

**US HOUSE COMMITTEE
ON
AGRICULTURE**

**“The Future of Digital Assets:
Providing Clarity for Digital Asset Spot Markets”**

June 6, 2023

**Testimony of
Hon. J. Christopher Giancarlo**

Thank you, Chairman Thompson, Ranking Member Scott, and Committee Members. It is an honor to appear before this committee once again.

I am Chris Giancarlo, former Chairman of the U.S. Commodity Futures Trading Commission (CFTC). I appear before you today in my individual capacity as an industry professional and former member of the Commission.¹ The views I express are mine and mine alone.²

Five Years Perspective

A little over five years ago, I sat on the other side of the Capitol and gave testimony to the Senate Banking Committee. The topic was a rather obscure one at the time: the oversight roles of the SEC and CFTC over crypto.³ That hearing turned out to be one of the more noticed Congressional hearings on digital assets, at least in certain corners of the Twitter-sphere.

In the year just prior to that hearing, the price of Bitcoin had risen almost twenty fold. Respected US derivatives exchanges, CBOE and CME, sensed commercial demand for Bitcoin price hedging and sought to launch exchange trading of Bitcoin

¹ My professional affiliations are listed in Schedule A attached hereto.

² This testimony contains my professional thoughts on the issues discussed herein; it neither contains legal advice nor establishes an attorney-client relationship in any form. The opinions expressed herein are attributable to me alone, and they do not reflect the views, positions or opinions of any commercial, professional or nonprofit organization with which I am affiliated, including Willkie Farr & Gallagher LLP or other attorneys at the firm.

³ U.S. Senate Committee on Banking, Housing and Urban Affairs, Hearing: “Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission,” (February 6, 2018), (hereafter: Virtual Currency Hearing), available at <https://www.banking.senate.gov/hearings/virtual-currencies-the-oversight-role-of-the-us-securities-and-exchange-commission-and-the-us-commodity-futures-trading-commission>.

futures. In response, my administration drew upon existing authority and innovated a unique process of heightened review for new crypto derivatives products to facilitate rather than hamper their market debut.⁴ Our approach was a balanced one. In the five years since, these crypto derivatives markets and the CFTC's oversight of them have been quite successful.

Some may recall that our original decision to greenlight these products sparked some controversy.⁵ There were calls to prevent their launch.⁶ Yet, my team felt that attempting to block new futures products would not stop the rise of Bitcoin or other virtual currencies, but just push them offshore. Doing nothing would have been irresponsible.

At that February 2018 Senate hearing, I talked about a new generation's interest in crypto. I explained that the energy and momentum behind digital assets was not just driven by technological efficiencies and benefits. There was something else going on – something generational and cultural, social, and human.

I told the Senate that,

“...we owe it to this new generation to respect their enthusiasm about digital assets with a thoughtful and balanced response, not a dismissive one.”⁷

And here we are today – over five years later, still seeking that thoughtful and balanced response. Americans – especially innovators, investors and younger Americans – await Congressional action to create a legal framework for this innovation.

I commend this Committee and this Congress for undertaking this unprecedented joint effort at law making. I support the goal of *“finding workable solutions that provide much-needed regulatory clarity and certainty, while still adhering to time-tested principles that protect market participants.”⁸* Addressing the complex aspects confronting this innovation, including the concept of decentralization is no simple feat,

⁴ Remarks of CFTC Chairman J. Christopher Giancarlo to the ABA Derivatives and Futures Section Conference, Naples, Florida (January 19, 2018), at:

<https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo34>

⁵ See generally, *“CryptoDad – The Fight for the Future of Money,”* (Wiley) 2022, (Chapts., 8-10)

⁶ *Id.*

⁷ Written testimony of J. Christopher Giancarlo, Chairman, Commodity Futures Trading Commission Before the Senate Banking Committee, Washington, D.C. (February 6, 2018) (hereafter: Senate Banking Testimony), at:

<https://www.banking.senate.gov/imo/media/doc/Giancarlo%20Testimony%202-6-18b.pdf>

⁸ Thompson, McHenry, Johnson, Hill Issue Joint Statement on Digital Assets Partnership (April 27, 2023) at: <https://agriculture.house.gov/news/documentsingle.aspx?DocumentID=7613>.

but one that deserves the attention of this Committee. For this, American investors and innovators should be grateful.

