

Testimony By
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And
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Subcommittee on Digital Assets, Financial Technology, and Artificial Intelligence
American Innovation and the Future of Digital Assets: A Blueprint for the 21st Century
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Chairmen Johnson & Steil, Ranking Members Davis & Lynch, and Members of the
Subcommittees:

Thank you for the opportunity to appear before you today and share my views about digital asset regulation, including the Commodity Futures Trading Commission's (CFTC) role in digital asset regulation. I had the honor of serving as the CFTC's General Counsel from 2017-2021 and currently advise clients about CFTC and digital asset regulation in my role as a partner with Katten Muchin Rosenman LLP. However, my appearance before you is in my personal capacity; I am not representing or speaking on behalf of any other person, private sector agency or governmental agency.

I would like to address a few issues in my testimony today, including the current jurisdiction that the CFTC has over the digital asset market, including the spot market, the CFTC's substantial experience regarding digital assets, and the protections that the Commodity Exchange Act (CEA) and rules currently offer for investors, particularly to retail customers.

CFTC Jurisdiction Regarding Digital Assets

As these Subcommittees are well aware, the CFTC is the primary regulator of the futures, options on futures, and swaps markets. The CFTC also regulates leveraged retail commodity transactions. The CFTC's full "regulatory" authority includes the ability to require registration and examine registered entities that offer these products.

The CFTC also has enforcement jurisdiction (or anti-fraud and anti-manipulation jurisdiction) in the commodities markets at large. Thus, if the CFTC thinks that there is manipulation or fraud in a spot market for a commodity—such as gold or Bitcoin—it can institute an enforcement action to enjoin that activity and seek recompense of ill-gotten gains from that activity.

Why is it important for the CFTC to have anti-fraud and anti-manipulation authority over the spot markets? Quite simply, because the spot markets highly influence the derivatives markets. Spot markets and derivatives markets are highly correlated. For example, there is a 99.9 percent correlation between bitcoin’s spot market price and the price on CFTC-regulated bitcoin futures products.¹ If somebody can manipulate the price of the spot market, they generally also can influence the price of derivatives products based upon the underlying asset.²

Former CFTC Commissioner Dawn Stump provided an excellent explanation about the rationale and nature of the CFTC’s anti-fraud and anti-manipulation authority for the spot market:

The public should be aware that where cash commodity markets are concerned, this limited authority (anti-fraud/manipulation/false reporting, as opposed to day-to-day regulatory oversight) is bestowed upon the CFTC as a tool to assist in its primary function of regulating derivatives products, such as futures. Futures contracts serve a price discovery function. Well-functioning futures (and other derivatives products) rely upon a sound underlying cash market and may reference cash market indexes in their pricing. Therefore, cash market transactions can potentially be part of a scheme to manipulate prices of derivatives products that are regulated by the CFTC. Congress has recognized these relationships between prices of cash transactions and derivatives products, and thus the CEA provides the CFTC with limited enforcement authorities with respect to cash transactions.³

Thus, CFTC enforcement actions in the spot market are not primarily focused on policing the spot market for its own sake. The CFTC emphasizes, instead, its role in regulating the derivatives markets.

The CFTC nevertheless has actively used its enforcement authority in the digital assets space. It has brought at least 80 enforcement actions involving digital asset commodities. In the last fiscal

¹ *Grayscale Investments, LLC v. SEC*, 82 F.4th 1239, 1245 (D.C. Cir. 2023). In *Grayscale*, the D.C. Circuit concluded that the SEC’s denial of Grayscale’s application for a bitcoin exchange-traded product was arbitrary and capricious because the SEC “failed to explain its different treatment of similar products.” *Id.* at 1242.

² See, e.g., *In re Coinbase, Inc.*, CFTC No. 21-03 at 3-4 (Mar. 19, 2021).

