

117TH CONGRESS
2D SESSION

S. 5030

To provide digital asset intermediaries with a safe harbor from certain enforcement actions by the Securities and Exchange Commission, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 29, 2022

Mr. HAGERTY introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To provide digital asset intermediaries with a safe harbor from certain enforcement actions by the Securities and Exchange Commission, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Digital Trading Clarity
5 Act of 2022”.

6 **SEC. 2. SAFE HARBOR.**

7 (a) DEFINITIONS.—In this section:

8 (1) ASSOCIATED PERSON.—The term “associ-
9 ated person”, with respect to an intermediary, has

1 the meaning given the term by any applicable self-
2 regulatory organization.

3 (2) BANK; EXCHANGE; SECURITIES LAWS;
4 SELF-REGULATORY ORGANIZATION; STATUTORY DIS-
5 QUALIFICATION.—Except as otherwise expressly pro-
6 vided, the terms “bank”, “exchange”, “securities
7 laws”, “self-regulatory organization”, and “statutory
8 disqualification” have the meanings given those
9 terms in section 3(a) of the Securities Exchange Act
10 of 1934 (15 U.S.C. 78c(a)).

11 (3) BROKER-DEALER.—The term “broker-deal-
12 er” means a person that is a broker or a dealer, as
13 those terms are defined in section 3(a) of the Securi-
14 ties Exchange Act of 1934 (15 U.S.C. 78c(a)).

15 (4) COMMISSION.—The term “Commission”
16 means the Securities and Exchange Commission.

17 (5) DIGITAL ASSET.—The term “digital asset”
18 means an electronically native asset that—

19 (A) confers economic, proprietary, or ac-
20 cess authority; and

21 (B) is recorded using cryptographically-se-
22 cured distributed ledger technology or any simi-
23 lar analogue.

24 (6) INTERMEDIARY.—The term “inter-
25 mediary”—

1 (A) means any centralized platform, in-
 2 cluding an exchange, that—

3 (i) has customers; and

4 (ii) makes a digital asset available for
 5 trading among multiple buyers and sellers
 6 under a Federal or State law, rule, or reg-
 7 ulation that authorizes the platform to pro-
 8 vide those services; and

9 (B) does not include any individual.

10 (7) LIST.—The term “list”, with respect to an
 11 asset, means—

12 (A) to make the asset available for trading;
 13 and

14 (B) to effect transactions in the asset.

15 (8) NATIONAL SECURITIES EXCHANGE.—The
 16 term “national securities exchange” means an ex-
 17 change registered as a national securities exchange
 18 pursuant to section 6 of the Securities Exchange Act
 19 of 1934 (15 U.S.C. 78f).

20 (9) SECURITY.—Except as otherwise expressly
 21 provided, the term “security”—

22 (A) with respect to an application of the
 23 Securities Act of 1933 (15 U.S.C. 77a et seq.),
 24 has the meaning given the term in section 2(a)
 25 of that Act (15 U.S.C. 77b(a)); and

1 (B) with respect to an application of the
2 Securities Exchange Act of 1934 (15 U.S.C.
3 78a et seq.), has the meaning given the term in
4 section 3(a) of that Act (15 U.S.C. 78c(a)).

5 (b) SAFE HARBOR.—

6 (1) IN GENERAL.—Any digital asset with re-
7 spect to which a determination has not been made
8 under subsection (d), and that is listed through an
9 intermediary that has satisfied the requirements de-
10 scribed in subsection (c), shall not be considered to
11 be a security.

12 (2) APPLICATION.—Paragraph (1) shall apply
13 to all activities of an intermediary that lists a digital
14 asset that satisfies the conditions of that paragraph,
15 including the listing of that digital asset through the
16 intermediary.

17 (c) REQUIREMENTS.—The requirements described in
18 this subsection with respect to an intermediary are as fol-
19 lows:

20 (1) The intermediary shall establish a process
21 for listing digital assets through the intermediary,
22 which shall be reasonably designed to permit the
23 intermediary to determine whether the digital asset
24 is a security.

