CFTC & SEC: THE WILD WEST OF CRYPTOCURRENCY REGULATION

TABLE OF CONTENTS

INTRODUCTION

Over the past few years, a turf war has been brewing between the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") over which agency should regulate cryptocurrencies. Both agencies have pursued numerous enforcement actions over the cryptocurrencies they believe to be within their jurisdiction. This turf war has many moving components, but the focus always comes back to one question: which cryptocurrencies are commodities, and which cryptocurrencies are securities? The distinction is important because the CFTC has statutory authority to regulate commodities, whereas the SEC has statutory authority to regulate securities. This Comment rejects the pursuit of defining cryptocurrency and instead proposes a regulatory framework where the two agencies regulate jointly and where the firms can self-designate and register with either the CFTC or SEC.

On March 9, 2022, President Biden signed an Executive Order ("Order") which emphasized the importance of inter-agency cooperation to determine the risks associated with cryptocurrency and an appropriate regulatory framework to address those risks.[1] "The new and unique uses and functions that digital assets can facilitate may create additional economic and financial risks requiring an evolution to a regulatory approach that adequately addresses those risks."[2] The Order solicits reports regarding potential regulatory and legislative actions on cryptocurrencies that would work to protect United States consumers, investors, and businesses.[3] It asks that the United States Secretary of the Treasury work alongside the SEC, CFTC, and other government agencies, such as the Consumer Financial Protection Bureau ("CFPB"), to produce a report outlining these regulatory recommendations within 180 days of the Order.[4] This Comment builds upon this Order and proposes a

1. Exec. Order No. 14,067, 87 Fed. Reg. 14,143 (Mar. 9, 2022).

2. *Id.* at 14,144.

3. *Id.* at 14,147.

4. *Id.* Nine government agencies submitted reports to the President as of the deadline, and on September 16, 2022, the White House released an outline of a new framework for regulating cryptocurrency. *Fact Sheet: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Assets,* THE WHITE HOUSE: BRIEFING ROOM (Sept. 16, 2022), (hereinafter *Framework Fact Sheet*) https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets/ [perma.cc/2VZF-M3W7]. However, the framework released by the White House acknowledges that the

collaborative regulatory framework where the CFTC and SEC will regulate the cryptocurrency market cooperatively through a committee with oversight from the Financial Stability Oversight Council ("FSOC").

I further propose that the CFTC-SEC Advisory Committee on Emerging Regulatory Issues ("Committee"), which was dissolved in 2014, be reconstituted to supervise the regulation process of cryptocurrencies. The two agencies shall require every firm offering cryptocurrencies to register with either the CFTC or SEC. The firm may choose to register with either agency, but it is a choice that the firm can make because they know the dynamic nature of their financial instruments best. This formal requirement creates a clear duty for all firms operating in the cryptocurrency markets to register, clearing up all of the recent questions about whether market participants had to do so. This registration requirement also provides the agencies with more insight into the transactions within the market, making it easier for them to develop a more knowledgeable plan for future regulation as their needs change. The Committee will then be tasked with tracking down firms that have not registered and will subsequently recommend enforcement actions to one of the agencies. The Committee will also be tasked with making regulatory recommendations on the evolving cryptocurrency markets.

Part II of this Comment briefly describes the history of cryptocurrency, establishes the difference between tokens and coins, and discusses the state of the cryptocurrency market and its regulatory framework. This Part explains the reasons for the ongoing turf war between the CFTC and SEC. It also includes a detailed analysis on how the CFTC defines a commodity and how the SEC defines a security to explain the turf war adequately, and to explain why this Comment rejects the pursuit of defining cryptocurrency as either a commodity or a security. Part II also examines how the complexities of cryptocurrency can allow it to evolve over time and lose its status as a security, making it even more difficult to define. The Part concludes by discussing what is being done about the turf war by introducing President Biden's Order. Finally, Part II reviews the Order's policy goals, its call to action by the President for a

regulation of cryptocurrency is an ongoing and iterative process that will continue to be shaped by the market, federal agency enforcement, and legislative action. *See id.*

whole-of-government approach to regulation, and the importance FSOC plays in addressing regulatory gaps.

Part III, the heart of this Comment, picks up where the Order leaves off and proposes a dual-regulation framework between the CFTC and SEC, overviewing the history of the CFTC and SEC's willingness to cooperate and why the complexity of cryptocurrency makes this cooperation so necessary. Part III also discusses the complex nature of cryptocurrency as well as the growing size and rapid innovation of the marketplace today. This Part then introduces the Committee, its history, and the part it will play in overseeing the dual-regulation framework. Finally, Part III introduces the next important component of the regulatory framework, self-designation, and provides other examples of self-regulating entities within the securities market.

Part IV then concludes with discussing whether legislative action is required to get the cryptocurrency market under regulation, finding that broad statutory authority granted by Congress already exists and is significant enough for the agencies to regulate without congressional action. Finally, Part IV suggests applying the regulatory framework discussed in this Comment to cryptocurrency exchanges and other market participants.

I. BACKGROUND

Since the creation of Bitcoin, new cryptocurrencies have been flooding the market, with an uptick in 2021 with over $1 trillion of digital assets traded almost every month.[5] With the growth of the market and market participants, it has become clear that regulation is needed—so why have Congress and regulators failed to impose order in the Wild West of the cryptocurrency market? This Part will briefly explain what cryptocurrency is and how it has evolved, the reasons for the on-going turf war between the CFTC and SEC, and the executive branch's recent action towards regulation.

5. *Cryptocurrency Historical Data Snapshot*, COINMARKETCAP (2022) [hereinafter COINMARKETCAP], https://coin marketcap.com/historical/ [https://perma.cc/3HJC-XBHQ].

A. *Cryptocurrency Primer*

In 2009, Bitcoin, the first-ever cryptocurrency, was born when Satoshi Nakamoto—a pseudonym—released a paper called "Bitcoin: A Peer-to-Peer Electronic Cash System," which discussed a new protocol that uses blockchain technology to create a digital coin called Bitcoin.[6] The blockchain is a decentralized ledger that rewards users on its network for verifying transactions; users on the network must solve complex cryptographic problems to confirm a transaction on the public ledger—a process commonly referred to as "mining."[7] "Each new transaction forms a block that is added to the chain of previous transactions involving that particular unit of [crypto]currency, and it is impossible to alter a block without changing all of the blocks preceding it in the blockchain."[8] Bitcoin and other cryptocurrencies use this blockchain technology to manage all of the transactions made on the network.[9] This blockchain technology is what makes cryptocurrency so secure and why we do not need a third-party institution, like a bank, to manage the transactions.[10]

Cryptocurrencies can be broken down into two subcategories: altcoins and tokens.[11] Altcoins refer to any coin other than Bitcoin.[12] Most altcoins are variants of Bitcoin created by using the open-source protocol that was used to create Bitcoin.[13] Some examples of altcoins modeled after the Bitcoin open-source protocol are Namecoin, Peercoin, and Dogecoin.[14] Some altcoins are not derived from Bitcoin's open-source protocol but instead have

6. SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1 (2009), https://bitcoin.org/bitcoin.pdf [https://perma.cc/6A3X-EBFY].

7. Rebecca M. Bratspies, *Cryptocurrency and the Myth of the Trustless Transaction*, 25 MICH. TECH. L. REV. 1, 12 (2018) (explaining proof-of-work verification); *see* NAKAMOTO, *supra* note 6, at 2 (describing cryptography process).

8. Jack J. Longley, Note, *The Crypto-Currency Act of 2020: Evaluating First Steps Toward Clarifying the Digital-Asset Regulatory Landscape*, 54 SUFFOLK U. L. REV. 549, 549 (2021).

9. *See* Averie Brookes, *U.S. Regulation of Blockchain Currencies: A Policy Overview*, 9 AM. U. INTELL. PROP. BRIEF 75, 78–79 (2018) (describing the history of Bitcoin).

10. *Id.*

11. Thomas Streissguth, *Crypto Coin vs. Token: What's the Difference?*, GOBANKINGRATES (Apr. 26, 2022), https://www.gobankingrates.com/investing/crypto/cypto-coin-vs-token/ [https://perma.cc/K4FW-H47D].

12. Aziz Zainuddin, *Altcoins vs. Tokens: What's the Difference?*, MASTER THE CRYPTO (Aug. 6, 2017), https://masterthecrypto.com/differences-between-cryptocurrency-coins-and-tokens [https://perma.cc/9MCT-RTTK].

13. *Id.*

14. *Id.*

created their own blockchain and protocol, such as Ethereum, Ripple, and BitShares.[15] A commonality between all altcoins is that they have their own independent blockchain where all of the transactions for the coin occurs.[16]

In contrast, tokens do not have their own blockchain. Token developers build their tokens on top of the blockchain of other cryptocurrencies.[17] In their most basic form, tokens represent tradable assets that have value.[18] Aside from being a currency, tokens can be a commodity (think non-fungible tokens, or "NFTs") or come with various functions, such as loyalty points.[19] Examples of crypto tokens are Tether, Shiba Inu, Chainlink, and Uniswap.[20] Creating tokens is a much easier process than creating an altcoin, as the issuer does not have to modify the codes from a particular protocol or create a blockchain from scratch.[21] Instead, tokens are made through smart contracts, which are programmable computer codes that are self-executing and do not need any third parties to operate them.[22]

Since the creation of Bitcoin, the intellectual property that went into creating blockchain currency was released to the public, and new cryptocurrencies have flooded the market. [23] There are now hundreds of thousands of unique digital assets with a combined market capitalization of approximately $2 trillion.[24] Bitcoin, the largest market capitalization cryptocurrency, is worth approximately $20,000 per Bitcoin, and approximately $19 million Bitcoin have already been mined.[25] Ether is the second most valuable

15. *Id.*

16. *Id.*

17. Lyle Daly, *What Are Crypto Tokens?*, THE MOTLEY FOOL, https://www.fool.com/investing/stock-market/market-sectors/financials/cryptocurrency-stocks/crypto-tokens/ [https://perma.cc/YSV3-2YGN] (June 27, 2022).