³ Concurring Statement of Commissioner Dawn D. Stump Regarding Enforcement Action against Coinbase, Inc., (Mar. 19, 2021), <https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement031921>.

year, almost 20 percent of the Commission’s enforcement actions related to digital asset commodities.⁴

The CFTC has a long history of involvement with digital assets. As early as 2014, the first Bitcoin denominated cash-settled swaps, options and non-deliverable forwards began trading on CFTC-registered swap execution facilities.⁵ The next year the CFTC found that Bitcoin and other virtual currencies were commodities.⁶ The first cash-settled Bitcoin futures contracts began trading on CFTC-registered Cboe Futures and CME in 2017.⁷ During the same year, the CFTC for the first time designated a swap execution facility and derivatives clearing organization to transact in physically deliverable Bitcoin swaps contracts. Also in 2017, the CFTC’s LabCFTC released a primer on virtual currencies.⁸ CFTC’s LabCFTC, which when I was at the CFTC reported to me as General Counsel, has grown and is now the Office of Technology Innovation that reports directly to the Chairman.

Since 2017, the CFTC has released additional backgrounders on virtual currencies and related derivatives products.⁹ And CFTC Staff in 2018 released an advisory regarding their priorities and expectations when reviewing new virtual derivatives products to be listed on CFTC regulated markets.¹⁰ The CFTC and its staff have continued to monitor the development of the digital assets market and recently withdrew the 2018 advisory because of “additional [CFTC] staff experience in the intervening years, as well as increasing market growth and maturity” in the digital asset space.¹¹

⁴ *CFTC Releases FY 2024 Enforcement Results*, CFTC Release No. 9011-24 (Dec. 4, 2024) (available at <https://www.cftc.gov/PressRoom/PressReleases/9011-24>).

⁵ Stan Higgins, *TeraExchange Receives US Approval to Launch First Bitcoin Derivative*, COINDESK (Sept. 12, 2014), <https://www.coindesk.com/tech/2014/09/12/teraexchange-receives-us-approval-to-launch-first-bitcoin-derivative/>; *In re TeraExchange LLC*, CFTC Docket No. 15-33 at 3 (Sept. 24, 2015) (“On September 11, 2014, Tera filed with [the CFTC Division of Market Oversight] a submission self-certifying the Bitcoin swap for trading on its [swap execution facility]. Tera began offering the Bitcoin swap for trading on September 12, 2014.”).

⁶ *See In re Coinflip, Inc.*, CFTC No. 15-29 (Sept. 17, 2015).

⁷ CFTC, Release No. 7654-17 (Dec. 1, 2017), <https://www.cftc.gov/PressRoom/PressReleases/7654-17>.

⁸ LabCFTC, *A Primer on Virtual Currencies* (Oct. 17, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcftc_primercurrencies100417.pdf.

⁹ *See* CFTC Backgrounder on Self-Certified Contracts for Bitcoin Products, https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/bitcoin_factsheet120117.pdf; CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets (Jan. 4, 2018), https://www.cftc.gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/backgr_ounder_virtualcurrency01.pdf.

¹⁰ *See* CFTC Staff Advisory No. 18-14 (May 21, 2018), <https://www.cftc.gov/node/214951>.

¹¹ *See* CFTC Staff Advisory No. 25-07 (Mar. 7, 2025), <https://www.cftc.gov/PressRoom/PressReleases/9059-25>. The new Advisory notes, for example, that

Today, there are many actively trading derivatives contracts on digital assets on CFTC-registered markets, with additional products that have been self-certified for trading.¹² These contracts are based on a number of digital assets, including the two most-traded digital assets, Bitcoin (BTC) (63.5% of global crypto market cap) and Ether (ETH) (7.3%).¹³ Other derivatives products that are either trading or have been self-certified for trading on CFTC-regulated markets include: XRP (4.4%), Solana (SOL) (2.5%), USDC (2.1%), Dogecoin (DOGE) (0.9%), Cardano (ADA) (0.8%), Chainlink (LINK) (0.3%), Avalanche (AVAX) (0.3%), Stellar (XLM) (0.3%), Shibu Inu (SHIB) (0.3%), Hedera (HBAR) (0.3%), Bitcoin Cash (BCH) (0.2%), Polkadot (DOT) (0.2%), Litecoin (LTC) (0.2%), Pepe (PEPE) (0.1%), Cronos (CRO) (0.1%), Bonk (BONK) (0.1%), and others.¹⁴ Collectively, these various digital assets account for over **83 percent** of global digital asset market capitalization.