I applaud the leadership of Chairman Thompson of the House Agricultural Committee and Chairman McHenry of the House Financial Services Committee to work together on this landmark bill. The coordination between these important Committees has produced a robust piece of legislation that advances consideration of an appropriate regulatory framework for crypto. The scope of regulation of financial services in the United States is unmatched by the rest of the world, thus making the coordination between these Committees necessary. This coordination has produced an impressive piece of legislation that could not have been achieved by either Committee on its own. Such coordination is difficult and time-consuming and deserves recognition and appreciation.

The CFTC Was Built for Innovation

As Congress contemplates an appropriate legal and regulatory framework for digital assets it is appropriate that attention is directed to the CFTC. In fact, the CFTC was reformulated over forty years ago into an independent body specifically to safeguard a breakthrough in financial innovation – financial futures – that enabled the global economy to hedge the risk of moving interest and exchange rates ensuring the US Dollar’s primacy as the world’s reserve currency.⁹ As you well know, the CFTC has been at the forefront of US financial market innovation since its inception. During the past decades, the CFTC has deftly overseen more new financial product innovation than almost any other market regulator.¹⁰ And yet, amidst such innovation, CFTC regulated markets have safely mitigated financial risk in an orderly manner without faltering or failing even during the great financial crisis.

The CFTC engaged early with digital assets, finding in 2015 that Bitcoin was properly defined as a commodity under its authority.¹¹ In the spring of 2017, the agency unanimously launched LabCFTC, a dedicated office to serve the Commission, Congress and innovators in furthering promising fintech and digital asset technology.¹² The CFTC’s greenlighting of the self-certification of bitcoin futures later that year initiated the world’s first significant, fully regulated market for digital assets. Since then,

⁹ Leo Melamed, *Man of the Futures: The Story of Leo Melamed & the Birth of Modern Finance* (Harriman House 2021).

¹⁰ See Generally Senate Banking Testimony.

¹¹ “CFTC Orders Bitcoin Exchange Bitfinex to Pay \$75,000 for Offering Illegal Off-Exchange Finance Retail Commodity Transactions and Failing to Register as a Futures Commission Merchant,” CFTC press release, (June 2, 2016), available at <https://www.cftc.gov/PressRoom/PressReleases/7380-16>

¹² “CFTC Launches LabCFTC as Major Fintech Initiative” (May 17, 2017), at: <https://www.cftc.gov/PressRoom/PressReleases/7558-17>.

other commodity-based, digital asset products including ether futures have come under CFTC oversight. Today, derivatives on digital asset commodities (the largest digital asset category by volume)¹³ trade in orderly and transparent markets under close CFTC supervision, fostering Dollar-based pricing, with healthy liquidity and high levels of open interest despite volatile current economic conditions.¹⁴ These markets provide the CFTC with regulatory visibility supporting robust enforcement that is second to no other market regulator in prosecuting perpetrators of digital asset fraud, abuse, and market manipulation. Yet, perhaps most importantly, the CFTC's early and unhesitant engagement with digital assets has *reduced* regulatory risk and uncertainty for responsible financial market innovation paving the way for an important new ecosystem of retail and institutional digital asset investment generating economic activity here in the United States.

The bill under consideration by this Committee addresses the important public interest in closing a gap in CFTC oversight. As you know, spot markets facilitate immediate physical delivery of tradable goods in contrast to markets for futures, forwards and options deliverable in the future. In spot markets, the CFTC has only limited authority over trading of digital asset commodities. As a result, there are no platform registration, operator supervision or standard investor protection measures in the spot markets that are common in US derivatives markets to police against fraud, manipulation, and abuse.