18. *Id.*

19. Zainuddin, *supra* note 12.

20. Daly, *supra* note 17.

21. Zainuddin, *supra* note 12. However, tokens are much more susceptible to abuse by companies looking to fundraise money quickly. Daly, *supra* note 17.

22. Zainuddin, *supra* note 12.

23. COINMARKETCAP, *supra* note 5.

24. *Examining Digital Assets: Risks, Regulation, and Innovation: Hearing Before the S. Comm. on Agric., Nutrition, and Forestry*, 117th Cong. (2022) (statement of Rostin Behnam, Chairman of Commodity Futures Trading Comm'n).

25. *Bitcoin*, COINMARKETCAP, https://coinmarketcap.com/currencies/bitcoin [https://perma.cc/3U6H-ZY6R] (Sept. 15, 2022).

cryptocurrency, with a market capitalization of $185 billion.[26] In 2021, almost every month saw over $1 trillion in monthly trading volumes in the digital asset cash market.[27] The derivatives market is even larger, with exchange volumes in just Bitcoin futures alone surpassing those volumes.[28]

With the growth of the market and market participants, it has become clear that regulation is needed. But what is not clear is what will be the source of that regulation. Cryptocurrencies are clearly being exchanged in the market, yet they still do not fall squarely into a single regulatory regime.[29] Instead, the CFTC, SEC, and other governmental agencies have created a piecemealed regulatory framework that focuses on retroactive rulings and enforcement actions. In recent years, cryptocurrency trading has attracted attention from investors, regulators, legislators, media, and commentators[30]; and the question has arisen, who is regulating the cryptocurrency market?

B. *Why is There a Turf War Between the CFTC and SEC?*

The two heavy hitters in the cryptocurrency regulatory market are the CFTC and SEC. Cryptocurrency's varying forms make it difficult to assign the entire asset class to one regulator because they share attributes of both a commodity and a security, which

26. *Ethereum,* COINMARKETCAP, https://coinmarketcap.com/currencies/ethereum [https://perma.cc/KBA8-E5G6] (Sept. 15, 2022).

27. *Global Cryptocurrency Charts: Total Cryptocurrency Market Cap,* COINMARKETCAP, https://coinmarketcap.com/charts [https://perma.cc/487B-UB28].

28. *Cryptocurrency Exchange Volume*, THE BLOCK, https://www.theblockcrypto.com/data/crypto-markets/spot/cryptocurrency-exchange-volume-monthly [https://perma.cc/26ES-SQGF]; *Volume of Bitcoin Futures*, THE BLOCK, https://www.theblockcrypto.com/data/crypto-markets/futures/volume-of-bitcoin-futures-monthly [https://perma.cc/5N92-HQFA].

29. Benham, *supra* note 24.

30. *See generally*, Emily Graffeo, *SEC Chief Gary Gensler Says Many Crypto Tokens Are Securities and Fall Under the Agency's Jurisdiction*, MARKETS INSIDER (Aug. 4, 2021, 1:04 PM), https://markets.businessinsider.com/news/currencies/sec-chief-gary-gensler-many-crypto-tokens-securities-commodities-bitcoin-2021-8 [https://perma.cc/TTU3-5C74]; FINANCIAL STABILITY OVERSIGHT COUNCIL, 2021 ANNUAL REPORT 10–11, 17, 52, 172; J. Scott Colesanti, *Sorry, They Were on Mute: The SEC's "Token Proposal 2.0" as Blueprint for Regulatory Response to Cryptocurrency*, 3 CORP. & BUS. L.J. 1, 2–3, 5–8, 20, 22, 27 (2022); *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 116th Cong. (2019) (statement of Mike Crapo, Chairman, S. Comm. on Banking, Hous., & Urb. Affs.); Todd Phillips, *A Climate and Competition Agenda for the Commodity Futures Trading Commission*, CTR. FOR AM. PROGRESS (Feb. 1, 2022), https://www.americanprogress.org/article/a-climate-and-competition-agenda-for-the-commodity-futures-trading-commission/ [https://perma.cc/627B-JXEQ].

presents novel challenges for regulators.[31] For example, the Ethereum blockchain network was created specifically to have tokens built on top of it to facilitate companies' initial coin offerings ("ICOs").[32] Ethereum allows users to program "smart contracts" that mimic physical contracts but are stored on a decentralized blockchain database.[33] At the same time, Ether, Ethereum's coin, is used as a currency and as an incentive for Ethereum miners to confirm their transactions on the network.[34]

Cryptocurrencies could be regulated under the Commodity Exchange Act ("CEA") by the CFTC.[35] Alternatively, cryptocurrencies could constitute securities regulated by SEC. Both the CFTC and SEC have regulatory schemes with broad regulatory purviews and sufficiently open-ended jurisdictional boundaries as to what is a commodity[36] and what is a security[37], which can then implicate one or more market regulatory schemes for cryptocurrencies. The CFTC and SEC's jurisdictional disputes are longstanding because of the vagueness of their statutory requirements, the creativity of

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31. *See* HANNA HALABURDA & MIKLOS SARVARY, BEYOND BITCOIN: THE ECONOMICS OF DIGITAL CURRENCIES 165–68 (1st ed. 2016) (discussing the challenges that the introduction of cryptocurrency has brought to the market).

32. Ameer Rosic, *What is an Initial Coin Offering? Raising Millions in Seconds*, BLOCKGEEKS (May 4, 2020), https://blockgeeks.com/guides/initial-coin-offering/ [https://perma.cc/63AB-ECVN].

33. *Introduction to Smart Contracts*, ETHEREUM.ORG, https://ethereum.org/en/developers/docs/smart-contracts/ [https://perma.cc/M738-XQH2] (Aug. 25, 2022).

34. Streissguth, *supra* note 11; *see* Jake Frankenfield, *What is Ether (ETH)? Definition, How It Works, Vs. Bitcoin*, INVESTOPEDIA, https://www.investopedia.com/terms/e/ether-cryptocurrency.asp [https://perma.cc/MNS7-DZT4].

35. *See* 7 U.S.C. §§ 1 et seq.

36. The definition of a commodity is complex and has been revised many times since the enactment of the Commodity Exchange Act in 1936.

> The term 'commodity' means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13-1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.

7 U.S.C. § 1a(9).

37. SEC v. W. J. Howey Co., 328 U.S. 293, 297 (1946).

crypto developers throughout the 21st century, and the totally unforeseen recent developments by FinTech entrepreneurs.[38]

The main distinguishing factor between a cryptocurrency that is an investment contract (security) and a cryptocurrency that is a virtual currency (commodity), is its primary, though not necessarily sole, purpose.[39] The primary purpose of a security is to make an investment—though there may be other purposes—and what gives life to the contract is the investment opportunity.[40] The opposite is true of commodities. The primary purpose is to establish a unit of exchange for access to goods and service; while another purpose may be to acquire a valuable asset—what gives life to the transaction is its utility on a network.[41] Ultimately, if a cryptocurrency is classified as a commodity, then the CFTC has the authority to regulate. If it is classified as a security, then the SEC has the authority to regulate it. Thus, the turf war between the CFTC and SEC really comes down to whether cryptocurrencies are a commodity or a security.

1. Cryptocurrency as a Commodity

Commodities are generally defined as "goods sold in the market with a quality and value uniform throughout the world."[42] For example, popular commodities include energy products like oil and natural gas, precious metals like gold and silver, as well as food and agricultural goods like coffee, wheat, cotton, and sugar. However, Section 1a(9) of the CEA defines "commodity" to include, among other things, "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt

38. *See, e.g.*, LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, FUNDAMENTALS OF SECURITIES REGULATION 433–34 (6th ed. 2011) (detailing a long jurisdictional battle triggered by the two agency's enabling acts and revisions, resulting in a temporary "treaty" largely codified in the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983)).

39. A CFTC PRIMER ON VIRTUAL CURRENCIES, LABCFTC 14 (2017); Jay Clayton, *Statement on Cryptocurrencies and Initial Coin Offerings*, SEC (Dec. 11, 2017) https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11 [http://perma.cc/MY63-AKCN].

40. Clayton, *supra* note 39.

41. LABCFTC, *supra* note 39.

42. *See* Nikolei M. Kaplanov, Comment, *Nerdy Money: Bitcoin, the Private Digital Currency, and the Case Against Its Regulation*, 25 LOY. CONSUMER L. REV. 111, 147 (2012).

in."[43] This definition of a commodity is broad.[44] Under the CEA, the CFTC has oversight of all commodities.[45]

While cryptocurrency has been around since 2009, the CFTC's involvement in cryptocurrency regulation did not begin until an exchange called TeraExchange, LLC, announced plans to issue a swap product based on Bitcoin in 2014.[46] TeraExchange was a swap exchange facility ("SEF") already registered with the CFTC; but the CFTC needed to establish jurisdiction over this new swap product so they announced in a hearing before a U.S. Senate Committee on December 10, 2014, that cryptocurrencies were a "commodity" subject to oversight under its authority under the CEA.[47] CFTC Chairman, Timothy Massad, went on to say the following:

> While the CFTC does not have policies and procedures specific to virtual currencies like bitcoin, the agency's authority extends to futures and swaps contracts in any commodity. The CEA defines the term commodity very broadly so that in addition to traditional agricultural commodities, metals, and energy, the CFTC has oversight of derivatives contracts related to Treasury securities, interest rate indices, stock market indices, currencies, electricity, and heating degree days, to name just a few underlying products.[48]

Nine months later, in September 2015, the CFTC brought its first enforcement action against an unregistered company, Coinflip, Inc. [49] The company was offering to connect buyers and sellers of Bitcoin option contracts without being registered as an SEF or a designated contract market ("DCM"), so the CFTC issued an order

43. 7 U.S.C. § 1a(9).

