To amend the securities laws to exclude investment contract assets from the definition of a security.

IN THE HOUSE OF REPRESENTATIVES

JULY 16, 2021

Mr. EMMER (for himself, Mr. SOTO, and Mr. KHANNA) introduced the following bill; which was referred to the Committee on Financial Services

A BILL

To amend the securities laws to exclude investment contract assets from the definition of a security.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Securities Clarity Act”.

SEC. 2. SENSE OF CONGRESS; PURPOSE.

(a) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) among the ways that participants in the digital asset industry have raised capital and earned revenue is through arrangements in which investors
provide funds for the development of blockchain-based protocols in exchange for digital assets or the future delivery of digital assets to be used in those protocols;

(2) although certain of those fundraising arrangements may be deemed to be “investment contracts” within the meaning given to that term in section 2(a) of the Securities Act of 1933 (the “Securities Act”), the underlying assets sold pursuant to these arrangements are frequently not themselves inherently securities as defined in section 2(a) of the Securities Act and, like other assets sold pursuant to investment contracts in the past, do not become securities as so defined merely because they are sold pursuant to an investment contract;

(3) under SEC v. W.J. Howey Co., 328 U.S. 293 (1946), and its progeny, the Federal courts have consistently held that “an investment contract, for purposes of the Securities Act, means a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”, and have not endorsed the notion that an asset underlying an investment contract (for example, the orange groves sold in Howey) is also con-
ferred “security” status merely as a result of its being sold pursuant to the relevant contract, trans-
action, or scheme;

(4) although the distinction between an invest-
ment contract, which is a security, and the assets sold pursuant to it had been well-settled for pur-
poses of section 2(a) of the Securities Act, the two have been unnecessarily conflated in the context of digital assets; and

(5) this new approach, which conflates an in-
vestment contract and the asset sold pursuant to that contract or scheme, differs from the approach taken in many other major jurisdictions around the world, has discouraged development of the digital asset sector in the United States, and has hindered innovation in that industry here without providing concomitant benefits to those who enter into invest-
ment contracts for the purpose of acquiring digital assets.

(b) PURPOSE.—The purpose of this Act is to clarify and codify that an asset sold pursuant to an investment contract, whether tangible or intangible (including an asset in digital form), that is not otherwise a security under the Act, does not become a security as a result of
being sold or otherwise transferred pursuant to an investment contract.

SEC. 3. TREATMENT OF INVESTMENT CONTRACT ASSETS.

(a) Securities Act of 1933.—Section 2(a) of the Securities Act of 1933 (15 U.S.C. 77b(a)) is amended—

(1) in paragraph (1), by adding at the end the following: “The term ‘security’ does not include an investment contract asset.”; and

(2) by adding at the end the following:

“(20) The term ‘investment contact asset’ means an asset, whether tangible or intangible, including assets in digital form—

“(A) sold or otherwise transferred, or intended to be sold or otherwise transferred, pursuant to an investment contract; and

“(B) that is not otherwise a security pursuant to the first sentence of paragraph (1).”.

(b) Investment Advisers Act of 1940.—Section 202(a)(18) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(18)) is amended by adding at the end the following: “The term ‘security’ does not include an investment contract asset (as such term is defined under section 2(a) of the Securities Act of 1933).”.

(c) Investment Company Act of 1940.—Section 2(a)(36) of the Investment Company Act of 1940 (15
U.S.C. 80a–2(a)(36)) is amended by adding at the end the following: “The term ‘security’ does not include an investment contract asset (as such term is defined under section 2(a) of the Securities Act of 1933).”.

(d) Securities Exchange Act of 1934.—Section 3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(10)) is amended by adding at the end the following: “The term ‘security’ does not include an investment contract asset (as such term is defined under section 2(a) of the Securities Act of 1933).”.

(e) Securities Investor Protection Act of 1970.—Section 16(14) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78(lll)(14)) is amended by adding at the end the following: “The term ‘security’ does not include an investment contract asset (as such term is defined under section 2(a) of the Securities Act of 1933).”.

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