In testimony to this Committee's sub-committee on Commodity Markets, Digital Assets and Rural Development, the CFTC's former General Counsel and my former colleague, Dan Davis, calculated that two thirds and three quarters of crypto currencies traded in spot markets are digital commodities, not digital securities.¹⁵ This bill would bring the CFTC's practical and seasoned oversight to spot trading in these most popular cryptocurrencies.

CFTC Chairman Rostin Behnam has stated that there are elements of the digital commodity cash markets suitable for direct CFTC oversight that are distinguishable from traditional cash commodity markets. I agree with Chairman Behnam and I support

¹³ Testimony of Daniel J. Davis Before the US House Agriculture Committee, Subcommittee of Commodity Markets, Digital Assets, and Rural Development, "The Future of Digital Assets: Identifying the Regulatory Gaps in Spot Market Regulation," at: <https://docs.house.gov/meetings/AG/AG22/20230427/115803/HHRG-118-AG22-Wstate-DavisD-20230427.pdf>.

¹⁴ CME Bitcoin Liquidity Report (May 26, 2023), at: <https://www.cmegroup.com/reports/bitcoin-futures-liquidity-report.pdf>.

¹⁵ *Id.*, Dan Davis Testimony.

the provisions in the bill that extend the CFTC's oversight to cover spot digital commodity markets.

Observations on Proposed Legislation

I would like to offer some observations on the draft bill being considered by this Committee.

First, the bill takes the appropriate step of enshrining LabCFTC into the Commodity Exchange Act. LabCFTC was a bipartisan initiative of the Commission created with the active support of then Democratic Commissioner Sharon Bowen.¹⁶ Its purpose was to promote responsible financial innovation by serving as a non-partisan resource for all stakeholders including Congress, a purpose that is all the more critical today. To serve as such a resource, it is important that LabCFTC be a resource to each Commissioner, not just the Chair. I was delighted to see that the bill codifies the independent and non-partisan nature of LabCFTC. This independence should promote one of the foundations of LabCFTC – to promote education within the Commission and externally with other stakeholders allowing the agency to have its finger fully of the pulse of innovation and its appropriate oversight.

Second, the coordination between the House Agriculture and Financial Services Committees affords an opportunity for this bill to address an issue that has challenged regulators and the digital asset industry: the distinction between a security and a commodity. I commend the Chairs of each Committee for pushing toward a level of clarity in what often has been an difficult distinction, especially in the area of digital assets. More clear rules of the road help provide a map to compliance, and in my view, the purpose of regulation is to promote compliance. Reviewing and modernizing the existing rules applicable to securities markets in order to facilitate compliance for the digital assets industry, as this bill seeks to do, is important and overdue. While admittedly not easy to achieve, the desired outcome should be a business knowing what rules apply, and in turn, fostering a culture of compliance around those rules. By contrast, we should work to avoid a system that leaves responsible market participants guessing as to the appropriate rule set, only to face enforcement if, after rigorous analysis, they reached a different conclusion than regulators.

¹⁶ In public remarks acknowledging the active support of former CFTC Commissioner Sharon Bowen in the creation of LabCFTC, I noted that, "Our work together is an example of how Federal officials can serve the American people productively and without destructive partisanship." "LabCFTC: Engaging Innovators in Digital Financial Markets," Address of CFTC Acting Chairman J. Christopher Giancarlo Before the New York Fintech Innovation Lab (May 17, 2017), at: <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-23>.

Lastly, and notwithstanding that this bill reflects extensive effort and thoughtful deliberation to create a regulatory framework for crypto, I would suggest a limited number of enhancements to the bill. Native to all starting points is an opportunity to digest potential areas for improvement. I would welcome an opportunity to discuss each of these suggestions, and any other contemplated changes as Congress and the greater public contemplate the bill.

