

**Statement of Heath P. Tarbert on the Digital Commodities
Consumer Protection Act before the Senate Committee on
Agriculture, Nutrition, and Forestry
September 15, 2022**

Chairwoman Stabenow, Ranking Member Boozman, and distinguished members of this Committee, thank you for inviting me to speak today on the Digital Commodities Consumer Protection Act of 2022. I am honored to share my perspective as the most recent past Chair and Chief Executive of the Commodity Futures Trading Commission (CFTC), the world’s premier derivatives regulator, as well as the current Chief Legal Officer of Citadel Securities, one of the world’s leading market makers.

The last time I appeared before this Committee I was the nominee to serve as the 14th CFTC Chair.¹ I stated then—and continue to believe—that the U.S. derivatives markets set the “global standard” for integrity, resilience, and vibrancy. Indeed, our financial markets are the envy of the world. Unfortunately, the same cannot be said for our digital asset markets. This Bill would help change that.

I. Digital Asset Markets Require Clear and Coherent Regulation

I appear before this Committee as neither a crypto evangelist nor a crypto denier. I believe that distributed-ledger technologies like blockchain—and many of the digital assets dependent on those technologies—embody the spirit of American innovation. They fuse two of our Nation’s greatest competitive advantages: technological ingenuity and vibrant financial markets. But digital asset markets currently lack the kind of coherent regulatory framework that enables other U.S. financial markets to flourish. The recent “crypto winter” has laid bare the

¹ Statement of Heath P. Tarbert, of Maryland, to be Chairman and Commissioner of the Commodity Futures Trading Commission before the Senate Committee on Agriculture, Nutrition, and Forestry (Mar. 13, 2019).

predictable consequences of these deficiencies—ranging from market collapses to fraudulent products to outright theft.² Those deficiencies also threaten to undermine the integrity of even the most widely traded digital assets, such as bitcoin.³ Indeed, a recent study by *Forbes* across 157 crypto exchanges globally found that “51% of the daily bitcoin trading volume being reported is likely bogus.”⁴

As CFTC Chair, I emphasized the duality of digital assets. I acknowledged the potential opportunities of this burgeoning asset class while also warning of its risks.⁵ I thought—just as I continue to think today—that it is critical for the CFTC to play an active role in the digital commodity space. Under my leadership, the Commission elevated the agency’s innovation office and successfully encouraged several of the largest crypto trading facilities to apply to become CFTC-regulated venues. At the same time, I used the tools available to the CFTC to crack down on crypto-related fraud, manipulation, and other violations of the Commodity Exchange Act. During my tenure, the agency brought nearly 20 crypto-related enforcement actions.⁶ Among these was a \$100 million penalty against an illegal,

² See Jonathan Ponciano, *Crypto Winter Watch: All the Big Layoffs, Record Withdrawals and Bankruptcies Sparked by the \$2 Trillion Crash*, FORBES (Aug. 18, 2022); Ryan Browne, *Hackers have stolen \$1.4 billion this year using crypto bridges*, CNBC (Aug. 10, 2022); Daniel Van Boom, *Luna Crypto Crash: How UST Broke and What’s Next for Terra*, CNET (May 25, 2022); MacKenzie Sigalos, *From \$25 billion to \$167 million: How a major crypto lender collapsed and dragged many investors down with it*, CNBC (July 18, 2022).

³ Sir Jon Cunliffe, Deputy Governor of the Bank of England, recently emphasized this point: “Crypto-technologies offer the prospect of substantive innovation and improvement in finance. But to be successful and sustainable innovation has to happen within a framework in which risks are managed: people don’t fly for long in unsafe aeroplanes.” Speech at Eden Hall, *Some Lessons from the Crypto Winter* (Jul. 12, 2022).

⁴ Javier Paz, *More than Half of All Bitcoin Trades Are Fake*, FORBES (Aug. 22, 2022).

⁵ See, e.g., Heath P. Tarbert, *Why the CFTC is the most important regulator you’ve never heard of*, FOXBUSINESS (July 29, 2019) (explaining that while “[t]echnological innovations such as blockchain hold great promise, and the rise of digital ‘currencies’ has created a new asset class,” we must remain vigilant against “emerging threats”).

