

# Lummis-Gillibrand Responsible Financial Innovation Act

## Section-by-Section Overview

### Title I—Definitions

- **Sec. 101 (Definitions)** One of the most pressing issues in the digital asset space is the lack of common definitions. This section creates definitions for digital asset, virtual currency, payment stablecoins, smart contracts and similar important terms in this space.

### Title II—Responsible Taxation of Digital Assets

- **Sec. 201 (De Minimis Exclusion)** Provides a *de minimis* exclusion of up to \$200 per transaction from a taxpayer's gross income for use of virtual currency for payment for goods and services, under specified conditions.
- **Sec. 202 (Broker Clarification)** Clarifies the definition of 'broker' for the purposes of the Infrastructure Investment and Jobs' Act' new reporting requirement on digital assets, delaying the implementation date to January 1, 2025.
  - This is identical language to the McHenry-Ryan proposal (H.R. 6006, 117th Congress).
- **Sec. 203 (Trading Safe Harbor for Non-US Persons)** Extends the current safe harbors for securities and commodities trading activity made by non-United States persons who use a United States financial institution to conduct digital asset trading activities under specified conditions, including that the non-United States person does not have an office in the United States.
- **Sec. 204 (Decentralized Autonomous Organizations)** Specifies that certain decentralized autonomous organizations (DAOs) are business entities for the purposes of the tax code.
  - Requires that a DAO be properly incorporated or organized under the laws of a jurisdiction as a decentralized autonomous organization, which may include an LLC, corporation, partnership, foundation, cooperative or similar organization.
- **Sec. 205 (Digital Asset Lending Agreements)** Establishes that digital asset lending agreements are not generally taxable events, in the same way that securities lending transactions are not today.
- **Sec. 206 (Internal Revenue Service (IRS) Guidance)** Requires the IRS to adopt guidance or clarifications on long-standing issues in the digital asset industry, including disposition of forks and airdrops, merchant acceptance of digital assets, digital asset mining and staking, charitable contributions of digital assets and the legal characterization of payment stablecoins as indebtedness.
- **Sec. 207 (Retirement Investing in Digital Assets)** Requires the Government Accountability Office (GAO) to conduct an analysis of the potential opportunities and risks of retirement investing in digital assets and to report to Congress, the Treasury Department and Labor Department.

- **Sec. 208 (Digital Asset Mining and Staking)** Declares that digital assets obtained from mining or staking activities do not form part of a taxpayer’s gross income until the disposition of those assets.
- **Sec. 209 (Conforming Amendments)** Implements this title.

Title III—Responsible Securities Innovation

- **Sec. 301 (Legal Clarity for Commodities and Securities)** For the first time, this bill makes a clear distinction between digital assets that are commodities or securities by examining the rights or powers conveyed to the consumer, giving digital asset companies the ability to determine what their regulatory obligations will be and giving regulators the clarity they need to enforce existing commodities and securities laws, bringing digital assets into the regulatory perimeter from the current vacuum. Lummis-Gillibrand accomplishes this by codifying existing precedents under the *Howey* test that an ancillary asset (defined below) provided to a purchaser under an investment contract is not inherently a security.
  - Digital assets which are not fully decentralized, and which benefit from entrepreneurial and managerial efforts that determine the value of the assets, but do not represent securities because they are not debt or equity or do not create rights to profits, liquidation preferences or other financial interests in a business entity (“ancillary assets”), will be required to furnish disclosures with the SEC twice a year. Ancillary assets in compliance with these disclosure requirements are presumed to be a commodity.
  - Lummis-Gillibrand strengthens our existing laws by requiring tailored disclosures relating to ancillary assets, ensuring consumers have the information they need to make informed financial decisions.
  - This section balances investor protection, the need to provide information to the marketplace and legal certainty for innovators.
  - Establishes a procedure for a court to rebut the presumption that an ancillary asset is a commodity.
- **Sec. 302 (Termination of Disclosure Requirements)** Establishes a clear procedure for ancillary assets which have become fully decentralized, for which there are no entrepreneurial or managerial efforts, to conclude providing disclosures to the SEC whilst still remaining commodities.
- **Sec. 303 (Satisfactory Control Location)** Resolves a long-standing issue with SEC custody requirements. Provides that the requirement to maintain a satisfactory control location under SEC Rules (17 C.F.R. § 240.15c3-3), with respect to a digital asset that is a security, may be fulfilled by protecting the asset with commercially reasonable cybersecurity practices for a private key.
- **Sec. 304 (Custody and Customer Protection Rules)** Requires the SEC, within 18 months, to complete its ongoing modernization of the Custody Rule (17 C.F.R. § 240.15c3-3) and Customer Protection Rule (17 C.F.R. § 275.206(4)-2) to account for changes in custody practices, digital assets, changes in market

structure, technology, broker-dealer practices and parity of state and national banks.