1 (2) The process established under paragraph
2 (1) shall include written policies and procedures to
3 conduct and document an accurate classification of
4 the applicable digital asset for the purposes of the
5 securities laws, which shall be supported by mate-
6 rials that include legal analysis performed by attor-
7 neys with expertise in the securities laws, which shall
8 take into consideration—

9 (A) relevant Commission rules, enforce-
10 ment actions, no-action letters, and exemptive
11 orders and other relevant guidance provided by
12 the Commission or the staff of the Commission;

13 (B) relevant guidance from, or formal ac-
14 tion taken by, other Federal agencies, including
15 the Commodity Futures Trading Commission;
16 and

17 (C) relevant case law.

18 (3) The intermediary, and any associated per-
19 son with respect to the intermediary, shall consent
20 to service of process for any civil action brought by,
21 or any proceeding before, the Commission or a self-
22 regulatory organization of which the intermediary is
23 a member.

24 (4) The intermediary, and each associated per-
25 son to which paragraph (3) applies, shall maintain

1 a written record of the consent provided under that
2 paragraph, which shall be made available to the
3 Commission and any applicable self-regulatory orga-
4 nization, upon request.

5 (5) The intermediary shall—

6 (A) determine and confirm that neither the
7 intermediary nor any associated person with re-
8 spect to the intermediary is subject to a statu-
9 tory disqualification, which may be made on a
10 good faith basis pursuant to a questionnaire
11 completed by those associated persons; and

12 (B) maintain a written record of the deter-
13 minations and confirmations made under sub-
14 paragraph (A), including any questionnaires de-
15 scribed in that subparagraph, which shall be
16 made available to the Commission and any ap-
17 plicable self-regulatory organization, upon re-
18 quest.

19 (6)(A) The intermediary shall establish, main-
20 tain, and enforce written policies, procedures, and
21 controls, consistent with industry best practices and
22 guidance of the Commission, that are reasonably de-
23 signed to demonstrate effective control with respect
24 to the applicable digital asset and to protect against
25 theft, loss, and accidental use of the private keys, or

1 a shard of a private key, that the intermediary con-
2 trols, including with respect to—

3 (i) onboarding the digital asset and associ-
4 ating the digital asset with a private key, or a
5 shard of a private key, in possession or under
6 control of the intermediary;

7 (ii) systems used to create, store, or use
8 those private keys and shards of those private
9 keys;

10 (iii) the generation of cryptographically
11 strong private keys and shards of private keys;
12 and

13 (iv) creating backup keys and shards of
14 private keys.

15 (B) Without limitation, the requirement under
16 subparagraph (A) may be satisfied through—

17 (i) a proprietary self-custody system;

18 (ii) a self-custody vendor that provides self-
19 custody services, such as key generation and re-
20 covery, if the systems of that vendor meet or
21 exceed the reasonably designed security require-
22 ments of the intermediary; or

23 (iii) a custodian, such as a bank, that the
24 Commission has determined is a satisfactory
25 control location.

1 (7) The intermediary shall—

2 (A) adopt customer protection measures,
3 including—

4 (i) in order to identify potentially ma-
5 nipulative or fraudulent conduct, by estab-
6 lishing, maintaining, and enforcing written
7 policies, procedures, and controls that are
8 reasonably designed to fulfill all applicable
9 obligations of the intermediary under—

10 (I) subchapter II of chapter 53 of
11 title 31, United States Code; and

12 (II) the International Money
13 Laundering Abatement and Financial
14 Anti-Terrorism Act of 2001 (title III
15 of Public Law 107–56) and the
16 amendments made by that Act; and

17 (ii) by creating and keeping records in
18 accordance with the obligations of the
19 intermediary for a period of not less than
20 3 years, the first 2 years of which shall be
21 in an easily accessible place; and

22 (B) make all records created and kept
23 under subparagraph (A) available to the Com-
24 mission and any applicable self-regulatory orga-
25 nization, upon request.