- **The bill should impose a deadline for the CFTC and SEC to complete the joint definitional rulemakings.** Section 104(a) of the bill requires that the CFTC and the SEC engage in joint rulemakings to further define numerous definitions contained in the bill. Given that these definitions impact both agencies, I support the prospect of joint rulemakings to further define the terms that would become part of the Commodity Exchange Act and federal Securities Laws. In my view, these definitional rulemakings would benefit from a deadline to complete the further definitions within a specified amount of time after the passage of the bill. A deadline directs the agencies on the urgency for action, and helps deliver on the promise of clarity. The length of the deadline should take into consideration the number of definitions and the resources of the respective agencies to dedicate staff to the necessary rulemakings.
- **The list of joint rulemakings should include a joint CFTC-SEC rulemaking on the process to certify that a blockchain network is decentralized.** Under Section 204 of the bill, any person may certify to the SEC that a blockchain network to which a digital asset relates is a “decentralized network.” The certification carries with it a presumption that the network is decentralized that the SEC can rebut upon making a determination that the network is not decentralized. One consequence of the SEC approving a certification that a blockchain network is decentralized is that a digital asset related to the decentralized network is treated as a digital commodity subject to the regulatory oversight of the CFTC. Given that any certification might involve the transition of regulation from the SEC to the CFTC, both agencies should inform the process that governs the certification. This process includes the materials necessary for the SEC to consider a filing complete, the relevant factors for the SEC to consider in evaluating a blockchain network, and how the SEC determines that a particular blockchain network raises novel and complex issues that warrant lengthier consideration. The definition of a decentralized network also references various time periods (*e.g.*, 12 months and 3 months) where certain facts cannot exist for the network to be considered decentralized. For example, a digital asset issuer or an

affiliated person cannot market the blockchain network “during the previous 3-month period.”¹⁷ A joint rulemaking could further clarify how to interpret these time period, in particular, how these time periods apply once a blockchain networks has been certified as decentralized. Lastly, Section 204(g) establishes a process for the SEC to reconsider a prior determination that a blockchain network is decentralized. If the SEC were to determine that a network was no longer decentralized, a digital asset might transition from being a digital commodity back to a security. A joint CFTC-SEC rulemaking surrounding the process for reconsideration would help promote a clear and transparent methodology for a reconsideration, which would shed light on the impact that a change to a blockchain network might have on its regulatory classification.

- **Both the CFTC and SEC should determine that a blockchain network is no longer decentralized.** As noted above, Section 204(g) establishes a process for the SEC to reconsider whether a blockchain network is no longer decentralized, and the impact of any change in classification would mean the transition of regulation from the CFTC back to the SEC. Given that any reclassification necessarily involves digital assets currently regulated by the CFTC, a reconsideration determination should require a joint determination with each agency approving the reclassification. To be clear, if both agencies did not agree to a reclassification, the network should remain certified as decentralized. A joint determination should help foster clear rules regarding whether a blockchain network is decentralized.

Conclusion – The Time to Act is Now

The world is once again experiencing a fundamental new innovation in finance. The same digital network technology – the internet – is doing to banking, finance and money itself what it has already done to information gathering, personal communications, social networking, entertainment and retail shopping. That is: increase efficiency, lower costs, increase inclusion and challenge a whole lot of existing market structures.

¹⁷ See Section 101 (definition of “decentralized network”).

Today, despite growing U.S. politicization and administration hostility,¹⁸ Bitcoin continues to grow in transaction count,¹⁹ adoption²⁰, network strength²¹, and code execution.²² Ignoring or attacking digital assets does not make them go away. Nor is it prudent public policy.

We need not be naïve. The cryptocurrency universe contains its share of get-rich-quick fraudsters, shady entrepreneurs, and outright criminals. Yet, crypto is also supported by a growing contingent of professional and institutional users and real everyday believers, including advocates for the poor and the unbanked, libertarians, pacifists, earnest tech geeks, mathematicians, sound-money aficionados, long-term investors, and many idealistic Americans. Whatever their interests, they deserve to be taken seriously, not dismissed or disparaged as fools or idiots. They deserve well-conceived, crypto-native legal and regulatory frameworks.