⁶ See generally Div. of Enforcement, Commodity Futures Trading Comm’n, FY2020 Division of Enforcement Annual Report, at 7 (2020); Div. of Enforcement, Commodity Futures Trading Comm’n, FY2019 Division of Enforcement Annual Report, at 11 (2019).

unregistered futures exchange that offered bitcoin products to U.S. customers.⁷ In approving this action and others like it, I reflected that while “[d]igital assets hold great promise for our derivatives markets and for our economy,” innovation “can flourish only if there is market integrity.”⁸

But market integrity does not materialize in a vacuum. It requires a coherent regulatory framework through which market participants respect clear and consistent rules of the road. At Citadel Securities, we know this to be true not just in theory but in practice. As a leading market maker in the United States, Citadel Securities provides liquidity across the equities, options, futures, swaps, and fixed income markets.⁹ Because Citadel Securities typically serves as a reliable buyer or seller to investors looking to trade, our presence in virtually any market reduces trading costs, increases transparency, improves market resiliency, and broadens access. We are proud of our 20-year track record of helping retail investors, institutional asset managers, alternative asset managers, pension funds, and other clients obtain better pricing and meet their investment goals. We have long advocated for sound regulation here in America and beyond.¹⁰

⁷ CFTC, Press Rel. 8270-20, “CFTC Charges BitMEX Owners with Illegally Operating a Cryptocurrency Derivatives Trading Platform and Anti-Money Laundering Violations” (Oct. 1, 2020); CFTC, Press Rel. 8412-21, “Federal Court Orders BitMEX to Pay \$100 Million for Operating a Cryptocurrency Trading Platform and Anti-Money Laundering Violations” (Aug. 10, 2021).

⁸ CFTC, Press Rel. 8270-20, *supra* note 7 (internal quotation marks omitted).

⁹ Citadel Securities executes approximately 35% of all U.S.-listed retail equity volume, acts as a specialist or market maker in more than 4,000 U.S. listed-options names, and ranks as a top liquidity provider on the major U.S. options exchanges. We are the largest Designated Market Maker on the floor of the New York Stock Exchange, and one of the world’s largest ETFs traders. We are also recognized as a leading market maker in interest rate swaps, U.S. Treasuries, and foreign exchange products.

¹⁰ As a Firm, we have long championed the core regulatory principles of fairness, efficiency, and transparency. See Citadel Securities, *Enhancing Competition, Transparency, and Resiliency in U.S. Financial Markets* (May 2021).

But it is difficult, if not impossible, for established institutions like ours to participate and provide those benefits to a market where the regulatory landscape is uncertain, fragmented, and opaque. Because the digital asset markets lack sound regulation, much of the traditional financial sector remains on the sidelines. For investors, the absence of these trusted institutions results in higher costs, less transparency, and greater volatility. But this absence is neither inevitable nor intractable. We at Citadel Securities, like many other traditional financial firms, believe we could play a significant and constructive role in the digital asset markets. But established firms like ours are reluctant to meaningfully engage in a new market absent clear rules of the road.

That is why the Digital Commodities Consumer Protection Act of 2022 is so critical. The Committee has recognized that a clear and coherent regulatory framework is a prerequisite for safe and secure digital asset markets falling within its jurisdiction.

II. The Bill Achieves Three Essential Goals for Digital Commodities

On behalf of Citadel Securities, I am pleased to support this historic and bipartisan legislative initiative. The Bill would enhance integrity, resilience, and vibrancy in the U.S. digital commodity markets by achieving three essential goals. Specifically, the Bill: (1) addresses a critical gap in the CFTC's jurisdiction; (2) promotes U.S. leadership in digital assets; and (3) is designed to stand the test of time.

1. The Bill addresses a critical gap in the CFTC's jurisdiction.

Since its inception in 1975, the CFTC has been responsible for regulating traditional commodity derivatives, such as futures and options contracts on energy and agricultural products. In the intervening decades, those futures and options

contracts expanded to cover interest rates, foreign exchange, and all kinds of financial and non-financial assets. In response to the financial crisis of 2007–2009, Congress further expanded the CFTC’s jurisdiction to include swaps—a related family of financial derivatives.¹¹ But while the CFTC has long regulated derivatives—and despite its name starting with the word “commodity”—it has *never* had regulatory authority over the cash commodity markets that underlie those derivatives. To give a simple example, although the CFTC may regulate futures and options on dairy products, it does not directly regulate the sale of milk.