This long-standing and active oversight of digital asset derivatives has given the CFTC unique insights, expertise, and understanding of the operation of spot digital asset markets. For example, products trading on CFTC markets must not be readily susceptible to manipulation. Thus, the CFTC and CFTC-registered entities must monitor the digital asset spot market—over 83 percent of that market—to comply with current CFTC requirements. As Dr. Chris Brummer has noted, this activity on CFTC-regulated markets has allowed “the CFTC [to] gain[] expertise in overseeing the institutionalization of significant infrastructures intersecting directly with the digital asset commodity spot market.”¹⁵ The CFTC and CFTC-registered entities understand the digital asset spot market because they have been reviewing that market for a number of years.

“since 2018, average daily volumes in aggregate across all Bitcoin futures have increased over 300 percent, and aggregate open interest has increased by over 800 percent.” *Id.* at n. 4.

¹² Products are “self-certified” by a CFTC-registered entity. An entity self-certifying a product must provide to the CFTC “[a] concise explanation and analysis of the product and its compliance with applicable provisions of the [Commodity Exchange] Act, including core principles, and the Commission’s regulations thereunder.” 17 C.F.R. § 40.2(a)(3)(v). Furthermore, a registered entity must “provide [to CFTC staff] any additional evidence, information or data that demonstrates that the contract meets, initially or on a continuing basis, the requirements of the [Commodity Exchange] Act or the Commission’s regulations or policies thereunder.” *Id.* § 40.2(b). In certain circumstances, the Commission can stay the trading of the contract. *Id.* § 40.2(c).

¹³ The percentage of market cap for these digital assets (noted in parentheses “(XX%)” for each digital asset) was taken from coinmarketcap.com on April 30, 2025.

¹⁴ See Designated Contract Market Products, https://www.cftc.gov/IndustryOversight/IndustryFilings/TradingOrganizationProducts?Category=&Date_From=&Date_To=&Organization=&Show_All=0&Status=Certified&Subcategory=&Type=&page=0 (visited Apr. 30, 2025).

¹⁵ Testimony of Chris Brummer before the Subcommittee on Commodity Exchanges, Energy and Credit at 5 (June 23, 2022), https://agriculture.house.gov/uploadedfiles/brummer_congressional_testimonythe_future_of_digital_asset_regulation.pdf. Indeed, last year the CFTC voluntarily opened up to public comment consideration of a registered entity’s proposed changes to the market structure for certain digital asset derivatives products. *CFTC Seeks Public Comment on FTX Request for Amended DCO Registration Order*, CFTC Release No. 8499-22 (Mar. 10, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8499-22>. The CFTC received

Furthermore, the CFTC has clarified the scope of its authority to regulate retail commodity transactions that involve leverage, financing, or margin. A key statutory requirement for CFTC jurisdiction is whether “actual delivery” of retail commodity transactions have occurred within 28 days. The CFTC engaged in extensive rulemaking with the digital asset community and provided thorough guidance about the meaning of “actual delivery” as that phrase applied to digital assets, with multiple examples of acceptable and non-acceptable practices.¹⁶ With Commission-backed guidance on this issue in place after receiving and incorporating extensive public feedback, the Commission has used its enforcement authority to have market participants follow the guidance.¹⁷

Neither the CFTC nor any other federal regulator has plenary regulatory authority over the trading of digital assets that qualify as commodities. Based on the CFTC derivatives products based on digital assets described above, I believe that at least 83 percent (and likely more) of the digital asset spot market transactions would fall within the CFTC’s current enforcement authority. It is, therefore, a relatively short step to provide the CFTC with the additional regulatory authority to require registration and oversee these digital asset spot markets. A regulatory regime based on “core principles”—key goals for CFTC registrants to achieve but with reasonable discretion to achieve those goals—would be a good fit for regulation of the digital asset spot market. This market is ever changing and regulatory regime that requires high standards while encouraging responsible innovation would provide participants in this area to flourish and be competitive with international counterparts.

