

**Presentation to the
CFTC Technology Advisory Committee
March 27, 2019**

**ABA Derivatives & Future Law Committee White Paper
*Digital and Digitized Assets: Federal and State
Jurisdictional Issues***

Charles R. Mills, Partner, Steptoe & Johnson LLP (www.Stepto.com)

- **Chair, Jurisdiction Working Group of the Innovative Digitized Products and Processes Subcommittee (IDPPS)**
- **White Paper Editor and Co-Author**

Kathryn M. Trkla, Partner, Foley & Lardner LLP (www.foley.com)

- **Vice Chair, ABA Derivatives & Futures Law Committee & Chair, IDPPS**
- **White Paper Editor and Co-Author**

The Derivatives and Futures Law Committee and The Innovative Digitized Products and Processes Subcommittee (IDPPS):

- **Derivatives and Futures Law Committee**

- Longstanding committee in the American Bar Association (ABA) Business Law Section
- Over 500 members
- Rita Molesworth, Willkie Farr & Gallagher LLP, Chair
- Kathryn Trkla, Vice Chair
- Michael Spafford, Paul Hastings LLP, Vice Chair

- **IDPPS: Subcommittee of the Derivatives and Futures Law Committee**

- Formed in March 2018 in response to Chairman Giancarlo's challenge in his remarks at the Derivatives and Futures Law Committee Winter Meeting in 2018 to be proactive in this space.
- Over 80 members, with diverse expertise, including attorneys who are active in the areas of derivatives, securities, Fintech law, and related areas.
 - Kathryn Trkla, Chair
 - Michael Spafford, Vice Chair
 - Paul Architzel, Wilmer Cutler Pickering Hale and Dorr LLP, Vice Chair

Innovative Digitized Products and Processes Subcommittee (IDPPS): Mission Statement

- **To educate ourselves, policy makers and the public about current issues raised by innovative digitized products and processes, such as cryptocurrencies, smart contracts and blockchain or other distributed ledger technologies;**
- **To identify and study emerging legal and regulatory issues and their implications for such products and processes;**
- **To study and understand how the Commodity Exchange Act framework and other statutory and regulatory frameworks may intersect, and identify areas of conflict or other issues that overlapping laws may create; and**
- **To make appropriate recommendations to address material issues identified.**

Innovative Digitized Products and Processes Subcommittee (IDPPS): Three Working Groups

- **Jurisdiction Working Group**

- To consider federal and state laws that may apply to digital assets, and jurisdictional issues that overlapping laws may create, including under the CEA and federal securities laws.

- **Blockchain Modality Working Group**

- To consider commercial and regulatory issues relating to applications of blockchain / distributed ledger technologies in the financial markets and financial services industries.

- **SRO Working Group**

- To consider issues for potential implementation of self-regulation with respect to markets for digital assets, including evaluation of different models for self-regulation.

The White Paper: *Digital and Digitized Assets: Federal and State Jurisdictional Issues* (March 2019)

- **Prepared by the Jurisdiction Working Group**
 - Charles Mills serves as chair, and Jonathan Marcus with Skadden serves as vice chair.
 - 34 contributing authors, including 31 attorneys from 16 law firms, 2 attorneys who serve as in-house general counsel, and 1 attorney from an SRO.
- **The paper provides a comprehensive survey of the regulation of cryptocurrencies and other digital assets at the federal and state levels, along with summaries of key initiatives outside the U.S.**
 - Focus is on how regulation may apply to the creation, offering, use and trading of digital assets.
 - The paper is intended to serve as a resource for practitioners and policy makers.
- **IDPPS is considering other issues relating to applications of blockchain technology and self-regulation, but those are outside the paper's scope.**

The White Paper's Subjects

Section 1. Background on Digital Assets and Blockchain Technology

1. Blockchain Technology
2. Digital Assets

Section 2. Commodity Exchange Act and CFTC Regulation

1. Introduction
2. Classification of Transactions Under the CEA
3. CFTC's Treatment of Virtual Currencies as Commodities
4. Allocation of Jurisdiction Over Transactions Between the CFTC and SEC

Section 3. Federal Securities Regulation: Securities Act and Exchange Act

1. Digital Assets as Securities—The *Howey* Test
2. Implications for the Requirements of the Securities Act and Exchange Act