For traditional commodities markets, the CFTC’s limited jurisdiction makes sense. After all, why would we need a federal financial regulator in Washington to set the rules for the sale of grain between a neighborhood farmer cooperative and a mill, or for the sale of electricity from a generation plant to the local power company? Many of these local activities have been subject to effective state regulation since the late nineteenth century, while others are also subject to industry-specific federal regulation. In short, there is no regulatory gap for the CFTC to fill in these markets. And while Congress did provide the CFTC with certain enforcement authority to combat fraud and manipulation in cash commodity markets, it did so on the theory that such misconduct could ultimately harm the associated U.S. derivatives markets. That authority, however, is backward-looking. The agency can intervene only *after* harm occurs. It can punish bad behavior, but it cannot create regulations to prevent it.

While targeted enforcement authority may be well-suited for traditional cash commodity markets, it is woefully inadequate for policing the national and global digital commodity markets that have emerged during the last few years. It is

¹¹ See Heath P. Tarbert & Daniel J. Grimm, *The CFTC’s Swap Data Overhaul*, 20 FLA. ST. U. BUS. REV. 1, 10–11 (2021) (discussing swap-market reforms after the financial crisis).

undisputed that some of those digital assets qualify as “commodities” within the CFTC’s jurisdiction. But they are unlike traditional physical commodities in key ways. Digital assets are financial instruments residing in cyberspace and on various forms of decentralized blockchain technology, so they are by their nature incompatible with local regulation. And unlike traditional commodities, digital assets can be traded by anyone with an internet connection. Those differences have opened digital commodity markets to millions of everyday retail investors in the United States.¹² Unfortunately, because of the current regulatory gap, many of those retail investors have also suffered catastrophic losses as a result of hacks, fraud, and bankruptcies.

Some states have attempted to fill this regulatory gap by applying money-transmitter licensing requirements to digital commodities,¹³ but those laws are limited in reach and ill-suited to regulate this nationwide financial market. At the same time, market participants understandably struggle to navigate dozens of disparate regulatory regimes. A national market requires national regulation. And national regulation requires a national regulator. The CFTC is a natural fit, given its existing authority over fraud and manipulation in digital commodity markets. But under its current regulatory authority, the CFTC can only intervene long after such fraud or manipulation has occurred. That is simply too little, too late.

The Bill addresses this glaring regulatory gap by granting the CFTC authority to regulate direct trading—and not merely futures and derivatives—

¹² As the current CFTC Chair has observed, “[u]nlike most cash commodity markets, which are dominated by wholesalers and large financial institutions facilitating the transfer of commodities for commercial use and consumption, the cash market for digital assets is currently characterized by a high number of retail investors mostly engaged in price speculation.” See CFTC Chairman Rostin Behnam, Senate Committee on Agriculture, Nutrition, & Forestry, “Examining Digital Assets: Risks, Regulation, and Innovation” (Feb. 9, 2022), written statement at 2.

¹³ See CFTC Chairman Rostin Behnam, Senate Committee on Agriculture, Nutrition, & Forestry, Hrg., “Examining Digital Assets: Risks, Regulation, and Innovation” (Feb. 9, 2022), Tr. at 10.

involving “digital commodities,” which would include digital assets like bitcoin, ether, and related products.¹⁴ The CFTC would no longer need to wait until fraud and manipulation occur but could act proactively to prevent them. With this authority, the CFTC could provide consistent and appropriate “rules of the road,” removing much of the guesswork and confusion that constrains U.S. digital commodity markets today. This is a clear win for all participants in digital commodity markets, as the Bill would allow those markets to grow responsibly within the same kinds of regulatory guardrails that have made traditional U.S. financial markets the envy of the world.

2. The Bill promotes U.S. leadership in digital asset markets.

The Bill takes the critical first step of closing a harmful regulatory gap for digital commodities and establishing a strong foundation for American leadership in digital asset markets.¹⁵ But just as importantly, it does so in a forward-thinking way. The Bill would create a sound regulatory framework to foster digital commodity markets with integrity, resilience, and vibrancy. These are the very factors that have made the United States a leader in traditional financial markets such as equities, futures, bonds, and swaps.