44. *See, e.g.*, Board of Trade of Chicago v. SEC, 677 F.2d 1137, 1142 (7th Cir. 1982).

45. *See* Commodity Exchange Act, 7 U.S.C. § 6.

46. LabCFTC, *supra* note 39, at 12; Press Release, Commodity Futures Trading Comm'n, CFTC Settles with TeraExchange LLC For Failing to Enforce Prohibitions on Wash Trading and Prearranged Trading in Bitcoin Swap (Sept. 24, 2015) (on file with https://www.cftc.gov/PressRoom/PressReleases/7240-15 [https://perma.cc/RRG7-J4GB]); *see also* NAKAMOTO, *supra* note 6.

47. Timothy Massad, *Testimony Before the S. Comm. on Agric., Nutrition, and Forestry*, COMMODITY FUTURES TRADING COMM'N (Dec. 10, 2014), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-6 [https://perma.cc/23XM-QLZJ].

48. *Id.*

49. Press Release, Commodity Futures Trading Comm'n, CFTC Orders Bitcoin Options Trading Platform Operator and Its CEO to Cease Illegally Offering Bitcoin Options and to Cease Operating a Facility for Trading or Processing of Swaps Without Registering (Sept. 17, 2015) (on file at https://www.cftc.gov/PressRoom/PressReleases/7231-15 [https://perma.cc/ 4YXX-TRT7]); Coinflip, Inc., CFTC No. 15-29 (Sept. 17, 2015) (Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions).

declaring that "Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities."[50]

Roughly three years later, a federal court finally weighed in on the CFTC's declaration of their cryptocurrency jurisdiction in *CFTC v. McDonnell*.[51] On March 6, 2018, the United States District Court for the Eastern District of New York confirmed the CFTC's position, which it had taken in its 2015 order in the Coinflip proceeding, that it does in fact have cryptocurrency jurisdiction.[52] The *McDonnell* defendants argued that the CFTC lacked authority to regulate cryptocurrency as a commodity or exercise its jurisdiction over fraud that does not directly involve the sale of futures or derivative contracts.[53] The court ruled that, since virtual currencies were "goods" exchanged in a market for a uniform quality and value, they fell within the common definition of "commodity" under the CFTC's jurisdiction.[54] The court supported this categorization because it "realistically reflects the economic behavior of Bitcoin users and squares with traditional economic conceptions of exchange."[55] The court also stated that the jurisdictional authority of the CFTC does not prevent other agencies from exercising their regulatory power when appropriate, and that no one agency is granted full regulatory authority over cryptocurrency.[56]

As reflected by its enforcement actions, the CFTC interprets established digital coins on functioning networks such as Bitcoin and Litecoin as cryptocurrencies under its jurisdiction.[57] The CFTC's definition aligns with the description that cryptocurrencies are

50. Coinflip, *supra* note 49, at 2–3.

51. 287 F. Supp. 3d 213, 229 (E.D.N.Y. 2018).

52. *Id.*; Coinflip Inc., *supra* note 49. The United States District Court of Massachusetts was the second federal court to uphold the CFTC's position that they have cryptocurrency jurisdiction. CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 495 (D. Mass. 2018).

53. *See* 287 F. Supp. 3d at 217.

54. Press Release, Commodity Futures Trading Comm'n, CFTC Wins Trial Against Virtual Currency Fraudster (Aug. 24, 2018) (on file at https://www.cftc.gov/PressRoom/PressReleases/7774-18 [https://perma.cc/3C2T-9Y32]). Judge Weinstein also stated that this decision should not be viewed as increasing the CFTC's authority or the beginning of more aggressive enforcement, but merely as an affirmation of the same contours to the CFTC's jurisdiction that it has previously asserted its authority over. *Id.*

55. Mitchell Prentis, *Digital Metal: Regulating Bitcoin as a Commodity*, 66 CASE W. RSRV. L. REV. 609, 626 (2015); McDonnell, *supra* note 51, at 224.

56. 287 F. Supp. 3d at 226, 228.

57. *See id.* at 216 (alleging that the defendants fraudulently misrepresented their trading in Bitcoin and Litecoin, and misappropriated customer funds); *see generally* Complaint, CFTC v. Gelfman Blueprint, 2018 U.S. Dist. LEXIS 207379 (S.D.N.Y. 2018) (No. 17-7181) (alleging that the defendants fraudulently misstated their success in trading Bitcoin).

commodities from SEC Director Hinman's June 2018 speech.[58] In that speech, Hinman provides a list of questions to help determine whether a digital coin is a commodity, and all of the questions point to whether its primary use is as a medium of exchange for users of a network (rather than an investment opportunity).[59] For example:

> (1) Is token creation commensurate with meeting the needs of users or, rather, with feeding speculation?
> . . .
> (3) Is it clear that the primary motivation for purchasing the digital asset is for personal use or consumption, as compared to investment? Have purchasers made representations as to their consumptive, as opposed to their investment, intent . . . ?
> (4) Are the tokens distributed in ways to meet users' needs? For example, can the tokens be held or transferred only in amounts that correspond to a purchaser's expected use. . .?[60]

"The picture that emerges is that the digital coin that is a virtual currency is functioning on an operating network, and the primary (but not necessarily the only reason) to purchase it is a means to access goods and services on that network."[61] Accordingly, for established networks like Bitcoin and Ether, the digital coins are cryptocurrencies that fall under the commodity umbrella.[62]

2. Cryptocurrency as a Security

a. Defining a Security: The Howey Test

Securities are generally defined as a financial instrument that holds some type of monetary value.[63] Under the Securities Exchange Act of 1933 ("'33 Act"), SEC has oversight of these financial instruments, which includes investment contracts, stocks, bonds, and transferrable shares.[64] Congress chose such a broad definition

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58. *See* William Hinman, Chairman, Div. of Corp. Fin., Sec. & Exch. Comm'n, Digital Asset Transactions: When Howey Met Gary (Plastic), Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018) (transcript available at https://www.sec.gov/news/speech/speech-hinman-061418 [https://perma.cc/V7CZ-UXY3]).

59. *Id.*

60. *Id.*

61. Petal Walker, *The Legend of the "Secumodity": Can the Same Coin Be a Security or Commodity at Different Points in Its Evolution?*, FUTURES & DERIVATIVES L. REP., May 2019, at 1, 3.

62. *Id.* at 1–3, 6.

63. *See* Securities Act of 1933, 15 U.S.C. § 77b(a)(1).

64. *Id.* § 77s(1); STRATEGIC HUB FOR INNOVATION & FIN. TECH., SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS [hereinafter "INVESTMENT

to ensure it would "encompass virtually any instrument that might be sold as an investment."[65] Both SEC and the federal courts frequently use the "investment contract" analysis set forth in *SEC v. W.J. Howey Co.* to determine whether novel financial instruments, such as cryptocurrencies, are classified as securities and thus subject to federal securities laws.[66] The U.S. Supreme Court ruled that under the *Howey* test an investment contract is (1) an investment of money, (2) in a common enterprise, (3) with the expectation of profits, (4) to be derived from the entrepreneurial or managerial efforts of others.[67] These elements are also outlined in Director Hinman's June 2018 speech, where he provided a list of questions to determine if a digital coin is a security:

> "(1) Is there a person or group that has sponsored or promoted the creation and sale of the digital asset, the efforts of whom play a significant role in the development and maintenance of the asset and its potential increase in value?
> (2) Has this person or group retained a stake or other interest in the digital asset such that it would be motivated to expend efforts to cause an increase in value in the digital asset? Would purchasers reasonably believe such efforts will be undertaken and may result in a return on their investment in the digital asset?
> . . .
> (4) Are purchasers "investing," that is seeking a return? In that regard, is the instrument marketed and sold to the general public instead of to potential users of the network for a price that reasonably correlates with the market value of the good or service in the network?"[68]

If a cryptocurrency is found to be an investment contract, and therefore a security, it is subject to SEC regulation and must either be registered or be subject to an exemption from registration.

b. The Defining Element: Element Two, "A Common Enterprise"

Under the *Howey* test, the determination of whether a cryptocurrency is an investment contract turns on the second element, whether there is an investment of money *in a common enterprise*

CONTRACT ANALYSIS"], https://www.sec.gov/corpfin/frame work-investment-contract-analysis-digital-assets [https://perma.cc/7N58-JFTA] (Apr. 3, 2019).

65. SEC v. Edwards, 540 U.S. 389, 393 (2004) (quoting Reves v. Ernst & Young, 494 U.S. 56, 61 (1990)); *see generally* SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

66. INVESTMENT CONTRACT ANALYSIS, *supra* note 64.

67. *Howey*, 328 U.S. at 301; *see also* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975).

68. *See* Hinman, *supra* note 58.

with an expectation of profits to be derived from the efforts of others. In the 2019 case *Balestra v. ATBCOIN LLC*, a class action was brought against an issuer and two of its founders for a violation of the '33 Act by selling unregistered securities through an ICO.[69] ATBCOIN was a technology-based start-up, whose purpose was to facilitate rapid and low-cost digital financial transactions leveraging blockchain technology.[70] In 2017, ATBCOIN conducted an ICO and promised to launch a resulting ATB blockchain.[71] By the end of the ICO, ATBCOIN had raised over $20 million from thousands of investors, but the promised blockchain had not materialized, and within a year Balestra's coins had dropped in value by more than eighty-five percent from the purchase price.[72] At no point did ATBCOIN file a registration statement with the SEC—not before, during, or after the ICO.[73] Thus, the plaintiff sued under the private cause of action relating to unregistered securities sales found at Section 12(a)(1) of the '33 Act.[74]

When discussing the *Howey* test, the court noted that a plaintiff may demonstrate the second element, a "common enterprise," by pleading the existence of "horizontal commonality," meaning that "'the fortunes of each investor in a pool of investors' are tied to one another and to the 'success of the overall venture.'"[75] The funds raised through the ICO were pooled to facilitate the launch of the ATB Blockchain, which, if successful, would increase the value of ATB Coin.[76] The court emphasized that the analysis should be based on the economic realities of the underlying transaction.[77] Noting that all potential profits were "entirely reliant" on the success of the blockchain platform, the decision likewise emphasized that the issuer had advertised that "serious people from many prosperous countries" were investing in the coins.[78] Thus, the court concluded that all four elements of the *Howey* test were satisfied and ATB Coin was, in fact, a security.[79]

69. 380 F. Supp. 3d 340, 346 (S.D.N.Y. 2019).
70. *Id.*
71. *Id.* at 347.
72. *Id.*
73. *Id.* at 348.
74. *Id.*
75. *Id.* at 353 (quoting Revak v. SEC Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994)).
76. *Id.*
77. *Id.* at 352–53.
78. *Id.* at 354–55.
79. *Id.* at 357.

