee on Banking, Housing, and Urban Affairs, Senate Banking Committee Digital Asset Market Structure Request for Information (July 22, 2025), *available at* https://www.banking.senate.gov/imo/media/doc/market_structure_rfi.pdf. See also Majority Press Release, U.S. Senate Committee on Banking, Housing, and Urban Affairs, “Scott, Lummis, Colleagues Release Market Structure Discussion Draft, Issue Request for Information from Stakeholders” (July 22, 2025), *available at* <https://www.banking.senate.gov/newsroom/majority/scott-lummis-colleagues-release-market-structure-discussion-draft-issue-request-for-information-from-stakeholders>.

² U.S. Senate Committee on Banking, Housing, and Urban Affairs, “Market Structure Discussion Draft” (July 22, 2025), *available at* https://www.banking.senate.gov/imo/media/doc/senate_banking_committee_digital_asset_market_structure_legislation_discussion_draft.pdf.

Below please find our responses to select questions in the RFI.

I. Regulatory Clarity and Tailoring

Question 1(a): Should legislation rely on the concept of ancillary assets? If so, is the definition in proposed Section 4B(a) of the Securities Act appropriate? Does it exclude the right categories of assets?

Yes, “ancillary assets” is the right approach.

The question of whether a digital asset is a security most commonly arises in the context of determining whether the digital asset is sold pursuant to an investment contract.³ Prior leadership at the Securities and Exchange Commission (“SEC” or “Commission”) failed to provide a coherent *Howey* interpretation for market participants and contributed greatly to the legal uncertainty that persists today. Courts have increasingly embraced a simple legal truth long argued by market participants: the digital asset⁴ itself is not a security, even when sold pursuant to an investment contract.⁵ Legislation is key to enshrining this fundamental principle of the investment contract analysis into law.

The ancillary asset concept is elegant in its simplicity: it defines an ancillary asset as an intangible asset sold in connection with an investment contract and clarifies (i) the ancillary asset itself is not a security, and (ii) secondary transactions in an ancillary asset are not securities

³ The term “security” includes many instruments, including the flexible category of “investment contract,” which has been central to the analysis over whether a digital asset or digital asset transaction constitutes a security. *See, e.g.*, Section 2(a)(1) of the Securities Act of 1933 (“Securities Act”) (15 U.S.C. § 77b(a)(1)). The seminal test of whether a scheme or arrangement constitutes an investment contract was developed in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) (“*Howey*”). Of course, a digital asset itself (or a digital asset transaction) may be a security if it has the characteristics of any of the enumerated list of instruments within the relevant definitions of “security” under the federal securities laws. SEC Commissioner Hester Peirce recently underscored this point by noting: “tokenized securities are still securities,” citing as an example where an operating company or an investment company tokenizes its shares. *See* Hester M. Peirce, “Enchanting, but Not Magical: A Statement on the Tokenization of Securities” (July 9, 2025), available at

<https://www.sec.gov/newsroom/speeches-statements/peirce-statement-tokenized-securities-070925>. The Discussion Draft accounts for such a distinction by excluding such arrangements from the definition of ancillary asset.

⁴ Here we are referring to an ancillary asset. As discussed, a digital asset is a medium in which rights typical of a security may be imbued; however, such securities are expressly excluded from the definition of ancillary asset.

⁵ Courts have established that the subject of an investment contract is not, in and of itself, the embodiment of the investment contract. *See, e.g.*, *SEC v. Ripple Labs Inc.*, No. 20-cv-10832 (S.D.N.Y. July 13, 2023) (“XRP, as a digital token, is not in and of itself a “contract, transaction[,] or scheme” that embodies the *Howey* requirements of an investment contract.”) and *SEC v. Binance Holdings Limited et al.*, No. 23 Civ. 1599, ECF No. 248 (D.D.C. 2024) (“In the Court’s view, then, the SEC’s suggestion that the token is “the embodiment of the investment contract,” ... as opposed to the subject of the investment contract, muddled the issues before the Court.... In short, no one should read this case as deciding that crypto assets themselves are or are not “securities;” that is not the question presented.”).

transactions. Excluded from the definition are assets sold in connection with an investment contract that provides the owner of the asset with certain financial rights.

The clear break between the investment contract subject to the securities laws and the underlying digital asset, which may be a digital commodity, permits a clear division of regulatory oversight. By clarifying that secondary market transactions in ancillary assets are not securities transactions, this framework avoids some of the most problematic tripwires of the previous administration's regulatory approach, in which the classification of secondary market transactions could depend on strained interpretations and applications of the *Howey* test.

We generally agree with the Discussion Draft's definition of "ancillary asset." One note, however, is that Section 4B(a)(1)(A) seems ambiguous as to whether the "intangible, commercially fungible" assets it refers to only include digital assets, or whether other types of assets could qualify. To the extent the Committee wants to limit unintended applicability to other assets, it could consider defining ancillary assets as a subset of digital assets.

We also agree with the principle behind the exclusions in Section 4B(a)(1)(B)⁶—that assets that come with explicit legal rights to financial interests should not qualify as ancillary assets. This should address any concerns that the ancillary assets framework would undermine the health of existing securities markets by providing an avenue for issuers of traditional securities to easily circumvent applicable securities regulations. Nearly everything that we normally consider part of the current securities market—stocks, bonds, options, notes—consists of assets with legal or contractual rights. The idea that, say, bond issuers would be able to profitably evade securities regulations simply by *removing any obligation to repay* from their instruments seems far-fetched. Unlike crypto assets, bonds and other securities would have no value at all if they did not come with legal rights, and investors would have no incentive to accept a total sacrifice of those rights.

It seems particularly implausible that this rule would undermine the public securities markets. Traditional investors in public securities benefit from both legal rights and the disclosures required by the securities laws, and would generally not be willing to sacrifice either.