Financial market regulators also need digitally-native legal frameworks to prosecute bad guys, while giving certainty to everyone else who desire to follow clear rules, well-tailored for digital innovation. Prudential regulators need to accept that financial stability is not sustained by shoring up legacy financial technology and staunchly defending the status quo. Responsible innovators need to believe that digital asset technology is as welcome here in America as it increasingly is abroad.

Weeks before my 2018 Senate testimony, I went to Switzerland and spoke to the Financial Stability Board – the chief international standard setting body of the global financial system. Many in the assembled group of global regulators were skeptical about the CFTC’s decision to greenlight bitcoin futures. I told them that, “crypto is not going away.” Technology including digital assets “is like a roaring wind.” I said, “you can take shelter from technological change, get blown away by it, or hitch a sail and ride it.” Adding, “We Americans prefer to ride the wind.”²³

In the five years since, many of the countries represented in that Swiss conference room are now trying to hitch their sails to crypto innovation.²⁴ They are hoping to benefit from the United States’ early lead.

¹⁸ Michael J. Casey, “Biden Administration is Politicizing Crypto,” (March 31, 2023), at: <https://www.nasdaq.com/articles/biden-administration-is-politicizing-crypto>.

¹⁹ Will Clemente, “Bitcoin Transactions are Increasing at Fast Pace,” referring to Reflexivity Research, The Pomp Letter (paid subscription) (May 4, 2023).

²⁰ Anthony Pompliano, “Bitcoin Fundamentals Keep Getting Stronger,” The Pomp Letter (paid subscription) (February 7, 2023).

²¹ *Id.*

²² *Id.*

²³ *Id.* *CryptoDad*, pp. 164-68.

²⁴ The Atlantic Council has assembled a global database of cryptocurrency regulation. See “Cryptocurrency Regulation Tracker,” Atlantic Council at: <https://www.atlanticcouncil.org/programs/geoeconomics-center/cryptoregulationtracker/>. Of 45

This Committee knows that the American dream was created by innovators riding the wind of innovation. As it did three decades ago during the first wave of the internet,²⁵ Congress needs to support American innovation today.

Thoughtful, clear-eyed and unbiased leadership is needed. American crypto consumers, investors and financial innovators alike deserve the benefit of the market supervision, expert analysis and oversight of the world's most experienced and farsighted financial regulators: the CFTC and the SEC.

Thank you.

national regulatory systems considered, many have or are developing regulatory frameworks conducive to cryptocurrency innovation, including such US economic allies and competitors as: Australia, Brazil, Canada, the EU (including France, Germany and Italy), Japan, Mexico, Singapore, South Korea and the UK.

²⁵ In February 1996, Congress recognized that "the Internet . . . ha[d] flourished, to the benefit of all Americans." The Telecommunications Act of 1996 together with the ensuing Clinton administration's "Framework for Global Electronic Commerce" are well recognized as the enlightened regulatory underpinning of America's early leadership in the Internet of Information.

Appendix A

J. Christopher Giancarlo

PROFESSIONAL AFFILIATIONS

WILLKIE FARR & GALLAGHER, <i>Senior Counsel</i>	New York, NY Jan. 2020 – Present
NOMURA HOLDINGS, INC., <i>Independent Director</i>	Tokyo, Japan Jun. 2021 – Present
DIGITAL ASSET HOLDINGS LLC, <i>Independent Director</i>	New York, NY Jan. 2022 – Present
DIGITAL DOLLAR PROJECT, <i>Co-Founder & Exec. Chairman</i>	New York, NY Jan. 2020 – Present
CHAMBER OF DIGITAL COMMERCE, <i>Member, Board of Advisors</i>	Washington, D.C. Oct. 2019 – Present