Another example of litigation that turns on the second element of the Howey test is an ongoing case that was filed in 2020, *SEC v. Ripple Labs*.[80] The complaint alleged that Ripple had conducted an unregistered securities offering under the '33 Act.[81] "Founded in 2012, Ripple touts itself as a blockchain-based alternative to SWIFT, the global interbank messaging system that enables trillions of dollars in payments every day."[82] Ripple also facilitates cross-border transactions by using "XRP, the sixth-largest cryptocurrency by market value . . ." and "[O]wns a majority of the 100 billion XRP tokens in circulation, which it periodically releases from an escrow account to keep prices stable."[83] Brad Garlinghouse, Chief Executive Officer of Ripple Labs Inc., said there is a lot at stake for both his company and the cryptocurrency market at-large.

> "This case is important, not just for Ripple; it's important for the entire crypto industry in the United States," he said. "It would really be negative for crypto in the United States." If Ripple loses, most tokens trading on platforms in the U.S. would be deemed securities, Garlinghouse said, meaning those platforms would have to register with the SEC as broker dealers. "That's cost, that's friction . . . . If you determine XRP as a security of Ripple, we have to know every person that owns XRP," he said. "That's an SEC requirement. You have to know all of your shareholders. It's not possible."[84]

The SEC argues that Ripple seeking investments in coins to fund its operation and its network suffices as satisfying the common enterprise element of the *Howey* test, while the admitted reliance on the defendant's expertise satisfies element four (i.e., "managerial efforts of others").[85] Ripple's General Counsel, Stuart Alderoty, said that "[o]wning a unit of XRP provides no right title or interest in Ripple or any distribution of profits from Ripple . . . [and that

80. *See* Complaint at 7, SEC v. Ripple Labs, Inc., No. 20-CV-10832, 2021 U.S. Dist. LEXIS 69563 (S.D.N.Y. Dec. 22, 2020).

81. *Id.* at 2–3.

82. Ryan Browne, *Crypto Firm Ripple's Court Battle with the SEC Has Gone 'Exceedingly Well,' CEO Says*, CNBC, https://www.cnbc.com/2022/04/14/ripples-court-battle-with-sec-has-gone-exceedingly-well-ceo-says.html [https://perma.cc/CHA2-52PJ] (Apr. 14, 2022, 1:55 PM).

83. *Id.*

84. *Id.*

85. *See* Complaint at 7, SEC v. Ripple Labs, Inc., No. 20-CV-10832, 2021 U.S. Dist. LEXIS 69563 (S.D.N.Y. Dec. 22, 2020).

t]here was never a contract for an investment."[86] The suit is pending in the U.S. District Court for the Southern District of New York and a judgment is not expected until 2023.[87]

c. Under the Howey Test, Bitcoin is Not a Security

Most cryptocurrencies pass elements one and three of the *Howey* test, because almost all current cryptocurrency holders have purchased their share with money and expect to earn a profit. A central point of a dispute over the determination of status for any cryptocurrency, as SEC chairman Gary Gensler stated in 2021, is element two, as claims of decentralization often do not correspond with the realities of the distribution, or "mining", of crypto-currency.[88] Because of this, many cryptocurrencies do not meet the definition of investment contracts. For example, Bitcoin does not pass the *Howey* test.

Bitcoin satisfies elements one and three of the *Howey* test, because buying Bitcoin is an investment of money with the expectation of profits. However, the second and fourth elements of the *Howey* test are not satisfied by the purchase of Bitcoin. Bitcoin does not have a horizontal commonality (a common enterprise) because each investor acts on their own accord when purchasing Bitcoin; thus, there is no pooling of funds among the investors.[89] Additionally, Bitcoin does not have a vertical commonality because there is no promoter or third party who controls the investor's success when dealing with the purchase of Bitcoin. The fourth element is not satisfied because the investor's expectation of profit is tied to the market price of Bitcoin, not the managerial efforts of others. Bitcoin thus does not satisfy the *Howey* test because there is no

86. Benjamin Pimentel, *The Ripple-SEC Legal Brawl Could Be a Game-Changer for Crypto*, PROTOCOL (May 1, 2022), https://www.protocol.com/fintech/ripple-sec-xrp-lawsuit-trial [https://perma.cc/J83Q-FHSF].

87. *Id.*

88. Rakesh Sharma, *SEC Chief Reiterates Call for Cryptocurrency Regulation*, INVESTOPEDIA (Sep. 14, 2021), https://www.investopedia.com/sec-chief-reiterates-call-for-cryptocurrency-regulation-5201311 [https://perma.cc/YF9N-G2DH].

89. Florian Uffer, *Application of the Howey Test to Cryptocurrency*, U. RICH. J.L. & TECH.: BLOG POSTS (Mar. 11, 2019), https://jolt.richmond.edu/2019/03/11/application-of-the-howey-test-to-cryptocurrency/ [https://perma.cc/RXL4-2UX2]; Cole Schotz & David Borsack, *Cryptocurrencies and the Securities and Exchange Commission*, JDSUPRA (Aug. 4, 2021), https://www.jdsupra.com/legalnews/cryptocurrencies-and-the-securities-and-6989064/ [https://perma.cc/JDQ5-CZKA].

common enterprise and expected profits are not derived from the managerial efforts of others.[90]

d. The Transitory State of Cryptocurrency: Is it a Security? Is it a Commodity? Is it a Bird? Is it a Plane?

Some cryptocurrencies meet the *Howey* test when they are first introduced to the market through an ICO, but over time their status can change.[91] As discussed above, to be an "investment contract," and thus a security, cryptocurrency must be accompanied by a promise for further development or price appreciation.[92] And there is a fundamental difference between when a cryptocurrency is issued by a developer, and when a cryptocurrency is traded on an exchange: an issuer promises further development and price appreciation, while the exchange promises neither. Thus, cryptocurrency can start out as a security during an ICO but evolve into a commodity as it begins trading on exchanges.[93]

This can be further understood by considering securities that have a non-security element coupled with an aspect of a contract that together create an investment opportunity. A prime example of this is in *Howey* where the Court found that a security was formed by the coupling of units for sale on a citrus grove development with a service contract to tend to the groves.[94] The Court found that the land sale contract and the service contract were inextricably linked because: (1) the purchasers were told that it was not feasible for them to make the investment unless they agreed to the service contract;[95] (2) the service contract gave the Howey Company (the contract company) a lease and possession of the land;[96] (3) the clients were business people who lacked the expertise to

90. Hinman, *supra* note 58 ("And so, when I look at Bitcoin today, I do not see a central third party whose efforts are a key determining factor in the enterprise. The network on which Bitcoin functions is operational and appears to have been decentralized for some time, perhaps from inception. Applying the disclosure regime of the federal securities laws to the offer and resale of Bitcoin would seem to add little value.").

91. *See* INVESTMENT CONTRACT ANALYSIS, *supra* note 64.

92. *Id.*

93. *See* MATHIAS FROMBERGER & LARS HAFFKE, ICO MARKET REPORT 2018/2019 3, 6 (2019). "In 2018, more than $14 billion [] were collected [by companies through] ICOs." *Id.* at 3. However, ICO activity began to decrease dramatically in 2019, partially because of this legal gray area that ICOs inhabit. *Id.* at 3, 6, 21.

94. SEC v. W.J. Howey Co., 328 U.S. 293, 299–301 (1946).

95. *Id.* at 295.

96. *Id.* at 296.

otherwise cultivate the orange groves themselves;[97] and (4) the plots of land were too small to be profitably cultivated on their own.[98] The Court held that the combination of these facts made the two contracts necessary and that the entire enterprise only made sense as an investment for profit.[99]

However, if the non-investment element of the investment contract is not transformed by its coupling, then it is possible for it to be decoupled. Thus, a digital coin can be decoupled from the profit-making aspect of its package and continue as a commodity on an established network. This concept is supported by Director Hinman's speech in 2018:

> Can a digital asset that was originally offered in a securities offering ever be later sold in a manner that does not constitute an offering of a security? In cases where the digital asset represents a set of rights that gives the holder a financial interest in an enterprise, the answer is likely "no." . . . But what about cases where there is no longer any central enterprise being invested in or *where the digital asset is sold only to be used to purchase a good or service available through the network on which it was created*? I believe in these cases the answer is a qualified "yes."[100]

As Hinman notes, where there is a digital coin that is being sold as an investment, but the coin itself is a cryptocurrency, the coin could be sold separately in the future outside securities laws—i.e., as a commodity.[101] In order to be considered a separate virtual currency on a network, he also noted that "purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial effort – the assets may not represent an investment contract."[102]

For example, when Ether was first launched, there was an investment of money (an investor purchased Ether with Bitcoin), in a common enterprise (all of the Ether was sold from one entity, ethereum.org), with a reasonable expectation of profit (the set price of Ether from the pre-sale increased after the first two weeks it was available for purchase), and the expectation of profits could be said to have been dependent on others (the investors were trusting the

97. *Id.*
98. *Id.* at 300.
99. *Id.*
100. Hinman, *supra* note 58 (emphasis added).
101. *Id.*
102. *Id.*

Ethereum developers to use the Bitcoin to develop Ethereum).[103] Therefore, it could be argued that Ether satisfied the *Howey* test when it was first launched. However, over time Ether was no longer sold via an entity but rather was obtained through mining, much like Bitcoin.[104] Recognizing the change in the Ethereum network, Director Hinman advanced a framework under which a cryptocurrency could be considered a security at one point in time but lose its status as a security through decentralization.[105] This change in classification, of course, then affects the regulatory framework provided by the CFTC and SEC and adds more complexity to an already confusing regulatory framework.