1 (8) The intermediary shall disclose on the
2 website of the intermediary the risks associated with
3 trading in the applicable digital asset, including that
4 the protection provided pursuant to the Securities
5 Investor Protection Act of 1970 (15 U.S.C. 78aaa et
6 seq.)—

7 (A) does not apply to digital assets that
8 are not securities, as defined in section 16 of
9 that Act (15 U.S.C. 78lll); and

10 (B) may not apply to all digital assets that
11 are securities.

12 (9) The intermediary shall enter into a written
13 agreement with a bank or registered broker-dealer
14 for the purposes of a compliance period described in
15 subsection (e), which shall provide that—

16 (A) beginning not later than 180 days
17 after the date on which that compliance period
18 begins, and until the intermediary is registered
19 as described in paragraph (10)(B), that bank or
20 broker-dealer shall facilitate transactions in
21 that digital asset in a manner that is consistent
22 with the obligations of the bank or broker-deal-
23 er under the Securities Exchange Act of 1934
24 (15 U.S.C. 78a et seq.), which shall include—

1 (i) effecting transactions in that dig-
2 ital asset;

3 (ii) issuing required confirmations and
4 statements to customers relating to the
5 transactions described in clause (i);

6 (iii) maintaining required books and
7 records relating to the transactions de-
8 scribed in clause (i);

9 (iv) ensuring that the broker-dealer
10 remains compliant with the requirements
11 under section 240.15c3-1 of title 17, Code
12 of Federal Regulations, or any successor
13 regulation, with respect to the transactions
14 described in clause (i), including that the
15 broker-dealer shall be subject to a
16 \$250,000 net capital requirement under
17 such section 240.15c3-1, in addition to
18 any other capital requirements that the
19 Commission or any applicable self-regu-
20 latory organization may determine to be
21 appropriate to protect investors; and

22 (v) in a manner that complies with, or
23 is exempt from, the requirements under
24 section 240.15c3-3 of title 17, Code of
25 Federal Regulations, or any successor reg-

1 ulation, receiving, delivering, and safe-
2 guarding funds and securities in connec-
3 tion with the transactions described in
4 clause (i);

5 (B) the intermediary shall notify customers
6 of the intermediary that, during the period be-
7 ginning on the date described in subparagraph
8 (A) and ending on the date on which that com-
9 pliance period ends, that bank or broker-dealer
10 will effect transactions of that digital asset, as
11 described in subparagraph (A)(i); and

12 (C) within a reasonable timeframe, and not
13 later than 180 days after the date on which
14 that compliance period ends, the intermediary
15 shall transfer operations that support effecting
16 transactions in that digital asset to that bank
17 or broker-dealer, unless that intermediary is a
18 bank or has registered as a broker-dealer.

19 (10) The intermediary shall certify that, if the
20 applicable digital asset is determined under sub-
21 section (d) to be a security, after the end of any
22 compliance period described in subsection (e), if ap-
23 plicable, the intermediary shall—

24 (A) stop listing the digital asset; or

(B) if the digital asset is registered under section 5 of the Securities Act of 1933 (15 U.S.C. 77e), or otherwise qualifies for an exemption from such registration, and the intermediary wishes to list the digital asset through the intermediary, register as—

(i) a broker-dealer; or

(ii) a national securities exchange.

(d) COMMISSION OR COURT DETERMINATION.—

(1) IN GENERAL.—

(A) DETERMINATION.—If the Commission (through a statement, formal rulemaking, or enforcement action, and without objection from the Commodity Futures Trading Commission), or a court of the United States in a final judgment, determines that a digital asset is a security, the Division of Examinations of the Commission shall request information from any intermediary listing the digital asset to determine if the intermediary satisfies the requirements under subsection (c).

(B) REQUEST BY INTERMEDIARY.—An intermediary may submit to the Commission a request for the Commission to make a determination under subparagraph (A).