The cornerstone of a well-functioning market is integrity, which results from customer protection and transparency. To enhance customer protection, the Bill would require digital commodity platforms to prohibit abusive trading practices,

¹⁴ Proposed Section 2(a)(18) of the Bill.

¹⁵ See e.g., President Joseph R. Biden, Executive Order on Ensuring Responsible Development of Digital Assets (Mar. 9, 2022) (“Digital Asset EO”) (“The United States has an interest in ensuring that it remains at the forefront of responsible development and design of digital assets and the technology that underpins new forms of payments and capital flows in the international financial system”); President’s Working Group on Financial Markets, *Statement on Key Regulatory Supervisory Issues Relevant to Certain Stablecoins* (Dec. 23, 2020) (encouraging policymakers to establish a regulatory landscape that balances responsible innovation with effective risk management and regulatory oversight).

eliminate or disclose conflicts of interest, and maintain sufficient capital and liquidity to protect customer assets.¹⁶ To enhance transparency, the Bill would require digital commodity platforms to “establish governance arrangements that are transparent to fulfill public interest requirements.”¹⁷ That is a marked difference from today, when rules, ownership, and other vital aspects of digital asset trading platforms are often opaque, leaving retail and institutional investors alike with little information to assess the safety, security, and fairness of transacting on a particular venue. The Bill would further require digital commodity platforms to capture and publish trading information in a timely manner,¹⁸ similar to how traditional financial exchanges operate today. All these enhancements to market integrity would strengthen U.S. leadership in responsible digital commodity trading.¹⁹

American leadership also requires our financial markets to be resilient and vibrant. The Bill would enhance the resilience of digital commodity trading facilities and broker-dealers alike by subjecting them to financial resource requirements and system safeguards for cybersecurity and other operational risks.²⁰ The Bill would promote vibrancy by way of optional self-certification, which

¹⁶ See SEC Chairman Gary Gensler, *Prepared Remarks on Crypto Markets*, Penn Law Capital Markets Association Annual Conference (Apr. 4, 2022) (noting that “unlike traditional securities exchanges, crypto trading platforms also may act as market makers and thus as principals trading on their own platforms for their own accounts on the other side of their customers”); Vice Chair Lael Brainard of the Federal Reserve, *Crypto-Assets and Decentralized Finance through a Financial Stability Lens* (Jul. 8, 2022) (observing that “crypto-trading platforms and crypto-lending firms not only engage in activities similar to those in traditional finance without comparable regulatory compliance, but also combine activities that are required to be separated in traditional financial markets”).

¹⁷ Proposed Section 5i.(b)(4)(G) of the Bill.

¹⁸ Proposed Section 5i.(b)(2)(G) of the Bill.

¹⁹ See *supra* note 2 (identifying recent dislocations in digital asset markets).

²⁰ Proposed Sections 5i.(b)(4)(D) & (E) of the Bill.

would allow responsible and more rapid innovation of new exchange products.²¹

At the same time, digital commodity trading facilities would be required to provide “impartial access,” which would reduce stagnation by ensuring that new and traditional institutional participants can easily enter these markets.²²

3. The Bill is designed to stand the test of time.

Perhaps the greatest feature of the Bill is that it is neither a quick fix nor a knee-jerk reaction to the emergence of digital commodity markets. Rather, the Bill is designed to stand the test of time. It is crafted on a bipartisan basis, adopts a principles-based approach, harnesses the power of self-regulation, and recognizes the important role played by other regulators. Together, these features ensure that this new legislation would continue to effectively and sensibly govern in the future, even as digital asset markets rapidly evolve.

First, history teaches that financial regulatory legislation enacted with broad bipartisan support is more likely to weather the winds of political change.²³ Much of the last decade has been spent fighting and refighting the battles that culminated in the Dodd-Frank Act, portions of which became highly partisan. The result has been delays followed by uncertainty as the relevant rules and regulations are in

²¹ Proposed Section 5i.(d) of the Bill.

²² Proposed Section 5i.(b)(2)(B)(2) of the Bill.