Nor do we think that this rule would privilege "form over substance." Whether an asset comes with legal rights or financial interests is one of the most substantive properties possible of that asset. Investors in traditional securities do not consider their legal rights to be a "formality." Hinging the relevant test on whether an asset is associated with legal rights is an elegant way to distinguish traditional securities, which derive their value from the legal obligations of another party, from crypto assets, which for the most part do not.

⁶ Discussion Draft, Section 101. In this document, we shall refer to subsections in Section 101 through references to Section 4B, which section Section 101 proposes to add to the Securities Act.

To avoid any doubt, we believe that the ancillary asset concept is preferable to the corresponding provisions of the Digital Asset Market Clarity Act of 2025 (“CLARITY Act”).⁷ The CLARITY Act’s “digital commodity” definition and complex securities exclusions would continue to permit *Howey* to be applied to crypto assets which do not derive their value from the legal obligations of another party.

Despite our agreement with the spirit of Section 4B(a)(1)(B), we recommend modifications because we are concerned that the current draft gives the SEC too much discretion to pass rules that could effectively restore aggressive enforcement regimes such as those pursued during the prior administration. We think the language should be amended to reduce its ambiguity.

First, we think this exclusion should only apply when the asset is associated with *legal* rights. While we think this is already the intent of the provision, it could potentially be read to cover “rights” that the asset has with respect to onchain protocols. Many assets, such as ETH, have the power to be staked to participate in consensus or other blockchain processes, which can allow the holder to earn revenue. Others have the ability to participate in onchain governance. While we do not think these types of powers are properly called “rights,” and while we do not think they would be covered under subparagraphs (i)–(iv) anyway, the clearest way to exclude onchain functionalities of these tokens from the kinds of offchain rights that the provision seems intended to cover would be to change the language in Section 4B(a)(1)(B) from “any of the following rights” to either “any of the following legal rights” or “any of the following legal rights distinct from the technical functionality of a token or protocol.”

Additionally, we think “express or implied financial interest” in Section 4B(a)(1)(B)(iv) should be replaced with “express financial interest.” The term “implied financial interest” is vague and could be interpreted very broadly. It could be read to include an interest in any value accrued through staking or any interest derived from the scarcity of the ancillary asset, such as value received in connection with a burn or buyback. This ambiguity and lack of a limiting principle undermines the clarity of the ancillary asset concept, and leaving its interpretation to rulemaking opens the door to a future Commission engaging in improper regulatory overreach and effectively gutting the benefits of the ancillary assets framework. For example, suppose a company contributes to the value of a network (such as by releasing open-source software; by building or hosting applications on top of the network; or by buying a token, like Tesla and other companies have done with Bitcoin). An aggressive future regulator or a federal judge not familiar with the nuances of crypto might say that this kind of behavior could create an expectation that the company will continue to do so, and thus gives the network’s token an “implied financial interest” in the company.

⁷ Digital Asset Market Clarity Act of 2025, 119th Congress, *available at* <https://www.congress.gov/bill/119th-congress/house-bill/3633>.

As discussed below in our response to question 1(b), this is the same kind of logic the SEC used under the prior administration to stretch the *Howey* test to bring questionable cases against a slew of companies in the crypto ecosystem, accusing them of creating an “expectation of profits” by doing anything that contributed value to a token. A test that could penalize issuers and their tokens for doing anything that could “imply” a financial interest would likely create the same kind of perverse incentives as efforts-based tests like *Howey*.

In the alternative to removing “implied” from Section 4B(a)(1)(B)(iv), we think language should be added to state that no implied financial interest exists if an issuer has expressly and unambiguously disclaimed the existence of any implied financial interest. As one possibility, the self-certification permitted by 4B(b)(2) could include such a disclaimer. This change could be made to any of Section 4B(a)(1)(B)(iv), Section 4B(b)(2), or a different part of Section 4B within Discussion Draft Section 101.

Finally, while we think we understand the intention of Section 4B(a)(1)(B)(iv) to mean that the SEC *may* choose to designate some clear and real but ineffable financial interest as disqualifying, it might instead be read to direct the Commission to promulgate broad regulations meant to exhaustively cover *all* possible financial interests. It would be less ambiguous to rewrite the provision to read: “Any other express [or implied] financial interest that the Commission may, by rule, determine to be a disqualifying financial right.”

Recommendations:

1. Replace the words “any of the following rights” in Section 4B(a)(1)(B) with “any of the following legal rights.”
2. Replace the words “express or implied financial interest” in Section 4B(a)(1)(B)(iv) with “express financial interest.” Alternatively, add language to Section 101 that makes clear no implied financial interest exists for an asset if the issuer has expressly and unambiguously disclaimed in writing that no implied financial interests exist.
3. Revise Section 4B(a)(1)(B)(iv) to read: “Any other express [or implied] financial interest that the Commission may, by rule, determine to be a disqualifying financial right.”

Question 1(b): Should legislation rely on existing concepts, such as from SEC v. W.J. Howey Co. (Howey), when defining which digital assets are securities?

We do not think that effective regulation of crypto assets requires undermining *Howey*.⁸ The ancillary assets approach correctly allows digital assets to be sold in investment contract transactions without being classified as securities themselves, and the Discussion Draft ensures

⁸ The *Howey* test establishes that an “investment contract” exists where a purchaser has made (1) an investment of money (2) in a common enterprise with (3) a reasonable expectation of profit (4) based on the efforts of others. *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946).

that secondary transactions in such assets are not treated as securities transactions. This avoids many of the most problematic consequences of the *Howey* test.

However, we do think that it is worth taking a critical look at whether the *Howey* test serves the public interest when applied to digital assets—both because in the Discussion Draft, it would still be applied to primary transactions, and because to the extent that other tests resemble it, they could face some of the same challenges.

The crypto industry experienced a *Howey*-centric regulatory regime during the previous administration.⁹ This approach was unworkable for the industry and failed to protect ordinary investors.