Customer Protections Provided in the CFTC Regime

Entities subject to current CFTC jurisdiction must provide extensive protections to customers purchasing CFTC-regulated products. And the CFTC and the National Futures Association (NFA)¹⁸ have not hesitated to enforce these customer protections. In addition to the anti-fraud and anti-manipulation authority described above, there are significant rules regarding the segregation and protection of customer funds. CFTC-registered futures commission merchants (FCMs) must provide general written disclosures regarding the risks of futures trading and

1,500 comments in response. *See* https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7254&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1_50. Although the request was ultimately withdrawn, the public comment process provided the CFTC with valuable insight into a host of questions regarding the market structure and operation of digital asset exchanges.

¹⁶ CFTC Final Interpretive Guidance, *Retail Commodity Transactions Involving Certain Digital Assets*, 85 Fed. Reg. 37,734 (June 24, 2020).

¹⁷ *See, e.g., In re Payward Ventures, Inc.*, CFTC No. 21-20 (Sept. 28, 2021).

¹⁸ The NFA has been designated by the CFTC as a registered futures association.

specific disclosure regarding their own circumstances.¹⁹ FCMs and introducing brokers must have privacy policies and have procedures in place to protect customer information.²⁰

The CFTC also has extensive rules to protect retail customers engaging in certain foreign exchange transactions.²¹ Entities engaged in retail foreign transactions must register,²² meet minimum financial requirements,²³ and comply with various recordkeeping and reporting requirements.²⁴ These entities must also provide appropriate disclosures to retail customers about the risks of engaging in these types of transactions, noting, among other things, that the customer can “rapidly lose all of the funds [they] deposit for such trading and [they] may lose more than [they] deposit.”²⁵

The NFA has additional rules that protect customers. For example, NFA members and associates must observe high standards of commercial honor and just and equitable principles of trade. This includes dealing fairly with customers and others at all times.²⁶ NFA members must also comply with express standards in all communications with the public generally and promotional literature specifically.²⁷

The NFA additionally requires members to provide specific disclosures regarding their digital asset activities and comply with certain conduct standards regarding their activities involving the digital assets Bitcoin and Ether.²⁸ Should the CFTC gain regulatory jurisdiction over digital asset spot markets, then one would expect similar types of protections for retail customers to be provided.

Conclusion

There appears to be a significant gap at the federal level in the regulation of spot digital assets.

The CFTC has extensive experience in the digital asset space through both its (1) overseeing of trading of digital asset-based derivatives on CFTC-regulated exchanges and (2) asserting its anti-fraud and anti-manipulation enforcement authorities over the spot markets. The CFTC and NFA also have significant experience in providing protections to customers participating in these

¹⁹ 17 C.F.R. § 1.55; NFA Rule 2-30.

²⁰ *See* 17 C.F.R. Parts 160 and 162.

²¹ *See generally* 17 C.F.R. Part 5.

²² *Id.* § 5.3.

²³ *Id.* §§ 5.6-5.7.

²⁴ *Id.* §§ 5.10-5.11.

²⁵ *Id.* § 5.5(a)(2)(b).

²⁶ NFA Rule 2-4.

²⁷ NFA Rule 2-28.

²⁸ NFA Rule 2-51; *see also* NFA Interpretive Notice 9073.

markets. This experience would provide an excellent foundation should Congress decide to give the CFTC regulatory jurisdiction over the digital asset spot markets.

Thank you for the opportunity to appear before the Subcommittees. I look forward to answering any questions you may have.