²³ See Secretary of the Treasury, Janet L. Yellen, *Remarks on Digital Assets* (Apr. 7, 2022) (“[R]esponsible innovation should reflect thoughtful public-private dialogue and take account of the many lessons we’ve learned throughout our financial history.”); Chris Giancarlo & Justin Browder, *Foundational Principles for US Crypto Asset Regulation* (Feb. 17, 2022) (“To ensure that any resulting legislation enjoys wide and long-lasting political legitimacy, it must be accomplished with broad bipartisan support.”); Christopher Dodd, *10 Years of Dodd-Frank: Looking Back, And Ahead*, Law360 (Jul. 20, 2020) (“Even when elusive, working to achieve bipartisan participation is important.”); Shaun Kern, *A Return to Bipartisanship in Banking*, ABA Banking Journal (June 1, 2018) (noting that a “bipartisan approach typically made better public policy . . . [and] also helped ensure that the changes Congress made to our banking laws were more durable, since both parties had meaningful input into the legislative process”).

constant flux as opposed to a steady evolution.²⁴ That has not been the case with Title VII of the Dodd-Frank Act, which was drafted by this Committee with broad, bipartisan support.²⁵ As with Title VII, the bipartisan nature of this Bill is a testament to the well-founded belief on both sides of the political aisle that regulatory clarity and coherence are preconditions to safe and sound innovation in the digital commodity space.

Second, the Bill responsibly advances the CFTC’s longstanding and time-tested approach of principles-based regulation.²⁶ This is the idea that the most effective regulatory solutions are often built upon “clearly stated principles” rather than “detailed, prescriptive rules.”²⁷ As former CFTC Chair, I believe that principles-based regulation is ideal for markets undergoing rapid change and innovation because principles are flexible by design—they chart broad requirements while allowing market participants to fill in the details in ways that are reasonable and effective.²⁸ I also think that principles-based regulation prevents market participants from exploiting the kinds of loopholes that can arise when regulations are too detailed to keep up with a rapidly evolving market.²⁹ Most critically, when reasonably and fairly implemented by a regulator such as the CFTC, principles-based regulation encourages responsible market innovation by

²⁴ See, e.g., Chairman Behnam, *supra* note 13 at 10.

²⁵ Heath P. Tarbert, *The Enduring Legacy of the Dodd-Frank Act’s Derivatives Reforms*, 6 J. FIN. REG. 159, 171 (2020).

²⁶ Heath P. Tarbert, *Rules for Principles and Principles for Rules: Tools for Crafting Sound Financial Regulation*, 10 HARV. BUS. L. REV. 1 (2020).

²⁷ *Id.* at 2. It is important to recognize, however, that there are several circumstances in which rules are ideal. See *id.* at 9–11.

²⁸ See *id.* at 6–8.

²⁹ See *id.* at 8 (“Principles-based regulation also discourages ‘loophole’ behavior and ‘checklist’ style approaches to compliance with the law,” in part because “rules may allow actors to comply with the ‘letter of the law’ but not the ‘spirit of the law.’”).

creating space for private-sector advancements to propel markets forward, while simultaneously making them safer and more secure.³⁰

In my view, the Bill adopts a principles-based approach that seeks to balance flexibility with clarity. It would mandate the establishment of “core principles for digital commodity platforms,” and allow platforms to exercise “reasonable discretion in establishing the manner” of their compliance with those principles.³¹ This flexibility would allow digital commodity platforms to evolve with the markets they serve and to adjust policies, procedures, and standards to reflect the unique digital products they offer. Trading facilities would have reasonable discretion in establishing their own rulebooks, and those rulebooks would in turn provide clear standards to which market participants can be held accountable.

Importantly, regulatory flexibility should not be confused with “light touch” regulation, nor a regime where market participants are left guessing what is permissible until an enforcement action comes their way.³² Regulated entities may have choices, but the CFTC remains responsible for ensuring that those choices are objectively reasonable. At the same time, the Bill would not give the CFTC a license to conduct rulemaking by enforcement. Instead, the Bill would vest in the CFTC the authority to impose additional requirements to implement or supplement the core principles “by rule or regulation.”³³

Third, the Bill reserves an important role for industry self-regulation to supplement the CFTC’s new jurisdiction, effectively creating a self-regulatory first line of defense. Specifically, it would require digital commodity trading facilities

³⁰ *Id.*

³¹ Proposed Section 5i.(b) of the Bill.

³² See Tarbert, *Principles*, *supra* note 26, at 7.