While the failure of this approach was partly due to regulators’ aggressive misinterpretation of *Howey* and their choice to regulate primarily through enforcement, we also think that it demonstrated some of the doctrinal weaknesses of the *Howey* test as a governing concept for digital asset regulation.¹⁰

First, the “efforts of others” prong of the *Howey* test, at least when applied to digital assets, can create perverse incentives that hurt investors. A test that hinges on whether a token issuer puts in efforts to contribute value to a token will inevitably incentivize issuers to minimize their efforts. This is particularly true when regulators and courts interpret any post-sale efforts as indicative of

⁹ The SEC asserted an aggressive and unbounded interpretation of *Howey* under former Chair Gary Gensler’s leadership. Enforcement actions filed by the SEC against digital asset trading platforms alleged violations relating to secondary transactions in “crypto asset securities,” a term designed to obfuscate the SEC’s lack of a consistent legal theory for why secondary transactions are investment contracts under *Howey*. Multiple district courts reprimanded the Commission for their lack of candor, with one court rejecting the SEC’s theory as “a departure from the *Howey* framework that leaves the Court, the industry, and future buyers and sellers with no clear differentiating principle between tokens in the marketplace that are securities and tokens that aren’t.” See *SEC v. Binance Holdings Ltd, et al.*, No. 23 Civ. 1599, ECF No. 248 (D.D.C. June 28, 2024) at 43.

The SEC and some lower courts have also taken an aggressive view of *Howey* through the deletion of the word “solely” from the “efforts of others” prong. See *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir. 1973) (“*Glenn Turner*”) (finding that “solely” can be replaced by “undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise”). The SEC erased the concept of “solely” from the *Howey* test in the Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Release No. 81207 (July 25, 2017) (“DAO Report”) (“An investment contract is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others”) despite citing to case law that expressly emphasizes such sole efforts, including *Howey* and *SEC v. Edwards*, 540 U.S. 389 (2004). This glossing over of the “solely” requirement is also present in the SEC staff’s “Framework for ‘Investment Contract’ Analysis of Digital Assets” (“Framework”), available at <https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets#> (“investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others”). In both the DAO Report and the Framework, the SEC adopts the standard set forth by the Ninth Circuit in *Glenn Turner*.

¹⁰ The inclusion of an ancillary asset as consideration in a securities transaction, whether an investment contract or otherwise, should not be interpreted to invalidate that status of such securities transaction. We suggest revising Section 4B(b) “Treatment of Ancillary Assets and Transactions” to clarify that secondary transactions in ancillary assets shall not be treated as securities, absent unique characteristics independent of the core of the ancillary asset.

an expectation of those efforts—even in the absence of promises. This interpretation puts honest issuers in a difficult bind, and provides unsavory issuers with an easy escape hatch. The end result is that the most conscientious projects receive legal threats and many projects wither away, too concerned about legal action to take any actions that could drive value to the protocols they built.

Second, the *Howey* test is unpredictable and difficult to apply. The caselaw around *Howey* was developed to cover a wide range of fact patterns, from orange groves to chinchillas to earthworm farms. While this makes it an effective catch-all for securities enforcers, it makes it a poor fit as a regulatory framework for an increasingly mature crypto asset industry.

The uncertainty of the *Howey* test deterred projects from continued efforts, and produced an invisible tax of legal fees for digital asset projects. A healthy regulatory regime should have beneficial second-order effects, rather than destructive ones.

Analogous concerns could apply to other tests as well, as discussed below in our response to question 6(a). While “control”-based tests, like the common control test in Reg DA of the Discussion Draft or the control-based test in the CLARITY Act make much more sense in a crypto asset context than “efforts”-based tests, they too suffer from misalignment with investor protection, which is the proper goal of the securities laws.

Recommendation:

1. Do not use *Howey* as the basis for any significant token classification system. Instead, create a new legislative definition in statute, as the Discussion Draft seeks to do with the “ancillary asset” definition. This definition should focus on objective factors and seek to eschew subjective considerations that may prove burdensome for ancillary asset originators to demonstrate.

Question 1(c): Should legislation mandate, as under proposed discussion draft Section 105, that the SEC undertake a rulemaking to clarify the definition of “investment contract” as articulated in *Howey*? If so, how?

The SEC has never undertaken a formal rulemaking of what an investment contract is in the nearly eight decades since *Howey* was decided.¹¹ It would be a benefit to investors, issuers, companies, stakeholders, and the SEC itself to have a public notice and comment process on

¹¹ In 2019, the SEC Staff of the Division of Corporation Finance issued the “Framework.” See *supra* note 9. This staff-level guidance was designed to aid the public in analyzing the sale of digital asset transactions under *Howey*. However, this guidance proved to be of limited utility because it (i) was merely staff-level guidance with no legal effect, (ii) provided over sixty factors for consideration when conducting a *Howey* analysis, and (iii) was at times contradicted by positions taken by the SEC through enforcement actions.

what constitutes an investment contract. If the Committee feels obligated to continue having any significant role for *Howey* in the digital asset space, this would be the least worst option.

The Discussion Draft, in Section 105(b), defines the five elements of an “investment contract” to be promulgated by the Commission. First, it must have an investment by an investor which involves more than a de minimis amount of money or services. Second, the investment must be made in a business entity of some form, whether incorporated or not. Third, there is an express or implied agreement by the issuer to provide “certain promises” to engage in “essential managerial efforts” on behalf of the enterprise. Fourth, the investor reasonably expects profits based on either the terms of the agreement or statements by the counterparty and its agents. Finally, the profits arising from any entrepreneurial or managerial efforts by the counterparty occur post-sale, are essential to the operation or success of the enterprise, and do not include ministerial, technical, or administrative activities.

The purpose of this test appears to be to provide a legal gloss on how *Howey* should be applied in the future. We believe it is appropriate for Congress to adopt a new test for investment contracts that is not constrained by *Howey*, consistent with the manner in which legislators have responded to other caselaw developments in the past.¹²

Howey was not envisioned by Congress when it enacted the Securities Act. The effect of that case has not been to establish some regulatory ambit for the proper registration and regulation of investment contracts. Instead, *Howey* stood for decades as a fundamental legal hazard for securities laws, where products that were deemed investment contracts were effectively impossible to sell in the legal securities market. As a result, there was little need for Congress to respond to and update *Howey*.

