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U.S. Senators Propose First Comprehensive Regulation for Digital Assets



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Earlier this week, U.S. Sens. Kirsten Gillibrand (D-N.Y.) and Cynthia Lummis (R-Wyo.) introduced the first comprehensive legislation to establish a regulatory framework for digital assets to promote innovation, delineate regulatory jurisdiction, provide customer protection, ensure transparency and integrate digital assets into the existing regulatory regimes (the Responsible Financial Innovation Act, or the “RFI”). Many of the principles laid out in the RFI were first articulated in President Biden’s March 3, 2022 Executive Order on Ensuring Responsible Development of Digital Assets.

The RFI aims at covering the entire universe of the digital assets industry, including cryptocurrencies (cryptos), stablecoins, smart contracts, distributed ledger technologies and defi platforms. Importantly, for the first time, the RFI will address jurisdictional reach and the mandates of several U.S. federal agencies with respect to digital assets, including the Commodity Futures Trading Commission (“CFTC”), the Securities and Exchange Commission (“SEC”), the U.S. bank prudential regulators (“USPRs”), the Internal Revenue Service (“IRS”) and even the Federal Regulatory Energy Commission (“FERC”) in connection with the energy used to mine digital assets.

At the core of the RFI is the notion that most cryptos are “commodities” and not “securities” and introduces the purpose of the assets and rights conveyed test to provide clearer guidelines for businesses in choosing, respectively, the CFTC’s or the SEC’s regulatory regime. Further yet, it gives broader authority to the CFTC to regulate digital assets spot markets, which to this day remain the largest blind regulatory spot where most of the crypto fraud occurs. Under the Commodity Exchange Act of 1936 (“CEA”), the CFTC only has enforcement authority over spot

commodity markets – while, as amended by the RFI, the CEA will provide the CFTC exclusive jurisdiction over spot digital assets markets, enabling the CFTC to fully regulate these markets (in addition to retaining its enforcement authority).

Finally, the RFI addresses the bankruptcy treatment of the digital assets, as well as enhanced customer protection and the payments innovation. Several provisions of the RFI focus on banking innovation and cybersecurity and the interagency cooperation between the CFTC, SEC, IRS, USPR, and FERC, and direct the establishment of the industry self-regulatory organization for the digital assets industry.