³³ Proposed Section 5i.(b)(1)(A)(ii) of the Bill.

to promulgate and enforce their own rules “to prevent manipulation, price distortion, and disruptions of the delivery or settlement process.”³⁴ Trading facilities would do so “through surveillance, compliance, and disciplinary practices and procedures, including investigations [and] sanctions.”³⁵ The Bill also recognizes the enormity of the administrative burden that the CFTC would face to implement the initial screenings and registration requirements for digital commodity trading facilities, dealers, brokers custodians, and all their associated persons. The Bill would lessen that burden by requiring those entities and persons to join a registered futures association to which the CFTC may delegate some of its more perfunctory regulatory duties.³⁶ The use of self-regulatory organizations to supplement government regulation is a tried-and-true method that has long been effective in the futures and swaps markets, particularly through the contributions of the National Futures Association (NFA).³⁷

Finally, while the Bill acknowledges that the CFTC is well-suited to regulate digital commodities, it also prioritizes cooperation and coordination with other federal agencies. The acute need for a regulatory framework governing digital commodities is the driving force behind the Bill—and its text is thoughtfully tailored to that objective. At the same time, the Bill implicitly recognizes the complexity of the U.S. financial system and the cross-cutting array of issues that

³⁴ Proposed Section 5i.(b)(2)(C)(iii)(II) of the Bill.

³⁵ *Id.*

³⁶ Proposed Section 5i.(i) of the Bill.

³⁷ See Heath P. Tarbert, *Self-Regulation in the Derivatives Markets: Stability Through Collaboration*, 41 *NW. J. INT’L L. & BUS.* 175, 184–87 (2021). As of June 2021, the NFA oversaw the day-to-day registration and supervision of approximately 3,176 entities and nearly 44,000 individuals within the U.S. derivatives industry. See *2021 Annual Review*, Nat’l Futures Assoc. (Nov. 8, 2021). In carrying out its responsibilities, the NFA also writes rules and standards of behavior that supplement those of the CFTC. The Financial Industry Regulatory Authority performs a similar self-regulatory function for the securities markets.

digital assets raise for banking, securities, consumer finance, payments, monetary policy, money laundering, and even national security.³⁸ The Bill appropriately stops short of trying to address every issue and does not foreclose Congress from doing so in the future.³⁹ In particular, the Bill would specifically exclude from the definition of “digital commodity” digital currencies backed by the U.S. government.⁴⁰ It would also exclude any “security” that would fall within the SEC’s purview.⁴¹

At its core, the Bill ensures that there is a relevant federal regulator to fill a persistent regulatory gap. That regulator may often be the CFTC. But it need not always be, and the Bill recognizes the contributions of other regulators—who also have critical roles to play—and seeks to avoid confusion about where responsibility lies.

III. The Bill Would Benefit from Further Refinements

All told, this Bill is a critically important first step to establishing a legal and regulatory framework for the purchase and sale of digital commodities in the United States. While the Bill successfully answers many of the most important questions facing this market, as this legislation progresses, we hope to continue to

³⁸ See e.g., Jay Clayton, *The Peculiar Challenges of Crypto Regulation*, WALL ST. J. (Aug. 25, 2022) (“[T]he word ‘crypto’ refers to a spectrum of products under multiple regulatory bodies . . . Proactive cooperation among regulators, an often cumbersome endeavor, is essential.”); Digital Asset EO, *supra* note 15.

³⁹ For example, certain digital assets such as “stablecoins” pose unique risks and implicate different regulatory frameworks and, as a result, may require more tailored legislative actions.

⁴⁰ Proposed Section 2(a)(18)(C)(iii) of the Bill.

⁴¹ Proposed Section 2(a)(18)(C)(ii) of the Bill. See also SEC Chairman Gary Gensler, *The SEC Treats Crypto Like the Rest of the Capital Markets*, WALL ST. J. (Aug. 19, 2022) (“Across decades of cases, the Supreme Court has made clear that the economic realities of a product—not the labels—determine whether it is a security under the securities laws.”).

engage with the Committee on potential improvements. I would like to make three suggestions to the Committee today.