It is only in the last few years, because of crypto and digital assets, that we have seen significant novel questions around the investment contract definition. For the first time at scale, we have products that are available to a general public where the asset can be a non-security in some contexts but be a security in others because of the *Howey* test. *Howey* has thus shifted from a barrier marking the edge of securities jurisdiction to a bustling legal controversy, one that even courts have suggested adjudicating would be beyond their abilities and better left to political actors.

¹² See, e.g., Civil Rights Act of 1991, 102nd Congress, available at <https://www.congress.gov/bill/102nd-congress/senate-bill/1745> (responding in part to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); Lilly Ledbetter Fair Pay Act of 2009, 111th Congress, available at <https://www.congress.gov/bill/111th-congress/senate-bill/181> (responding in part to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); and Religious Freedom Restoration Act of 1993, 103rd Congress, available at <https://www.congress.gov/bill/103rd-congress/house-bill/1308> (responding in part to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)).

As Judge Amy Berman Jackson noted in her decision on the pleadings motions in *SEC v. Binance*:

Therefore, the Court will endorse and follow the approach taken by the thoughtful judges who boldly wrestled with crypto assets before this case was filed, and it will assess the offerings identified in the complaint individually, resisting the government’s implication that this ruling could go so far as to answer the definitional question that officials in the other branches of government appear to have been assiduously avoiding.¹³

That is a judge explicitly noting that no judge has wanted to offer the clear Solomonic judgment on what crypto is and that we should not expect any clear decision for years, if not decades. It is the microcosm of the rising plea from the judiciary for the political branches to give clarity on this subject.

We believe the current Section 105 is excellent as drafted and could be kept in its current form.

Recommendation:

1. Keep Section 105 as it currently is drafted.

Question 1(d): Should Congress revisit other terms within the existing definition of security, such as note, to accommodate digital assets and to prevent a later SEC from inappropriately construing these terms?

We think more clarity would be warranted. These terms have not been substantially updated in years or even generations. In fact, Congress has amended 15 U.S.C. Section 77b, the section of the U.S. federal code that contains the definitions of “security,”¹⁴ “issuer,” “prospectus,” “accredited investor,” and “dealer,” only twelve times since 1933. The last two of those edits were the addition of the term “security-based swap” in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)¹⁵ in 2010 and the addition of the term “emerging growth company” in the Jumpstart Our Business Startups Act¹⁶ in 2012.

¹³ *SEC v. Binance Holdings Ltd, et al.*, No. 23 Civ. 1599, ECF No. 248 (D.D.C. June 28, 2024) at 20.

¹⁴ The term “security” is defined in each of the Securities Act (15 U.S.C. § 77b(a)(1)), the Exchange Act (15 U.S.C. § 78c(a)(10)), the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(18)), the Investment Company Act of 1940 (15 U.S.C. § 80a-2(a)(36)), and the Trust Indenture Act of 1939 (15 U.S.C. § 77ccc(a)(1)). In *Reves v. Ernst & Young*, 494 U.S. 56, 61 n.1 (1990), the Court stated that “[t]he definition of ‘security’ in... the 1934 Act... is virtually identical to the definition in... the 1933 Act... and we have consistently held that the coverage of the two Acts may be considered the same.”

¹⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Congress, available at <https://www.congress.gov/bill/111th-congress/house-bill/4173>.

¹⁶ Jumpstart Our Business Startups Act, 112th Congress, available at <https://www.congress.gov/bill/112th-congress/house-bill/3606>.

Prior to Dodd-Frank, the last time that the definition of “security” was altered by Congress was in 1982,¹⁷ when the terms “any put, call, straddle, option, or privilege on any security, certificate of deposit or group or index of securities....[or such products] on a national securities exchange relating to foreign currency” were added. It would be useful for Congress to apply modern eyes to long-standing terms such as “note” and “bond,” even if Congress ultimately decides not to change those definitions.

Our own view is that assets that do not provide any of the legal and financial rights specified in Section 4B(a)(1)(B) should be excluded from the other instruments listed in the definitions of “security” as well. That is a clearer and cleaner approach to distinguishing securities from non-securities. We believe that continually attempting to shoehorn novel approaches to financial products into established and existing terms is not prudent.

Recommendations:

1. Consider updating the definition of other concepts in the Federal securities laws.
2. Make clear that assets which do not provide any of the legal and financial rights specified in Section 4B(a)(1)(B) do not fit within any instrument listed in the definitions of “security,” including but not limited to investment contracts.

II. Investor Protection

Question 5: What type of information should issuers be required to disclose in connection with digital asset offerings?

We are generally supportive of the disclosure requirements included in Section 4B(d) in the Securities Act. The requirements elicit material information important to investors, but do not overburden ancillary asset originators with unnecessary disclosure obligations from the securities laws that would be of little use to digital asset holders.

However, there are some technical provisions relating to who must provide these disclosures, when these disclosures are required, and how the disclosures are provided that warrant further consideration by Congress.

First, the definition of “ancillary asset originator” in Section 4B(a)(2) is overinclusive. The joint and several consideration provision of Section 4B(a)(2)(B) imposes disclosure obligations on “the entity that received the largest amount” of the ancillary assets in the first twelve months following the commencement of an offering. This is reasonable only to the extent that the person

¹⁷ A bill to clarify the jurisdiction of the Securities and Exchange Commission and the definition of security, and for other purposes, 97th Congress, available at <https://www.congress.gov/bill/97th-congress/house-bill/6156>.

with the largest amount of ancillary assets received the ancillary assets in the initial sale and is responsible for the development of the digital asset network that utilizes the ancillary asset. Absent such context and responsibilities, the person with the largest amount of ancillary assets would not be in a position to provide responsive disclosures under Section 4B(d) and should not be saddled with the disclosure obligations of an ancillary asset originator.