#### Title IV—Responsible Commodities Innovation

- **Sec. 401 (Definitions)** Adds “digital asset” and “digital asset exchange” to definitions contained in the Commodity Exchange Act.
- **Sec. 402 (Conforming Amendments)** Implements this title.
- **Sec. 403 (CFTC Jurisdiction)** Lummis-Gillibrand grants the CFTC exclusive spot market jurisdiction over all fungible digital assets which are not securities, including ancillary assets, in addition to the agency’s current jurisdiction over leveraged transactions, similar to the Digital Commodity Exchange Act (H.R. 7614, 117th Congress).
  - Permits futures commission merchants to conduct digital asset activities and provides strong custody and customer protection requirements.
- **Sec. 404 (Digital Asset Exchanges)** Creates a pathway for digital asset exchanges to register with the CFTC to conduct trading activities, similar to the Digital Commodity Exchange Act.
  - Also establishes core principles, rulemaking, custody, customer protection, prevention of market manipulation, information-sharing and preemption standards.
- **Secs. 405, 406 (Conforming Amendments)** Implements this title.
- **Sec. 407 (Bankruptcy Treatment of Digital Assets)** Lummis-Gillibrand creates needed legal clarity for investors, creditors, digital asset exchanges and other financial institutions about the treatment of digital assets in bankruptcy, providing for similar treatment as commodities, and ensuring that assets are appropriately safeguarded in an insolvency.
- **Sec. 408 (Payment Stablecoins)** Provides that a payment stablecoin issued by a depository institution (bank/credit union) is neither a commodity, nor a security.
- **Sec. 409 (Financial Institutions Definition)** Establishes digital asset exchanges as ‘financial institutions’ under the Bank Secrecy Act.
- **Sec. 410 (CFTC Regulatory Costs)** Permits the CFTC to impose a small user fee on digital asset exchanges to cover increased costs to the agency, under strict conditions.

#### Title V – Responsible Consumer Protection

- **Sec. 501 (Responsible Consumer Protection)** Requires providers of digital assets to clearly disclose information in customer agreements related to their product, including asset treatment in bankruptcy, risks of loss, applicable fees, redemption and more.
- **Sec. 501 (Source Code Version of Digital Assets)** Requires providers of digital asset services to provide customers with information regarding the source code used for each digital asset and the legal treatment of each asset, including securities and commodities laws.

- **Sec. 503 (Settlement Finality)** Requires digital asset service providers and customers to agree on terms of settlement finality for all transactions, including the conditions under which a digital asset may be deemed fully transferred.
- **Sec. 504 (Notice to Customers; Enforcement)** Requires higher standards of disclosure from certain providers of digital assets and allocates enforcement authority.
- **Sec. 505 (Right to Individual Management of Digital Assets)** Codifies a person's right to keep and control the digital assets they own.
- **Sec. 506 (Conforming Amendments)** Implements this title.

#### Title VI – Responsible Payments Innovation

- **Sec. 601 (Issuance of Payment Stablecoins)** Lummis-Gillibrand requires all issuers of payment stablecoins to: (1) maintain high-quality liquid assets valued at 100% of the face value of all outstanding payment stablecoins; (2) provide public disclosures on the assets backing the stablecoin and their value; and (3) have the ability to redeem all outstanding payment stablecoin at par in legal tender. Establishes a detailed, optional process for depository institutions (banks/credit unions) to issue a payment stablecoin.
- **Sec. 602 (Sanctions Compliance for Payment Stablecoin Issuers)** Requires the Office of Foreign Assets Control to develop guidance articulating the sanctions compliance responsibilities and liabilities of an issuer of payment stablecoins.
- **Sec. 603 (Digital Yuan on Government Devices)** Requires the Office of Management and Budget, in consultation with the Director of the Cybersecurity and Infrastructure Security Agency, the Director of National Intelligence, and the Secretary of Defense, to develop standards and guidelines for executive agencies to develop security measures for use of the digital yuan on U.S. government devices.
- **Sec. 604 (Certificate of Authority to Commence Banking)** Provides that the Office of the Comptroller of the Currency may charter a National Bank Association for the exclusive purpose of issuing a payment stablecoin, and establishes permissible activities, tailored capital requirements, community contribution requirements and a recovery and resolution plan.
- **Sec. 605 (Tailored Holding Company Supervision)** Establishes tailored holding company supervision for depository institutions operating under section 604 or a substantially similar State law, which are exclusively engaged in issuing a payment stablecoin or in custodial or trust activities.
- **Sec. 606 (Implementation Rules Relating to Payment Stablecoins)** Ensures that existing stablecoin issuers and new entrants into the market have an adequate opportunity to compete with existing banks and credit unions for the issuance of payment stablecoins.
- **Sec. 607 (FinCEN Innovation Laboratory)** Establishes an Innovation Laboratory within the Treasury Department's Financial Crimes Enforcement Network to increase dialogue with the digital asset and financial technology

industry and to enable pilot projects that enhance supervision of financial institutions.