C. *What is Being Done About the Turf War?*

On March 9, 2022, President Biden signed an Executive Order ("Order") soliciting reports from several government agencies within 180 days on potential regulatory and legislative actions on cryptocurrencies that would work to protect United States consumers, investors, and businesses.[106] Nine agencies submitted reports to the President in response to his order.[107] On September 16, 2022, the White House released the "First-Ever Comprehensive Framework for Responsible Development of Digital Assets," ("Framework") which summarizes those reports. The Framework outlines the steps the administration plans to take, but it still doesn't solve the turf-war that exists between the CFTC and SEC.[108] There are three main takeaways for our purposes. First, the Order identifies several perceived public policy risks that digital assets can pose on issues ranging from consumer protection to national security.[109] Second, the Order tasks various federal agencies—working in coordination—to draft a host of reports and recommendations to

103. *See History of ETH: The Rise of Ethereum Blockchain,* COINTELEGRAPH, https://cointelegraph.com/ethereum-for-beginners/history-of-eth-the-rise-of-the-ethereum-blockchain [https://perma.cc/3VRG-Y6AP].

104. *Id.*

105. *See* Hinman, *supra* note 58. Mr. Hinman suggested that the SEC first use the *Howey* test to determine if the cryptocurrency was ever considered a security. *See id.* If the cryptocurrency was a security when it was first issued, then the SEC should determine whether the security is currently "centralized" (still a security), or "decentralized" (not a security). *See id.*

106. Exec. Order No. 14,067, 87 Fed. Reg. 14,143, 14,143, 14,145 (Mar. 9, 2022).

107. *Framework Fact Sheet*, *supra* note 4.

108. *Id.*

109. Exec. Order No. 14.067, 87 Fed. Reg. 14,143 (Mar. 9, 2022).

evaluate these perceived risks presented by digital assets.[110] Third, the Order tasks FSOC with filling in the market's regulatory gaps by coordinating reports and recommendations from the CFTC, SEC, and other agencies.[111]

1. Public Policy Goals

The Executive Order outlines six priorities for a coordinated federal framework for the regulation of digital assets: (1) consumer and investor protection; (2) financial stability and systemic risk; (3) prevention of illicit finance and national security; (4) U.S. leadership in the global financial system and economic competitiveness; (5) financial inclusion; and (6) responsible innovation.[112] Some of these priorities explicitly implicate the CFTC and SEC, especially the need to consumers, investors, and global financial stability and mitigate systemic risks associated with digital assets. These two agencies are central to the goals of the Order because their mission statements overlap greatly with the priorities listed in the Order.

The CFTC's mission is "to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation."[113] "In carrying out this mission, the Commission polices the derivatives markets for various abuses and works to ensure the protection of [consumer and investor] funds."[114] The mission of the SEC is "to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[115] In the lead-up to the Great Depression, the capital markets of the Roaring '20s were far from *fair, orderly, and efficient*, experiencing "excessive and unrestrained speculation,"[116] "false, inaccurate, or incomplete

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110. *Id.* at 14,143–44.

111. *Id.* at 14,148–49.

112. *Id.* at 14,147–48.

113. *About The Commission,* COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/About/AboutTheCommission [https://perma.cc/2GPM-MFPC].

114. *About the CFTC and Enforcement*, COMMODITY FUTURES TRADING COMM'N WHISTLEBLOWER PROGRAM, https://www.whistleblower.gov/aboutcftc [https://perma.cc/P6BU-Q87E].

115. U.S. SEC. & EXCH. COMM'N, AGENCY AND MISSION INFORMATION 4 (2014), https://www.sec.gov/about/reports/sec-fy2014-agency-mission-information.pdf [https://perma.cc/XQ4X-6XAV].

116. STAFF OF S. COMM. ON BANKING AND CURRENCY, 73D CONG., REP. ON STOCK EXCHANGE PRACTICES 5 (1934).

information,"[117] market manipulation,[118] and "negligent and fraudulent practices."[119] In response to the Great Depression, Congress authorized the SEC to regulate the nation's capital markets and securities industry, providing it jurisdiction over both the offering of securities—including stocks, bonds, investment contracts, notes, and derivatives based on securities—anyone who issues securities, as well as securities brokers and dealers, securities exchanges, and companies that invest in securities.[120] Not only do the two agencies mission statements overlap, so do some of their responsibilities. The SEC and CFTC have certain joint responsibilities under the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") and the Commodity Futures Modernization Act of 2000 ("CFMA"), including joint responsibility for regulating security futures products.[121]

2. Whole-of-Government Approach

The Order "requires various government entities to coordinate with one another, to submit reports on these and other topics and to suggest next steps for regulatory and legislative action."[122] In this pursuit, the Order "calls for studies and proposals from, and coordination amongst, regulators, suggesting that the White House believes that existing agencies can adequately regulate digital assets, rather than creating a new government entity to regulate digital assets."[123] The Order specifically encourages the SEC, CFTC, Federal Reserve, Federal Deposit Insurance Corporation ("FDIC"), and Office of the Comptroller of the Currency ("OCC") to consider the extent to which existing regulatory measures within their respective jurisdictions may be used to address the risks of digital assets and whether additional measures are needed.[124]

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117. *Id.* at 68.

118. *Id.* at 47.

119. *Id.* at 153.

120. 15 U.S.C. §§ 77b(a)(1), 77e, 78f, 78o, 80a–8.

121. Commodity Futures Modernization Act of 2000, 15 U.S.C § 78o; Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010).

122. *Executive Order on Digital Assets*, SULLIVAN & CROMWELL LLP (Mar. 9, 2022), https://www.sullcrom.com/files/upload/sc-publication-executive-order-on-digital-assets.pdf [https://perma.cc/TC2B-9WS3].

123. *Id.* at 2.

124. Exec. Order No. 14,067, 87 Fed. Reg. 14,143, 14,148 (Mar. 9, 2022).

3. Addressing Regulatory Gaps—FSOC

The Order states that the Treasury must "convene the Financial Stability Oversight Council, whose members include the SEC, CFTC, CFPB, and federal banking agencies, to identify financial stability risks and regulatory gaps posed by various types of digital assets and provide recommendations to address such risks."[125] The Order makes clear that the Financial Stability Oversight Council (FSOC) will play an important role in overseeing the cryptocurrency regulatory market.[126]

FSOC is a United States federal government organization, established by Title I of the Dodd–Frank Act, which was signed into law on July 21, 2010.[127] It was created in response to the regulatory gaps that were created by too many regulatory actors flooding the market during the 2008 Financial Crisis.[128] Its ultimate goal was to bridge these gaps by integrating the regulatory scheme from agency to agency.[129] Since 2017, the Secretary of the Treasury has overseen FSOC and the financial stability and regulatory gaps posed by digital assets.[130] The Order explicitly requires the Treasury to convene FSOC to create a plan for action that will promote financial stability, mitigate systemic risk, and strengthen the market's integrity.[131]

The Order and Framework is an acknowledgment from the executive branch that it is necessary to regulate the cryptocurrency market because of its perceived risks. It illustrates the Biden administration's desire for government agencies to work together to regulate the market through a "*whole of government approach*"—the first administration ever.[132] While the Order and Framework are important, they do not solve the turf war. It is more of a "call to action than [] a specific game plan"—leaving us with

125. SULLIVAN & CROMWELL LLP, *supra* note 122.

126. Exec. Order No. 14,067, 87 Fed. Reg. 14,143, 14,148–49 (Mar. 9, 2022).

127. Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1392 (2010) (codified as amended at 12 U.S.C. § 5301).

128. *See generally* H.R. REP. NO. 111-517 (2010) (Conf. Rep.).

129. U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 20 (2009), https://media.npr.org/documents/2009/jun/newfoundation.pdf [https://perma.cc/H8TX-KDBC].

130. Exec. Order No. 14,067, 87 Fed. Reg. 14,143, 14,148 (Mar. 9, 2022).

131. *Id.* at 14,148–49.

132. *Id.*

questions.[133] Which agency should take the lead on regulating? What actions should be taken? What is the plan? Below, in Part III, I answer these questions by proposing a dual regulation framework through a self-designation registration process overseen by a joint CFTC-SEC Committee.

II. PROPOSAL: A DUAL REGULATION FRAMEWORK

I argue that cryptocurrency firms should be dually regulated by the CFTC and SEC, and firms should get to choose, through registration, which agency is their regulator. The cooperation would be enacted through resurrecting the CFTC-SEC Joint Committee on Emerging Regulatory Issues, with the oversight of FSOC.

A. *Cooperation is a Crucial Part of the Response*

The SEC, CFTC, and other federal agencies have all been responsible for collectively establishing the existing, and very incomplete, regulatory environment. The rapid development of the diversity of cryptocurrencies poses a notable challenge for these financial market regulators. The technology of cryptocurrency could become a common and social good rather than a significant threat to financial stability, but the regulatory patchwork is the greatest hurdle to mainstreaming integration and adoption.[134]

1. CFTC & SEC's Willingness to Cooperate

The mission of the CFTC is to foster open, transparent, competitive and financially sound markets.[135] The mission of the SEC is to protect investors, maintain fair, orderly, and efficient securities markets, and facilitate capital formation.[136] As previously mentioned in Part II.C, it's notable that the CFTC and SEC already

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133. Aaron Klein, *How Biden's Executive Order on Cryptocurrency May Impact the Fate of Digital Currency and Assets*, BROOKINGS: TECHTANK (Mar. 17, 2022), https://www.brookings.edu/blog/techtank/2022/03/17/how-bidens-executive-order-on-cryptocurrency-may-impact-the-fate-of-digital-currency-and-assets/ [https://perma.cc/X8BL-N438].