First, the new categories of registrants created by the Bill could be more clearly defined. For example, the Bill currently defines a digital commodity dealer to include “a person that . . . has an identifiable business of buying or selling digital commodities for conversion into other digital commodities, currency, or other consideration.”⁴² The Bill also defines a digital commodity broker to include any person that “arrang[es] digital commodity trades on behalf of another person.”⁴³ These definitions could be interpreted broadly to capture persons—such as investment funds, their advisers, and even persons investing for their own account—who are generally not thought of as “dealers” or “brokers,” and not treated as such in similar regulatory frameworks. To avoid impairing these kinds of actors and activities, the definitions should be closely tailored to the specific activities Congress intends to regulate.

Second, given the acute uncertainty regarding the status of particular digital assets now and in the future as either digital commodities or securities, I believe market participants should be able to reasonably rely on the processes in the Bill for the listing and trading of new digital commodities. This includes the self-certification process to identify digital assets that are digital commodities. Market participants who register and trade such products in good-faith compliance with the Bill’s regulatory framework should be protected from adverse retroactive government or private actions if digital commodities certified in accordance with the Bill are subsequently reclassified as securities.

⁴² Proposed Section (2)(a)(21)(A)(iv) of the Bill.

⁴³ Proposed Section (2)(a)(19)(A)(iii) of the Bill.

Finally, and more broadly, while I am supportive of applying principles-based regulation to evolving technologies like digital commodities, it is important to ensure that market participants who reasonably apply and rely on those principles in good faith are not later subject to arbitrary, post hoc enforcement actions. While the CFTC has not typically engaged in rulemaking by enforcement, it is important for Congress to make its intent on this point crystal clear. Unlike the notice-and-comment process,⁴⁴ rulemaking by enforcement deprives market participants of the opportunity to weigh in on important questions of policy, fails to provide nuanced and comprehensive guidance that would allow market participants to adjust their behavior, and creates an uncertain regulatory system whereby participants are forced to divine an agency's policy. Using federal administrative resources in this way is simply inappropriate and unfair.

IV. The Challenge Posed By Digital Commodities Is Nothing New

I want to close not by looking to the future but to the past. Digital commodities may be new, but the challenge they pose to U.S. financial markets is not. In fact, 2022 looks a lot like 1922. One hundred years ago this very Committee helped to create the Grain Futures Act.⁴⁵ That watershed statute, enacted on September 21, 1922, was the precursor to the Commodity Exchange Act.⁴⁶ It established the Grain Futures Commission, an early forerunner of the CFTC.

The problem this Committee was trying to solve then was strikingly similar to the one it is working to solve now. A century ago, futures in wheat, corn, and

⁴⁴ Although I believe notice-and-comment rulemaking is more appropriate than other kinds of agency guidance when it comes to material policy changes, what matters even more is that market participants understand with clarity the standards to which they will be held to account. See CFTC Chairman Heath P. Tarbert, *Directive on the Use of Staff Letters and Guidance* (Oct. 27, 2020) (noting that “Staff Letters should supplement, rather than replace, rulemakings”).

⁴⁵ 42 Stat. 998 (1922), 7 U.S.C. §§ 1–17 (1926).

⁴⁶ Grain Futures Act, 42 Stat. 998–1003 (1922).

other grains emerged as a truly national financial market. But the exchanges and venues on which those products traded were subject to a patchwork of conflicting state laws⁴⁷ that failed to protect American farmers and their families from fraud and manipulation.⁴⁸ Then, as now, the solution was the same: a robust yet flexible federal regulatory framework that offers market participants clarity and coherence. The Digital Commodities Consumer Protection Act of 2022 will establish just such a framework. It would enable firms like Citadel Securities to make these markets work better for buyers and sellers of digital assets. We are pleased to support this important legislative initiative.

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Thank you again for the opportunity to address this esteemed Committee on the topic of digital commodity markets. I applaud you and your Staff for leading the charge with this important Bill, which I hope will move forward on a bipartisan basis. As you and your Staff make further refinements to the legislation in the coming days, my colleagues and I at Citadel Securities look forward to sharing our expertise and experience in improving investor protection, transparency, and market resiliency. I welcome questions from the Committee.

⁴⁷ See *State v. Christopher*, 318 Mo. 225, 247 (1927) (holding “that the effect of the Grain Futures Act was to restrict the operation of State laws . . . so as to make them inapplicable to transactions coming within the terms of the Grain Futures Act, conducted on a ‘contract market’ according to the rules prescribed by that market”).

⁴⁸ Grain Futures Act, Sec. 3.