Second, Section 4B(c)(1)(A) is overinclusive because it requires Section 4B(d) disclosures be filed with the SEC in connection with *any* offer, sale, or distribution by an ancillary asset originator, regardless of whether the ancillary asset originator is relying on the Regulation DA exemption to raise capital and without a requirement that the distribution be to a U.S. person. Accordingly, sales of ancillary assets pursuant to Regulation D and distributions of ancillary assets that do not constitute securities transactions would trigger Section 4B(d) disclosures under the Discussion Draft. We believe this wide-sweeping disclosure requirement is unnecessary for investor protection. Market structure legislation should only mandate the Section 4B(d) disclosure when an ancillary asset originator is relying upon the Regulation DA exemption and should preserve flexibility for ancillary asset originators to voluntarily provide such disclosure at their discretion.

Third, Section 4B(d)(2)(B) includes certain disclosure obligations relating to cybersecurity, custody, and valuations that may necessitate the need for ancillary asset originators to safeguard confidential information. Market structure legislation should therefore explicitly permit ancillary asset originators to seek confidential treatment of sensitive commercial or financial information provided to the SEC on the same basis that public companies are permitted to seek such treatment under existing regulations.¹⁸ We also encourage confidential treatment for personally identifiable information relating to ownership of ancillary assets that may be required to be disclosed under Section 4B(d)(2)(A)(x), (xi), (xii) and (xiii) and Section 4B(d)(2)(B)(ii), (iii) and (iv).¹⁹ Congress should also encourage the SEC to properly safeguard all confidential private information it receives.²⁰

¹⁸ See Securities Act Rule 406, 17 CFR § 230.406, available at <https://www.law.cornell.edu/cfr/text/17/230.406>, and Exchange Act Rule 24b-2, 17 CFR § 240.24b-2, available at <https://www.law.cornell.edu/cfr/text/17/240.24b-2>.

¹⁹ The provision of information regarding ancillary assets held by a person could unnecessarily violate the financial privacy of such persons and subject such persons to heightened risk of personal attack. See DeFi Education Fund et al, “Digital Asset Market Structure Request for Information, Questions related to Decentralized Finance” (August 1, 2025) at page 16-17 (“A person’s financial transactions can paint the most intimate picture of their beliefs, associations, and activities – aspects of their lives which could lead to discrimination or harassment at the very least. Exposing users’ identities would also provide the world with unprecedented access to all past and present transactions of users, as well as their balances, which could make users with large amounts of sums the targets for exploitation or worse”). See also Jameson Lopp, “Physical Bitcoin Attacks”, accessed August 2, 2025, available at <https://github.com/jlopp/physical-bitcoin-attacks> (demonstrating the physical threats from the forced disclosure of crypto holdings).

²⁰ See Press Release, U.S. Department of Justice, *Alabama Man Pleads Guilty in Connection with Securities and Exchange Commission X Account Hack* (Feb. 10, 2025), available at <https://www.justice.gov/opa/pr/alabama-man-pleads-guilty-connection-securities-and-exchange-commission-x-account-hack>; Press Release, SEC, *SEC Brings Charges in EDGAR Hacking Case* (Jan. 15, 2019), available at <https://www.sec.gov/newsroom/press-releases/2019-1>.

We commend the Discussion Draft for limiting the obligations relating to disclosures to such information that is material and “known or reasonably knowable to the ancillary asset originator.”²¹ This limitation recognizes that, in many instances, information relating to an ancillary asset, or a blockchain protocol to which an ancillary asset may relate, is not personal to an ancillary asset originator in the same way that information required to be disclosed under the Federal securities laws is typically personal to the issuer of such securities. The imposition of obligations under Section 17 of the Securities Act²² to disclosures under both the CLARITY Act²³ and the Discussion Draft²⁴ has the potential to create liability for parties making such disclosures where they fail to disclose a material fact. Section 17 may create liability even where a material fact is undisclosed because such fact is not known to the disclosing party, potentially even after due inquiry by the disclosing party—i.e., pursuant to a constructive knowledge standard. This risk is heightened when a party making disclosures is not an ancillary asset originator or other party materially responsible for the development of the ancillary asset, such as an investor or trading platform. We encourage the committee to define when information is “reasonably knowable,”²⁵ and to expand the language in the section to clarify that all parties, not just ancillary asset originators, be subject to a constructive knowledge standard.

Recommendations:

²¹ Discussion Draft, Section 101, adding Section 4B(d)(1)(A) to the Securities Act.

²² While we are supportive of the imposition of anti-fraud protections relating to disclosures, liability under Section 17 includes areas where a material fact is omitted, without an explicit requirement that such material fact be constructively known to the disclosing party. Securities Act, 15 U.S.C. § 77q (“It shall be unlawful for any person in the offer or sale of any securities... to obtain money or property by means of any... any *omission to state a material fact* necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading”) (emphasis added).

²³ See CLARITY Act *supra* note 7 at Section 202(a)(2), amending the Securities Act to add Section 4B(a)(2) (“Section 17 shall apply to a statement made in an offering statement, disclosure, or report filed under this section to the same extent as such section 17 applies to a statement made in any other offering statement, disclosure, or report filed under this Act.”). See also Section 302(a)(2), amending the Securities Act to add Section 10(d) (“Judicial precedents decided under section 17(a) of the Securities Act of 1933... and judicial precedents decided under applicable rules promulgated under such sections, shall apply to permitted payment stablecoins and digital commodities with respect to those circumstances in which the permitted payment stablecoins and digital commodities are, as applicable, brokered, traded, or custodied by or through a broker or dealer or through an alternative trading system or a national securities exchange to the same extent as they apply to securities.”).

²⁴ Discussion Draft, Section 101, adding Section 4B(g)(1) to the Securities Act (“Except as provided in subsection (i), any statement made in a disclosure, certification, or other document furnished under this section shall be subject to section 17”). Section 4B(i) provides a safe harbor for forward looking statements that further disclaims liability where “the plaintiff fails to prove that the person that made the statement had actual knowledge that the statement was false or misleading when made.”