134. Rostin Behnam, *Insight: Push Us Past Inertia—How the White House Can Help Mainstream FinTech*, BLOOMBERG LAW: TECH. & TELECOM LAW (May 21, 2019, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/tech-and-telecom-law/X1AFC64O000000?bna_news_filter=tech-and-telecom-law#jcite [https://perma.cc/58UL-PB8Y].

135. *See About the Commission,* COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/About/AboutTheCommission [https://perma.cc/7S42-58UW].

136. U.S. SEC. & EXCH. COMM'N, *supra* note 115.

have certain joint responsibilities under the Dodd-Frank Act and the CFMA, including joint responsibility for regulating security futures products.[137] On July 11, 2018, the CFTC and SEC signed a Memorandum of Understanding ("MOU") recognizing that "enhanced coordination and cooperation [amongst the agencies] concerning issues of common regulatory interest is necessary in order to foster market innovation and fair competition and to promote efficiency in regulatory oversight."[138] The CFTC and SEC further recognized in the MOU that through increased coordination and cooperation, the agencies can more easily facilitate the introduction of novel products to market users and investors, and enhance the functioning of the underlying markets.[139] Accordingly, the CFTC and SEC signed the MOU to reflect their intent to "establish a regulatory liaison and facilitate the discussion and coordination of regulatory action, as well as information exchange and data sharing, regarding issues of common regulatory interest."[140]

Since signing the MOU, the CFTC and SEC have continued to express a willingness to work collaboratively on regulating the financial markets together, and specifically, the digital asset market.[141] As Rostin Behnam, Chairman of the CFTC, said during a U.S. Senate Hearing on February 9, 2022, "while our oversight capabilities are generally complimentary, market regulation and financial supervision often rely on the development of cooperative arrangements."[142] Behnam further stated that while the "CFTC continues to use [its] existing enforcement authority to its fullest

137. Commodity Futures Modernization Act of 2000, 7 U.S.C. § 1; Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301 (2010).

138. U.S. SEC. & EXCH. COMM'N & COMMODITY FUTURES TRADING COMM'N, MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. SECURITIES AND EXCHANGE COMMISSION AND THE U.S. COMMODITY FUTURES TRADING COMMISSION REGARDING COORDINATION IN AREAS OF COMMON REGULATORY INTEREST AND INFORMATION SHARING (2018), https://www.cftc.gov/sites/default/files/2018-07/CFTC_MOU_InformationSharing062818.pdf [https://perma.cc/F6WS-ZJHU] (signed by Jay Clayton, Chairman of the SEC, and J. Christopher Giancarlo, Chairman of the CFTC).

139. *Id.*

140. *Id.*

141. *See* Rostin Benham, Chairman, Commodity Futures Trading Comm'n, Testimony before the U.S. S. Comm. on Agric., Nutrition, and Forestry: Examining Digital Assets: Risks, Regulation, and Innovation (Feb. 9, 2022) (transcript available at https://www.agriculture.senate.gov/imo/media/doc/Testimony_Behnam_020920225.pdf [https://perma.cc/8QXE-H83H]); Gary Gensler, Chairman, U.S. Sec. and Exch. Comm'n, Remarks on Crypto Markets at the University of Pennsylvania Law Capital Markets Association Annual Conference (Apr. 4, 2022) (transcript available at https://www.sec.gov/news /speech/gensler-remarks-crypto-markets-040422 [https://perma.cc/YN72-TR95]).

142. Benham, *supra* note 141.

extent in the digital asset commodity space to protect customers from fraud and manipulation . . . [the CFTC] recognize[s] that the challenges in this space going forward are likely to extend beyond the confines of the Commodity Exchange Act."[143]

On April 4, 2022, Gary Gensler, Chairman of the SEC, expressed a similar interest in dual regulation: "I've asked staff to work with the Commodity Futures Trading Commission (CFTC) on how we jointly might address such platforms that might trade both crypto-based security tokens and some commodity tokens, using our respective authorities."[144] While Gensler was specifically addressing the regulation of crypto exchanges, and not cryptocurrency generally, his statement still indicates the SEC's continued willingness to work with the CFTC on these matters.

2. The Complexity of Cryptocurrency Makes Cooperation Necessary

There are three reasons that cooperation is a crucial part of the federal response to regulating cryptocurrency. First, cooperation is necessary because of the complex nature of cryptocurrencies. As market participants and regulators have observed, the operational mechanics of different coins and tokens creates noteworthy variations among cryptocurrencies, making it difficult to define an entire class of cryptocurrency as either a commodity or a security.[145] And even if the agencies initially decide a cryptocurrency is a security, its designation can change from a security to a commodity as it becomes more decentralized over time, as discussed in Section II.B.[146]

Second, there are hundreds of thousands of different cryptocurrencies on the market right now, with a market capitalization of approximately $2 trillion.[147] The volume is so high that we need regulators to cooperate and combine their resources to handle the volume alone. The rapid growth of the cryptocurrency market makes cooperation between the CFTC and SEC a must because

143. *Id.*

144. Gensler, *supra* note 141.

145. *See generally, e.g.*, *Examining Facebook's Proposed Digital Currency and Data Privacy Considerations: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 116th Cong. 89–90 (2019); *Cryptocurrency Comparison*, IG, https://www.ig.com/en/cryptocurrency-trading/cryptocurrency-comparison [https://perma.cc/4YFJ-4CXS].

146. INVESTMENT CONTRACT ANALYSIS, *supra* note 64.

147. Benham, *supra* note 141.

without it, the agencies will never be able to get ahead of the regulation within the market without it.

Third, there is significant innovation in the space, and a single regulator is unlikely to be able to keep up with such a fast-changing market. Building a new framework is a huge task, involving many stakeholders and extending beyond just Bitcoin and cryptocurrencies. The "[u]se of blockchain technology, electronic payments, 'stable coins,' digital central bank currencies, and 'non-fungible tokens,' which have taken the art and collecting world by storm recently, will all need to be addressed to varying degrees by regulators."[148] In the last couple of years alone, developers, investment bankers, hedge funds, and venture capital firms began engineering two new classes of blockchain-based assets—derivatives and exchange traded funds (ETFs).[149]

Furthermore, as the range of ICOs has broadened and deepened, companies have begun exploring opportunities to use ICOs for fundraising.[150] One of the main drivers of ICOs has been global access to investor funds.[151] For example, the messaging app Telegram raised $1.7 billion in March 2018 before the SEC could file an emergency action for a restraining order.[152] "The capacity to tap a liquid market without the need for intermediaries has provided a wide range of new and established companies with deep pools of capital."[153] In a fast-paced and highly innovative cryptocurrencies markets, regulators need to be proactive, not reactive. "[T]he approach of 'cleaning up' after a crisis or implementing volumes of

148. Todd Ehret, *INSIGHT: U.S. Cryptocurrency Regulatory Path Appears Long and Complex*, REUTERS: FIN. REGUL. F., https://www.reuters.com/article/bc-finreg-cryptocurrency-regulatory-path/insight-u-s-cryptocurrency-regulatory-path-appears-long-and-complex-idUSKBN2BT211 [https://perma.cc/P5M6-NDG8] (Apr. 6, 2021, 1:25 PM).

149. *Cf.* AJ Horch, *Here's Why Investors Started Pouring Trillions into Exchange-Traded Funds*, CNBC, https://www.cnbc.com/2020/05/29/why-investors-are-pouring-trillions-into-exchange-traded-funds.html [https://perma.cc/GG34-GAGA] (May 29, 2020, 10:09 AM).

150. Daniel Araya, *The Challenges of Cryptocurrency Regulation*, THE REGUL. REV. (Oct. 9, 2018), https://www.theregreview.org/2018/10/09/araya-challenges-cryptocurrency-regulation/ [https://perma.cc/R2JS-APP2].

151. *Id.*

152. *Id.*; *see* Press Release, U.S. Sec. & Exch. Comm'n, SEC Halts Alleged $1.7 Billion Unregistered Digital Token Offering (Oct. 11, 2019) (on file at https://www.sec.gov/news/press-release/2019-212 [https://perma.cc/XV72-CBLZ]); *see also* Ilya Khrennikov, *Telegram Raises $1.7 Billion in Coin Offering, May Seek More*, BLOOMBERG (Mar. 30, 2018, 4:20 AM), https://www.bloomberg.com/news/articles/2018-03-30/telegram-raises-1-7-billion-in-coin-offering-may-seek-more [https://perma.cc/CP3U-7BLT]; *see also* Complaint at 1–2, SEC v. Telegram Grp. Inc., 2020 WL 61528 (S.D.N.Y. Oct. 11, 2019) (No. 19 CIV. 9439 (PKC)).

153. Araya, *supra* note 150.

new regulations aimed at filling a perceived gap in the regulatory scheme will no longer suffice."[154] With cooperation we can fix the regulatory gaps. Now we just need a model for the CFTC and SEC to follow.

B. *CFTC-SEC Joint Committee on Emerging Regulatory Issues*

This Note proposes that the CFTC-SEC Joint Committee on Emerging Regulatory Issues ("Committee") be resurrected and appointed to oversee the joint regulatory framework of the cryptocurrency market with one change to its prior structure, FSOC should be the authority that resolves any jurisdictional disputes that the Committee cannot resolve.