Section 4. Federal Securities Regulation: Investment Company Act and Investment Advisers Act

1. The Investment Company Act
2. The Investment Advisers Act

The White Paper's Subjects (cont'd)

Section 5. The Need for a Better CFTC and SEC Regulatory Scheme for Digital Assets

1. Introduction
2. Framing the Legal and Policy Analysis
3. The Challenging Issues Applying the Statutory Schemes to Digital Assets
4. The History of Resolving Jurisdictional Issues Between the SEC and CFTC
5. Statutory Process for Seeking Regulatory Clarity for Novel Derivative Products
6. Potential Approaches to Resolving Jurisdictional Issues Without New Legislation

Section 6. FINCEN Regulation

1. Scope
2. Registration as a MSB
3. Anti-Money Laundering Program
4. Know-Your-Customer Requirements
5. Enforcement

The White Paper's Subjects (cont'd)

Section 7. International Regulation of Digital Assets and Blockchain Technology

1. European Initiatives
2. Individual European Country Regulations
3. Asian and Australian Regulations
4. Global Guidance

Section 8. State Law Considerations

1. New York Department of Financial Services' BitLicense
2. New York Limited Purpose Trust Charter
3. New York Attorney General Virtual Markets Integrity Initiative
4. State Securities Regulation of Virtual Currencies and Initial Coin Offerings

Appendix: 50-State Virtual Currency Regulation Survey

The Need for a Better CFTC and SEC Regulatory Scheme: Goals of Regulation and Points of Intersection

- **Main goals of regulation:**
 - Futures and Swaps: facilitate use of derivatives markets for price discovery and risk shifting; ensure price integrity and convergence with cash market prices; protect market participants from fraud and manipulation.
 - Securities: facilitate capital formation and capital flows in an efficient and fair environment; assure integrity of market valuations; protect investors from fraud and manipulation in securities investments.
- **The predicate for jurisdictional overlap: the CEA “commodity” definition covers securities. (Hence our use of “non-security commodity.”)**
- **CFTC and SEC jurisdiction over derivatives may intersect in 3 ways:**
 - When an interest underlying a derivative is a security.
 - When a non-security commodity or derivative is embedded in a security.
 - When a derivative has both securities and non-security commodities as underlying references.
- **The laws are designed to preclude the SEC and CFTC from both asserting jurisdiction over cash market trading of the same “commodities” (under the CEA definition).**

Challenging Issues for the Statutory Scheme for Digital Assets

- **Digital assets can raise unprecedented, challenging jurisdictional issues.**
- **Most notable example:**
 - Digital assets that may start both as investment contracts (securities) because they are sold to raise capital to allow the issuer to buildout the platform (ecosystem) on which they will function and as commodities designed to function as a medium of exchange to purchase goods and services on the platform.
- **Over time digital asset investment contracts may transform into being only commodities.**
- **Such products can implicate each agency's regulatory interests, including during the "initial offering" (fundraising) stage.**
- **Current statutory schemes do not contemplate the temporal combination of securities with non-security commodities or commodity derivatives.**

Challenging Issues for the Statutory Scheme for Digital Assets (*cont'd*)

- **Current regulatory environment does not accommodate the initial offering of this type of digital asset in a manner that allows the asset to become a medium of exchange as intended.**
- **This can frustrate market innovation and the commercial viability of enterprises seeking to create such digital assets.**
- **Lack of clarity also may frustrate each agency's anti-fraud enforcement efforts.**
- **The markets would benefit if the CFTC and SEC developed a shared understanding of their respective regulatory interests over digital assets where they may have overlapping regulatory interests.**
- **Certain digital assets may be outside both agencies' statutory mandates.**

Resolving Jurisdictional Issues Without Legislation

- **Statutory process established by Section 718 of the Dodd-Frank Act for seeking clarity for novel derivative products.**
- **Each agency's exemptive authority.**
- **Benefit of established formal ongoing inter-agency process for resolving jurisdictional issues.**
- **Benefit of publishing guidance the public may rely upon.**
- **Beyond the issues covered in the White Paper, CFTC-SEC coordination would also be useful in considering issues of common interest relating to uses of blockchain technology in the financial markets, e.g., with respect to custody of digital assets.**