²⁵ In crafting a definition, accounting standards promulgated by the Financial Accounting Standards Board (“FASB”) provide a helpful guidepost. Under accounting standards, the term “reasonably knowable” appears in the context of management’s obligation to evaluate whether there are conditions and events that raise substantial doubt about an entity’s ability to continue as a going concern. Specifically, management’s evaluation “shall be based on relevant conditions and events that are known and reasonably knowable at the date that the financial statements are issued.” FASB Accounting Standards Update (“ASU”) No. 2014-15 at 205-40-50-3. FASB defines the “reasonably knowable” standard by stating “an entity should make a reasonable effort to identify conditions and events that it may not readily know, but would be able to identify without undue cost and effort.” FASB ASU No. 2014-15 at B26.

1. The joint and several consideration within the “ancillary asset originator” definition in Section 4B(a)(2)(B) should be revised to ensure that only non-issuers that received the largest amount of ancillary assets in the initial sale and are responsible for the development of the digital asset network have disclosure obligations.
2. Ancillary asset originators should only be mandated to provide disclosures described in Section 4B(d) in connection with an exempt transaction under Regulation DA. Ancillary asset originators should be provided flexibility to provide such disclosures on a voluntary basis in other contexts.
3. Ancillary asset originators should be afforded the ability to seek confidential treatment of sensitive information provided to the SEC in response to disclosure requirements of Section 4B(d).
4. The Discussion Draft should be amended (i) to define when information is “reasonably knowable,” and (ii) to ensure that all parties making disclosures required under the legislation be afforded a constructive knowledge standard, other than the actual knowledge standard pursuant to the forward-looking statements safe harbor.

Question 6: What, if any, restrictions on the disposition of ancillary assets by related persons or in affiliate transactions should Congress consider? To what extent are conflicts disclosures sufficient?

The imposition of holding periods and volume limitations may be reasonable restrictions on the sales of ancillary assets by certain insiders; however, restrictions should be narrowly tailored to achieve the assumed policy aims of protecting holders of ancillary assets from potential exit trading behavior by insiders.²⁶ Section 103 does not strike the appropriate balance and targeted modifications recommended below would improve the legislation.

First, we believe the scope of “related persons” under Section 103(a)(1) is too broad and covers parties that may not have the power to direct or control an ancillary asset originator²⁷ or possess inside information.²⁸ Specifically, the term includes a “consultant, advisor, vendor, or person

²⁶ Neither the CLARITY Act nor the Discussion Draft are clear regarding the policy goal of resale restrictions for digital commodities or ancillary assets. It has been presupposed that the policy aim is to promote “decentralization” (through the maturity test of the CLARITY Act or the certification regarding common control in the Discussion Draft) or to prevent insider sales prior to such decentralization. Contrast with Rule 144, which seeks to promote the availability of information in public markets when control securities or restricted securities are sold, with an eye on both reducing information asymmetries and promoting market liquidity. *See, e.g.*, Revisions to Rule 144 and 145, Release No. 33-8869; File No. S7-11-07 (December 17, 2007), *available at* <https://www.sec.gov/files/rules/final/2007/33-8869.pdf>.

²⁷ Rule 144 largely focuses on control securities. A control person is someone who has “the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996) (citing 17 C.F.R. § 240.12b-2).

²⁸ While restrictions on the trading of securities such as those found in Securities Act Section 5 and Rule 144 are focused on reducing information asymmetry, they do not address insider trading. Instead, Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5) form the basis for anti-fraud prohibitions on insider trading. *See SEC v Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968). In addition, the

serving in a similar capacity,” which would cover a wide range of third parties that provide any service to the ancillary asset originator. Additionally, “related person” includes *any* equity- or security-holder with respect to an ancillary asset originator, without reference to a threshold ownership percentage.²⁹ It is far from certain that such persons would have the ability to direct or control an ancillary asset originator or be privy to the sort of inside information that would justify indefinite restrictions on their ability to sell ancillary assets. If market structure legislation imposes restrictions on too many persons that are not truly insiders or control persons, it will reduce liquidity available for other holders of the ancillary asset and, in some cases, may discourage market participants from engaging with ancillary assets or consultants, advisors, or vendors from accepting tokens in exchange for services provided to ancillary asset originators. Market structure legislation should promote the operation of healthy markets but not seek to constrain perceived insiders, including those that do not exercise control.

Second, the CLARITY Act appropriately limited the application of holding periods and volume limitations to digital commodities actually acquired from a digital commodity issuer;³⁰ however, the Committee should consider unintended consequences of such holding periods and volume limitations, including the tax impact on (i) certain employees of an ancillary asset originator or other restricted parties who may realize ordinary income taxation upon vesting of a restricted token grant, but be prohibited from selling ancillary assets in order to pay such taxes and (ii) parties that may realize ordinary income from the onchain use of such ancillary assets (e.g., staking and restaking activity). The Committee should also consider whether it is appropriate for legislation to define the holding period and volume limitations that are more typically reflected in commercial agreements and norms.³¹ Doing so may fit certain parties and certain business

misappropriation theory of insider trading prohibits abuse in trading an instrument or asset by a party possessing information over which they have a duty. *See* *United States v. O’Hagan*, 521 U.S. 624 (1997). *See also* *United States v. Chastain*, No. 23-7038 (2d Cir. 2025) (overturning the district court’s denial of a motion to dismiss based on error on the materiality of information and other instructions; the original conviction relied upon misappropriation theory even though the underlying assets were not alleged to be securities) and Department of Justice, “Defendant Sentenced in Groundbreaking Cryptocurrency Insider Trading Case” (January 10, 2023), [available at https://www.justice.gov/usao-sdny/pr/defendant-sentenced-groundbreaking-cryptocurrency-insider-trading-case](https://www.justice.gov/usao-sdny/pr/defendant-sentenced-groundbreaking-cryptocurrency-insider-trading-case) (describing that a defendant pleaded guilty to wire fraud under the misappropriation theory relating to cryptocurrencies not alleged to be securities by the Department of Justice).