#### Title VII – Responsible Banking Innovation

- **Sec. 701 (DLT Study on Reduction of Risk)** Requires the Federal Reserve Board of Governors to study how distributed ledger technology (DLT) may be used to reduce risk in depository institutions, including through reduced settlement/operational risk and capital requirements.
- **Sec. 702 (Eligibility for Federal Reserve Services)** Lummis-Gillibrand underscores that existing law requires the Federal Reserve banks to make available payment, clearing and settlement services to any depository institution chartered under State or Federal law. Requires the Federal Reserve banks to make available a segregated balance account upon request.
- **Sec. 703 (Routing Transit Numbers)** Directs the Federal Reserve Board of Governors to assume issuance of routing transit numbers to depository institutions.
- **Sec. 704 (Application Review Times)** Prohibits the Federal banking agencies from delaying applicability of a requirement under existing law (12 U.S.C. 4807) to render a decision on all applications within 1 year by requiring that additional information be provided to the agency. Clarifies that the existing 1 year requirement is applicable to the Federal Reserve banks.
- **Sec. 705 (Digital Asset Examination Standards)** Requires the Federal Financial Institutions Examination Council to adopt examination standards relating to the digital asset activities of depository institutions within 18 months.
- **Sec. 706 (Codifying Custody Standards)** For the first time in Federal law, codifies common principles relating to asset custody for depository institutions.
- **Sec. 707 (Reputation Risk and Account Termination)** Prohibits use of reputation risk in the examination rating of a depository institution. Requires that Federal banking agencies provide appropriate reasons for requesting or ordering the termination of a customer account, under specified standards. Similar to language contained in the SAFE Banking Act of 2021 (S.910/H.R.1996, 117th Congress).
- **Sec. 708 (Technical and Conforming Amendments)** Implements this title.

#### Title VIII – Responsible Interagency Coordination

- **Sec. 801 (Interpretive Guidance from Federal Financial Regulators)** Requires Federal financial regulators to provide interpretive guidance on a matter within the jurisdiction of the regulator within 6 months of a request.
- **Sec. 802 (Interstate Sandbox Activities)** Permits a financial company operating in an existing state financial technology sandbox to do business across state lines upon approval of the appropriate State and Federal regulator, under specified consumer protection and activities restrictions. Allows a State to opt out and specifies consumer education and financial literacy requirements.

- **Sec. 803 (State Money Transmission Laws and Digital Assets)** Similar to the approach of the SAFE Mortgage Licensing Act of 2008 (12 U.S.C. 5107), requires state bank supervisors to adopt substantially uniform standards relating to the treatment of digital assets under money transmission laws within 2 years. If a state has not substantially adopted these uniform standards, the Consumer Financial Protection Bureau is authorized to adopt uniform standards for that state which are predominant amongst the other states.
- **Sec. 804 (Federal-State Financial Regulator Information Sharing)** Establishes rules for the privacy and confidentiality of information shared between State and Federal financial regulators.
- **Sec. 805 (Analysis of Decentralized Finance Markets and Technologies)** Requires the Treasury Department to study certain topics relating to decentralized finance.
- **Sec. 806 (Analysis of Energy Consumption in Digital Asset Markets)** Directs the Federal Energy Regulatory Commission, in consultation with the CFTC and SEC, to conduct a study analyzing topics around energy consumption in the digital asset industry, including the type and amount of energy used for mining and staking and the use of renewable energy in the digital asset market.
- **Sec. 807 (Analysis of Self-Regulation and Registered Digital Asset Associations)** Directs the CFTC and SEC, in consultation with digital asset intermediaries and the digital asset industry, to conduct a study on self-regulation in the digital asset markets and to develop a proposal for the establishment of registered digital asset associations.
- **Sec. 808 (Cybersecurity Standards for Digital Asset Intermediaries)** Directs the CFTC and the SEC, in consultation with the Treasury Secretary, to develop comprehensive, principles-based guidance related to cybersecurity for digital asset intermediaries around topics such as security operations, risk identification and mitigation, sanctions avoidance and money laundering.
- **Sec. 809 (Advisory Committee on Financial Innovation)** Lummis-Gillibrand establishes an Advisory Committee on Financial Innovation with the goal of studying and reporting to regulators on the evolving digital asset market so that regulations can be adapted and updated as the industry and regulatory needs change. The Committee is composed of members of the financial technology industry, experts in consumer protection and education, financial literacy and inclusion, commissioners of the SEC and CFTC, a Federal Reserve Board member, and a state regulator.