1. History of the Committee

This is a pre-existing committee that was formed on May 10, 2010, to address the drastic market fluctuation that occurred on May 6, 2010, commonly referred to as the "flash crash," when the market experienced high volatility trading in securities, stocks, futures, and options causing the market to lose almost $1 trillion in market value within one day.[155] The Committee was a discretionary committee that was jointly established and funded by the CFTC and SEC in accordance with the Federal Advisory Committee Act.[156] As stated on the Committee's archived site:

> The Securities and Exchange Commission and Commodity Futures Trading Commission established the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues to develop recommendations on emerging and ongoing issues relating to both agencies. The

154. LINDA RITTENHOUSE, SELF-REGULATION IN THE SECURITIES MARKETS: TRANSITIONS AND NEW POSSIBILITIES 5 (CFA Inst. ed. 2013).

155. Kevin Helms, *US Lawmakers Urge SEC and CFTC to Create Joint Working Group on Crypto Regulation*, BITCOIN.COM (Aug. 17, 2021), https://news.bitcoin.com/us-lawmakers-sec-cftc-joint-working-group-crypto-regulation/ [https://perma.cc/4PN9-ZRZG]; *see also* CFI Team, *2010 Flash Crash: The Stock Market Crash of March 6, 2010*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/2010-flash-crash/ [https://perma.cc/GHF2-6DKZ] (Jan. 11, 2023).

156. Federal Advisory Committee Act, as amended, 5 U.S.C. app. 2 (1972). The CFTC and SEC jointly funded the Committee in accordance with section 621 of the Consolidated Appropriations Act and estimated that its annual operating costs would be approximately $150,000; *see also* COMMODITY FUTURES TRADING COMM'N & U.S. SEC. & EXCH. COMM'N, CHARTER OF THE JOINT CFTC-SEC ADVISORY COMMITTEE ON EMERGING REGULATORY ISSUES § 2 (2013), https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/cftc-sec-joint_charter.pdf [https://perma.cc/D76G-EUUN] [hereinafter JOINT COMMITTEE CHARTER].

> establishment of the Joint Committee was one of the 20 recommendations included in the agencies' harmonization report issued in 2009. Subjects to be addressed by the Joint Committee shall include the identification of emerging regulatory risks, assessment and quantification of the impact of such risks and their implications for investors and market participants, and the agencies' efforts on regulatory harmonization.[157]

The Committee's creation was no surprise to the industry as the CFTC and SEC both acknowledged there was a lot of overlap between the securities and commodities markets and the "fundamental reason for the formation of the new joint committee [was] the interdependency of [those] markets."[158] However, it was the first time that the CFTC and SEC had ever shared an advisory committee.[159]

The Committee's charter laid out the structure of the Committee, stating that there "shall be two co-designated federal officers of the committee. The Chairman of the CFTC shall appoint a CFTC employee to serve as one co-designated federal officer . . . and the Chairman of the SEC shall appoint an SEC employee to serve as the other co-designated federal officer."[160] The charter gave these designated officers the duty to approve, call, and attend all of the Committee and subcommittee meetings.[161] In addition to the co-designated federal officers, the Chairmen of the CFTC and SEC served as administrative Co-Chairmen of the Committee, taking

157. *Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues*, U.S. SEC. & EXCH. COMM'N [hereinafter *Joint Committee*], https://www.sec.gov/spotlight/sec-cftcjoint-committee.shtml [https://perma.cc/C697-YRPX] (July 15, 2019).

158. *SEC and CFTC Respond to the Market Disruption*, JACKO LAW GROUP, PC: LEGAL MGMT. TIPS (May 29, 2010), https://www.jackolg.com/legal-risk-management-tips /sec-and-cftc-respond-to-the-market-disruption/ [https://perma.cc/H65D-BVXR]; Co-Chair of the Committee, and SEC Chairman at the time, Mary Schapiro, said, "Our markets are increasingly interrelated and interdependent so we need to appreciate how events in one arena can potentially impact investors and markets elsewhere. The Joint Committee will serve an essential role in addressing that challenge." *Joint Committee*, *supra* note 157.

159. Gary Gensler, Chairman, Commodity Futures Trading Comm'n, Opening Statement of Chairman Gary Gensler, Meeting of the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues (May 24, 2010) (transcript available at https://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement052410 [https://perma.cc/C3UW-M35T]) ("In fact, this is the first time that the two agencies have ever shared an advisory committee. Though we have been two separate agencies since the 1930s, we both exist to protect the investing public and promote transparent, fair and orderly markets. Our two agencies' oversight spans across the futures, securities and, hopefully shortly, the over-the-counter derivatives marketplaces. It is essential that we work cooperatively to regulate these markets. This committee can assist us in achieving this goal.").

160. JOINT COMMITTEE CHARTER, *supra* note 156.

161. *Id.*

on more of an advisory role.[162] When the Committee was first founded 2010, it was co-chaired by Mary Schapiro, SEC Chairman, and Gary Gensler, CFTC Chairman, along with eight additional highly-qualified members, many of which were former Chairmen of the CFTC or SEC: (1) Brooksley E. Born, Retired Partner, Arnold & Porter LL.P, Former CFTC Chairman; (2) John J. Brennan, Chairman Emeritus and Senior Advisor, Vanguard Group; (3) Robert F. Engle, Michael Armellino Professor of Finance, Leonard N. Stern School of Business, New York University; (4) Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA; (5) Maureen O'Hara, Robert W. Purcell Professor of Finance, Cornell University; (6) Susan M. Phillips, Dean and Professor of Finance, The George Washington School of Business, Former CFTC Chairman; (7) David S. Ruder, Professor of Law, Emeritus, Northwestern University School of Law, Former SEC Chairman; (8) Joseph E. Stiglitz, Professor of Finance and Business Administration, Columbia University.[163]

The Chairmen of the CFTC and SEC had the authority to appoint and remove members, but there had to be between ten and fifteen members on the Committee at any given point in time.[164] The charter also stated that:

> Each member who is not a regular government employee shall serve on the committee as the representative of an organization or identifiable group of persons with interests affected by the work of the committee, unless it is specified at the time of appointment that the member is appointed to serve as a special government employee. Representative members serve on the committee primarily in order to convey to the CFTC, the SEC, and the committee the views and interests of the organizations or groups they represent.

162. *See id.*

163. JOINT CFTC-SEC ADVISORY COMM. ON EMERGING REGUL. ISSUES, RECOMMENDATIONS REGARDING REGULLATORY RESPONSES TO THE MARKET EVENTS OF MAY 6, 2010 (Feb. 18, 2011) [hereinafter Feb. 18 RECOMMENDATIONS], https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/jacreport_021811.pdf [https://perma.cc/EH86-E26S]; Joint CFTC-SEC Advisory Comm. on Emerging Regul. Issues, *Committee Members, Meetings, and Advisory Reports*, GSA FED. ADVISORY COMM. ACT DATABASE, https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001h0wUAAQ [https://perma.cc/G8LX-ZPAP] (listing all of the members during the Committee's four years of existence). Opening statements from Gary Gensler, CFTC Chairman, at the first Committee meeting on May 24, 2010: "Our panel is comprised of a diverse and accomplished group of individuals. I am pleased to have three former Commission chairmen. We also have three distinguished and award winning professors of economics or finance, a former director of one of the largest asset management firms in the world and the head of the independent securities regulator." Gensler, *supra* note 159.

164. *See* JOINT COMMITTEE CHARTER, *supra* note 156, § 11.

There were also some caveats to whom the Chairmen could appoint to avoid potential conflicts of interests, for example no individual who was a registered federal lobbyist was allowed to serve on the Committee.[165] "To assure balance, the Committee's membership could include investors, members of the academic community, representatives of exchanges or other self-regulatory organizations, securities market participants, futures market participants, representatives of investment funds or investment advisors, and representatives of issuers or end users."[166] The charter also called for subcommittees that could consist of members who serve on the Committee and/or other individuals.[167] The subcommittees could be established or dissolved by the Chairmen or the co-designated federal officials appointed by the Chairmen, and reports from the subcommittees would be submitted to the Committee, not directly to the CFTC or SEC.[168]

The Committee operated for a term of two years from the date that the charter was filed with Congress, May 10, 2010.[169] Upon the end of the two-year term, the charter was renewed as authorized under section 14 of the Federal Advisory Committee Act.[170] The Committee met approximately six times each year to develop clear goals toward identifying and addressing emerging regulatory risks, protecting investors and customers, and furthering regulatory harmonization, and to recommend processes and procedures for achieving and reporting on those goals.[171] During the four years of the Committee's existence, it appeared to achieve a lot of its objectives under the charter: sixty percent of its recommendations were fully implemented and forty percent were partially implemented.[172] The Committee's most significant set of

165. *Id.*

166. U.S. SEC. & EXCH. COMM'N & COMMODITY FUTURES TRADING COMM'N, MEMBERSHIP BALANCE PLAN FOR THE JOINT CFTC-SEC ADVISORY COMMITTEE ON EMERGING REGULATORY ISSUES, https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005nD9/.4V2UOvsGLZ73yhe8IngDoxX8KHYYjOy5BV8.jAHlOI [http://perma.cc/UG3U-N2SB].

167. JOINT COMMITTEE CHARTER, *supra* note 156, § 12.

168. *Id.*

169. Notice of Federal Advisory Committee Renewal, 77 Fed. Reg. 27,444, 27,445 (May 10, 2012).

170. *Id.*

171. *Id.*

172. SEC - 73617 - JOINT CFTC-SEC ADVISORY COMM. ON EMERGING REGULATORY ISSUES - AGENCY AUTHORITY, FED. ADVISORY COMM. ACT DATABASE (2014) [hereinafter SEC – 73617], https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001h0wUAAQ [https://perma.cc/27UF-MB4N]. These numbers are the cumulative total

recommendations came on February 18, 2011, in a report entitled *Recommendations Regarding Regulatory Responses to the Market Events of May 6, 2010* ("Report"), setting forth its recommendations for regulatory action by the CFTC and SEC in the wake of the so-called "flash crash" of May 6.[173] The report sets forth fourteen recommended actions and divides them into three broad categories: (1) volatility related transactions; (2) restrictions on co-location and direct access; (3) liquidity enhancement issues.[174] These recommendations are aptly summarized in the Report, and only partially relevant to our discussion, thus, only a few of the recommendations are summarized below.