²⁹ Under the securities laws, there is no numerical threshold (e.g., 10% or 20%) over which control is specifically identifiable; instead facts and circumstances such as executive officer or director positions or voting control will be a focus of analysis. Mere ownership of any amount of equity or other securities should not establish a control relationship. *See* Revisions to Rule 144 and 145 *supra* note 26 (“[T]he determination of whether any person is an affiliate of an issuer is a factual one, and must be resolved on a case-by-case basis. In general, the Commission considers a person to be an affiliate of an issuer if that person directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.”).

³⁰ *See, e.g.*, CLARITY Act *supra* note 7 at Section 204, proposing to add Section 4C to the Securities Act (restrictions are imposed only on a digital commodity “acquired directly from its issuer, or an agent or underwriter thereof, pursuant to an investment contract in reliance on section 4(a)(8), or another exemption under [the Securities] Act.”). This mitigates the negative impact of holding period and volume limitation inflexibility.

³¹ Commercial practices in startup markets, including those involving ancillary assets, include defined lockups for (i) parties investing in an exempt offering from the ancillary asset originator and (ii) tokens granted or distributed to founders, employees and certain consultants of an ancillary asset originator. For token grants and distributions to founders and employees, lockups typically will match or exceed vesting terms (the period in which an employee

models, but may stifle and make American companies, projects, employees and investors competitively or financially disadvantaged relative to international parties to whom such restrictions may not apply. Such actions could threaten the goals stated by the Committee and the President to make America the crypto capital of the world.³²

Third, the reporting obligations imposed on related persons under Sections 103(c)(1)(D) and 103(c)(2)(D) do not consider legitimate security and privacy concerns of insiders. Publicly disclosing ownership and transactional details exposes ancillary asset holders to unique risks. Criminals could seek to use the information to attempt to hack wallets associated with related persons, and in some cases, will seek to use the information to endanger the physical safety of the related person.³³ Confidential reporting would enable the regulator to monitor insider transactions for potential misconduct and at the same time preserve the safety of related persons.

Recommendations:

1. The related person definition in Section 103(a)(1) and (2) should be narrowed to reflect true control persons of ancillary asset originators. Specifically, consultants, advisors, and vendors should be deleted from the definition, and a minimum of 10 percent threshold should be added to equity- and security-holders of ancillary asset originators. We respectfully urge consideration of the following language to accomplish this goal:
 - a. *Definition.—In this section, the term “related person means” —*
 - (1) *any person that directly, or indirectly through one or more intermediaries, has the power to direct the management and policies of the ancillary asset originator;*
 - (2) *any person that is a founder, executive officer, director, trustee, general partner, promoter, or any equity holder that beneficially owns 10 percent or more of the outstanding securities of the ancillary asset originator, unless such person demonstrates that they do not exercise control over the management or policies of the ancillary asset originator;*
2. The reporting obligations imposed on related persons under Sections 103(c)(1)(D) and 103(c)(2)(D) should permit confidential reporting to address the legitimate safety concerns of related persons.
3. Congress should direct the Commodity Futures Trading Commission (“CFTC”), not the SEC, to promulgate and oversee restrictions on sales by related persons. To the extent

must remain engaged with a company to avoid forfeiture of an equity or token grant – often four years). For employees and consultants, lockup terms are typically time based but may also tie to key performance indicators or milestones. Legislating lockups for investors and employees represents Congress affirming certain business models and practices to the detriment of models that may differ in structure.

³² Press Release, “Senator Scott: President Trump’s Signature on GENIUS Act Delivers for the American People” (July 18th, 2025) available at <https://www.scott.senate.gov/media-center/press-releases/senator-scott-president-trumps-signature-on-genius-act-delivers-for-the-american-people/>.

³³ See *supra* note 19.

market structure legislation grants the CFTC authority to regulate secondary trading of ancillary assets, it would be more efficient for the CFTC to have direct responsibility for monitoring insider transactions in the ancillary asset transactions subject to its jurisdiction. Section 101(h) should be amended to reflect changes in Section 103.

4. Instead of identifying specific holding periods and volume restrictions in Section 103(c), Congress should direct the relevant regulatory agency to determine the proper thresholds through the rulemaking process. Notice-and-comment rulemaking subject to robust economic analysis will allow for more optimal holding periods and volume restrictions to be determined. Such rulemaking should also mandate the creation of exemptions designed to waive holding periods and volume limitations where such restrictions create hardships upon the holder (e.g., preventing the holder from realizing proceeds to account for reasonably determined tax obligations as such obligations are generated or realized).
5. Section 103 should only apply restrictions on ancillary assets acquired directly from an ancillary asset originator or an agent thereof pursuant to a fundraising sale.

Question 6(a): Are the factors in proposed Section 103 for determining whether an ancillary asset ‘is not under common control by related persons’ appropriate? If not, how should they be modified?

We are concerned that the common control concept, as a proxy for decentralization, may push all projects into a one-size-fits-all pathway to decentralization that may not be realistic or desirable. For example, DePIN projects often need and expect a longer runway than four years to reach decentralization, particularly those relating to high utility infrastructure projects. Market structure legislation can reward decentralization without punishing the lack of it or the failure to meet an arbitrary and ill-suited timeline.

With respect to the specific factors proposed in Section 103, we believe the consideration in subparagraph (D) relating to the degree of economic or technical influence of a person over the network is not helpful because it would be difficult for market participants and the SEC to measure in any meaningful way. Further, the consideration in subparagraph (E) that provides the SEC with limitless discretion in identifying factors to consider is unnecessary and ripe for abuse by future SEC leadership that may be hostile to the industry.

Recommendations:

1. The condition for exemption under Regulation DA in Section 102(c)(2) should be amended to permit the ancillary asset originator to choose the time horizon within which it will take reasonable steps for the digital network to become certified as not subject to common control.
2. The considerations identified in Section 103(b)(2) for determining whether common control exists should be modified to remove subparagraphs (D) and (E).