1 (2) ENTRY INTO COMPLIANCE PERIOD.—If,
 2 after a request for information under paragraph (1),
 3 the Division of Examinations of the Commission de-
 4 termines that an intermediary has satisfied the re-
 5 quirements under subsection (c) with respect to a
 6 digital asset, the intermediary and digital asset shall
 7 enter the compliance period described in subsection
 8 (e).

9 (3) FAILURE TO COMPLY.—If, after a request
 10 for information under paragraph (1), the Division of
 11 Examinations of the Commission determines that an
 12 intermediary has not satisfied the requirements
 13 under subsection (c) with respect to a digital asset—

14 (A) the digital asset shall be considered to
 15 be a security with respect to that intermediary;
 16 and

17 (B) the intermediary shall be subject to all
 18 legal requirements with respect to the activities
 19 of the intermediary with respect to the digital
 20 asset as a result of the application of subpara-
 21 graph (A).

22 (e) COMPLIANCE PERIOD.—

23 (1) IN GENERAL.—With respect to an inter-
 24 mediary and a digital asset described in subsection
 25 (d)(2), the following shall apply:

1 (A) During the 2-year period beginning on
2 the date on which the determination described
3 in subsection (d)(1) is made, the following shall
4 apply:

5 (i) The intermediary shall not be sub-
6 ject to an enforcement action by the Com-
7 mission, or any other cause of action, for
8 a violation of section 5 or 17 of the Securi-
9 ties Act of 1933 (15 U.S.C. 77e, 77q), or
10 of section 10(b) of the Securities Exchange
11 Act of 1934 (15 U.S.C. 78j(b)), solely with
12 respect to listing that digital asset.

13 (ii) The intermediary shall not be sub-
14 ject to any enforcement action by the Com-
15 mission for failure to register as a broker-
16 dealer or as a national securities exchange
17 (or for any associated requirements with
18 respect to any such registrant) in connec-
19 tion with the activities of the intermediary
20 with respect to that digital asset.

21 (iii) In the case of a determination
22 made by the Commission under subsection
23 (d)(1), the intermediary may seek declara-
24 tory relief in an appropriate court of the
25 United States stating that the digital asset

1 is not a security, notwithstanding that de-
 2 termination by the Commission.

3 (iv) With respect to an action brought
 4 under clause (iii), the court may, in the
 5 discretion of the court, permit the inter-
 6 mediary to continue to list the digital asset
 7 during the pendency of the action.

8 (B) Beginning on the date that is 180
 9 days after the date on which the 2-year period
 10 described in subparagraph (A) begins, the bank
 11 or broker-dealer described in subsection (c)(9)
 12 shall facilitate all transactions of the inter-
 13 mediary with respect to the relevant digital
 14 asset, as described in subsection (c)(9)(A), until
 15 the date on which the intermediary is registered
 16 as described in subsection (c)(10)(B).

17 (2) END OF COMPLIANCE PERIOD.—After the
 18 end of the 2-year period described in paragraph
 19 (1)(A), any broker-dealer or exchange that lists the
 20 applicable digital asset shall stop listing that digital
 21 asset, if—

22 (A) the digital asset—

23 (i) is not registered under section 5 of
 24 the Securities Act of 1933 (15 U.S.C.
 25 77e); or

1 (ii) does not otherwise qualify for an
2 exemption from registration under section
3 5 of the Securities Act of 1933 (15 U.S.C.
4 77e); or

5 (B) an appropriate court of the United
6 States has determined in an action described in
7 paragraph (1)(A)(iii) that the digital asset is a
8 security.

9 (f) RETROACTIVE EFFECT.—With respect to a digital
10 asset that the Commission has determined is a security,
11 if the Commission subsequently determines that the digital
12 asset is not a security, the applicable intermediary shall
13 not be subject to any enforcement action by the Commis-
14 sion, or any other cause of action, for a violation of section
15 5 or 17 of the Securities Act of 1933 (15 U.S.C. 77e,
16 77q), or of section 10(b) of the Securities Exchange Act
17 of 1934 (15 U.S.C. 78j(b)), solely with respect to listing
18 that digital asset.

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