3. Provide a special condition for exemption under Section 102(c) for DePIN projects to accommodate their unique circumstances.

III. Trading Venues and Market Infrastructure

Question 11: How should legislation address centralized intermediaries involved in the trading of digital assets?

We look forward to working with you and your colleagues on the Senate Committee on Agriculture, Nutrition & Forestry as to how legislation can best address centralized intermediaries involved in the trading of digital assets. At this time, we raise two discrete issues arising from the Discussion Draft.

First, we believe that market structure legislation should not impose regulatory obligations on digital asset market makers that would prevent them from performing their critical role of liquidity provision. For example, requiring market makers to adhere to the Section 103 selling restrictions of the Discussion Draft would have a devastating impact on their ability to provide market liquidity. Such restrictions would also stand in contrast with how similar market making activity is permitted under the federal securities laws. Market structure legislation should not impose selling restrictions or other regulatory obligations on market makers that are more stringent than comparable regulations under the securities laws.

Second, Section 4B(c)(1) exempts a foreign originator from the disclosure obligations of Section 4B(d). To the extent there is no disclosure provided in connection with such ancillary asset, it is unclear whether the ancillary asset will be permitted to be listed on regulated platforms in the US. Market structure legislation should provide a pathway for ancillary assets distributed by foreign originators, or ancillary assets with no identifiable originator (foreign or domestic) to be permitted to be listed on regulated platforms in the US. While legislation should encourage the onshoring of crypto projects back to the US, we believe that a balance must be struck for those projects that legitimately originate offshore.

Recommendations:

1. The restrictions on sale provisions of Section 103 should be amended to exempt market makers. We respectfully urge consideration of the following language to accomplish this goal:

Market Liquidity Provision.—This section shall not apply to any person buying or selling a digital commodity through regular two-sided bidding and offering for the purposes of providing market liquidity, subject to rulemaking by the Commission, provided that such activities are not undertaken for the purpose of evading the requirements of this section.

2. Congress should provide a pathway for ancillary assets distributed by foreign originators, or ancillary assets with no identifiable originator to be permitted to be listed on regulated U.S. platforms.

IV. Illicit Finance

Question 17: How should legislation address illicit finance and anti-money laundering issues as they relate to digital assets?

In order to neutralize state actor cyber security and illicit finance threats, we recommend that legislation require the establishment of a Crypto Cybersecurity Center (“Center”) that uses a technology-driven whole-of-government taskforce to prevent and disrupt state actors from exploiting cryptocurrency businesses and protocols. The Center would work in close collaboration with the private sector and would demonstrate unprecedented strength against scams, fraud, and cyber-attacks.

The Center would be inspired by task forces like JIATF-South, where a full range of authorities are brought together to combat a threat, as opposed to piecemeal efforts that can range in effectiveness and at times be disconnected from the realities of the technology. It would also serve as a center of gravity for U.S. government departments and agencies and private sector technology partners to bring innovative technologies and capabilities to severely disrupt these thefts.

The Center would also serve as a hub for developing, testing, and approving onchain compliance solutions and would allow officials to understand and test different cryptocurrency technologies.

Recommendation:

1. Congress should require the establishment of a Crypto Cybersecurity Innovation Center that uses a technology-driven whole-of-government taskforce to prevent and disrupt state actors from exploiting cryptocurrency businesses and protocols, in collaboration with the private sector.

V. Innovation

Question 31: Should Congress create an office at the SEC to be responsible for promoting innovation or designate an existing office as encompassing such duties?

The SEC’s Crypto Task Force (“Task Force”) is doing tremendous work to foster innovation and to bring clarity on the application of the federal securities laws to digital asset activities. The Task Force’s openness to meet with industry leaders and stakeholders, and the level of

transparency of those meetings, is unparalleled among federal financial regulators. The Task Force is soliciting feedback from stakeholders within the crypto industry and traditional financial markets, creating a forum for key input that informs SEC commissioners and divisions, and their respective actions.

Congress should encourage this refreshing approach to regulation by codifying the Task Force and directing it to continue its innovation promotion activities. At the CFTC, Congress should codify LabCFTC as the primary office responsible for promoting innovation at that agency.

Recommendations:

1. Codify the Task Force and LabCFTC to have official responsibilities for promoting innovation in connection with the fulfillment of the SEC's and CFTC's missions.
2. Require the Task Force and LabCFTC to solicit input from stakeholders and deliver reports to their respective commissions in advance of the promulgation of rules by such commissions.

Question 34: What, if anything, should Congress consider to encourage better cooperation between the SEC and CFTC regarding digital asset regulation?

The SEC and CFTC have a long history of sharing jurisdiction over products with mixed results. While the two agencies have collegially held meetings together to consider joint rulemakings in recent years,³⁴ the regulators also have resorted to litigation to settle their differences.³⁵ Congress can encourage better cooperation between the two agencies by clearly granting jurisdiction over specific activities and identifying specific rulemakings to be completed by each agency to implement market structure legislation. Precision in legislative directives will ensure that regulators follow the contours of the law and do not usurp Congressional authority that was not delegated.

Recommendation:

1. Congress should be as precise as possible in directing the SEC and the CFTC in their rulemakings implementing market structure legislation.

VI. Preemption

³⁴ See CFTC and SEC to Hold a Joint Open Meeting on October 22 (Oct 22, 2020), available at <https://www.cftc.gov/PressRoom/Events/opaeventcftcsecjointopenmeeting102220>.

³⁵ See, e.g., *Board of Trade of the City of Chicago vs. SEC*, 677 F.2d 1137 (7th Cir. 1982); *Chicago Mercantile Exchange vs. SEC*, 883 F.2d 537 (7th Cir. 1989); *Board of Trade of the City of Chicago vs. SEC*, 187 F.3d 713 (7th Cir. 1999).