The first recommendation directed at the SEC was "the broader use of circuit breakers for individual stocks to temporarily halt trading when prices change by more than a certain amount (usually ten percent) in a certain period (usually five minutes), and suggested consideration of similar circuit breakers for options and other derivatives."[175] Second, the Committee recommended implementing "a so-called 'limit up/limit down' process that, instead of halting trading of a security altogether, restricts trading to a price band within a certain percentage of the average price over the past few minutes."[176] Finally, the Committee recommended changing "the amount of the decline necessary to trigger a halt, reducing the minimum duration of the halt, and using the S&P 500 index as the reference instead of the narrower DJIA [Down Jones Industrial Average]."[177] The SEC adopted all three of these recommendations and many others suggested in the Committee's Report.[178]

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percentage of the formally conveyed recommendations that have been implemented over the life of the committee.

173. FEB. 18 RECOMMENDATIONS, *supra* note 163; *see also* JOINT CFTC-SEC ADVISORY COMM. ON EMERGING REGULATORY ISSUES, PRELIMINARY FINDINGS REGARDING THE MARKET EVENTS OF MAY 6, 2010 (May 18, 2010) [hereinafter PRELIMINARY FINDINGS], www.sec.gov/sec-cftc-pre limreport.pdf [https://perma.cc/WN7L-LC2Y]; JOINT CFTC-SEC ADVISORY COMM. ON EMERGING REG. ISSUES, FINDINGS REGARDING THE MARKET EVENTS OF MAY 6, 2010 (Sept. 30, 2010), www.cftc.gov/ucm/groups/public/@otherif/documents/ifdocs/staff-findings050610.pdf [https://perma.cc/ZU5S-8RTF] [hereinafter FINDINGS].

174. Feb. 18 RECOMMENDATIONS, *supra* note 163.

175. Charles R. Korsmo, *High-Frequency Trading: A Regulatory Strategy*, 48 U. RICH. L. REV. 523, 581 (2014).

176. *Id.* at 582.

177. *Id.*

178. *Investor Bulletin: Measures to Address Market Volatility*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-circuitbreakersbulletinhtm.html [https://perma.cc/TH7A-R3WH] (Jan. 4, 2016).

There were a few recommendations that were only partially implemented by the CFTC and SEC because they were not rule recommendations, but were rather recommendations for the CFTC and SEC to work with other market participants to evaluate specific topics that could lead to future rule changes.[179] For example, one of the Committee's "recommendations" was that they support the "SEC's 'naked access' rulemaking and urge[d] the SEC to work closely with FINRA and other Exchanges with examination responsibilities to develop effective testing of sponsoring broker-dealer risk management controls and supervisory procedures."[180] The forty percent of recommendations made by the Committee that were only partially implemented by the CFTC and SEC all required further research by the agencies before adopting a rule.[181] The Committee was active from May 10, 2010, to May 11, 2014, at which point the second two-year term expired and its charter was not renewed.[182]

2. The Committee's Role in the New Regulatory Framework

It has been almost eight years since the Committee was active, but President Biden's Order on the importance of agency cooperation leads me to believe that this Committee should be resurrected with the change of FSOC acting as oversight to the Committee.[183] The Committee would serve three main purposes: (1) resolve any issues and appeals with the self-designation process, as discussed in Section III.C; (2) track down firms that haven't registered yet and recommend enforcement actions; and (3) provide recommendations on how to change the regulatory scheme as the cryptocurrency market evolves.

The Committee's old charter stated that all reports and recommendations must be submitted to the Chairman of the CFTC, acting on behalf of the CFTC, and to the Chairman of the SEC, acting

179. SEC - 73617, *supra* note 172.

180. Feb. 18 RECOMMENDATIONS, *supra* note 163, at 2, 7.

181. SEC - 73617, *supra* note 172.

182. *Id.*

183. *See generally Fact Sheet: President Biden to Sign Executive Order on Ensuring Responsible Development of Digital Assets*, THE WHITE HOUSE: BRIEFING ROOM (Mar. 9, 2022) [hereinafter *Executive Order Fact Sheet*], https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/ [https://perma.cc/X8AN-JMG8].

on behalf of the SEC.[184] The Committee should continue this reporting structure upon resurrection because it takes advantage of the fact that the agencies have their own subject matter experts for their relevant regulatory scheme. However, I propose that FSOC should be added to the reporting structure. Whenever there is a jurisdictional battle that the Committee cannot resolve, FSOC should be the authority that resolves those jurisdictional conflicts.

As discussed in Part II, FSOC was created in 2010 when Congress adopted the Dodd-Frank Act.[185] Congress orchestrated market-wide regulatory intervention to address the market regulatory gaps that emerged in response to the 2008 Financial Crisis.[186] FSOC's ultimate goal was to bridge these gaps by integrating the regulatory scheme from agency to agency.[187] It established a forum for senior regulatory officials of the most significant financial markets regulators to act as a super regulator.[188] In its 2021 Annual Report, FSOC analyzed the rapid growth of the digital asset market and made recommendations that echoed Biden's Executive Order: "The Council recommends that federal and state regulators continue to examine risks to the financial system posed by new and emerging uses of digital assets . . . . The Council encourages coordination among U.S. financial regulators to address risks arising from digital assets."[189] FSOC has always been responsible for facilitating the resolution of jurisdictional issues among member agencies, including the SEC and CFTC, which is why FSOC should be the entity to oversee the Committee and resolve any jurisdictional conflict between the two agencies that the Committee cannot resolve itself.[190]

184. JOINT CFTC-SEC ADVISORY COMM. ON EMERGING REG. ISSUES, CHARTER OF THE JOINT CFTC-SEC ADVISORY COMMITTEE ON EMERGING REGULATORY ISSUES (2010), FED. ADVISORY COMM. ACT DATABASE [hereinafter 2010 CHARTER], https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001h0wUAAQ [https://perma.cc/VCN3-MCU7].

185. Financial Stability Act of 2010, Pub. L. No. 111-203, 124 Stat. 1392 (codified as amended at 12 U.S.C. § 5321(a)).

186. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010).

187. *See* U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 3 (2009).

188. *See* FIN. STABILITY OVERSIGHT COUNCIL, U.S. DEP'T OF THE TREASURY, 2019 ANNUAL REPORT i (2019).

189. FIN. STABILITY OVERSIGHT COUNCIL, U.S. DEP'T OF THE TREASURY, 2021 ANNUAL REPORT 172 (2021).

190. JEFFREY M. STUPAK, CONG. RSCH. SERV., R45052, FINANCIAL STABILITY OVERSIGHT COUNCIL (FSOC): STRUCTURE AND ACTIVITIES (2018), https://sgp.fas.org/crs/misc/R45

C. *The Regulatory Framework Will Rely on Self-Designation*

Firms know their financial instruments best and given the complexity of cryptocurrencies it's hard to make a rule, nonetheless a bright-lined rule, that properly determines the classification of each cryptocurrency. Thus, this Paper proposes that the Committee should empower the market participants to self-designate which agency, either the CFTC or SEC, they believe should regulate their market activities. By allowing firms to self-designate, we could avoid many of the jurisdictional disputes that consumes significant agency resources and ultimately leads to confusion for market participants as to whether to register at all.[191]

To develop a self-designation regulatory framework, first, we will pull concepts from several regulatory schemes that already exist. We will consider the CFTC's current self-certification process and other self-regulatory organizations ("SROs") that oversee parts of the market. Then we will analyze the benefits and drawbacks to the self-designation approach.

1. CFTC's Self-Certification Process for DCMs & SEFs

The first regulatory scheme that will influence the design of our self-designation process is the CFTC's self-certification process for DCMs and SEFs.[192] While the CFTC's self-certification process is designed specifically for exchanges, it will still inform our self-designation regulatory framework for cryptocurrency more broadly. To understand the CFTC's self-certification process, you will first need to understand a little about DCMs and SEFs. DCMs and

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052.pdf [https://perma.cc/FZ8L-WM35]; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §112(a), 124 Stat. 1376, 1394 (2010) (codified as amended 12 U.S.C. § 5301). Although the council has more responsibilities, it summarized its core mission in its introduction to its 2016 annual report. FIN. STABILITY OVERSIGHT COUNCIL, U.S. DEP'T OF THE TREASURY, 2016 ANNUAL REPORT i (2016), https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/financial-stability-oversight-council/studies-and-reports/annual-reports/fsoc-2016-annual-report [https://perma.cc/4SWG-PS5J].

191. STUPAK, *supra* note 190, at 8–9.

192. *Listing Procedures: Self-Certification Filing Procedures*, COMMODITY FUTURES TRADING COMM'N: INDUSTRY OVERSIGHT,] [hereinafter *Listing Procedures*] https://www.cftc.gov/IndustryOversight/ContractsProducts/ListingProcedures/index.htm [https://perma.cc/8S42-GDF4].

SEFs are exchanges where people can go to trade swaps.[193] In its simplest form, a swap is an agreement between two parties to exchange sequences of cash flows for a set time period.[194] Under the Dodd-Frank Act, enacted in 2010, no person can operate a facility for trading or processing swaps unless it is registered as either a DCM or SEF.[195] These exchanges have self-regulatory obligations for the markets they operate, and as front-line regulators, they should be proactive, flexible, and ensure proper surveillance and oversight of the trading of virtual currency contracts.[196]

On May 21, 2018, the CFTC issued an advisory that provided guidance to exchanges that want to use the self-certification process to list a derivative contract based on virtual currency.[197]

DCMs and SEFs, as self-regulatory organizations (SROs), must establish and maintain an effective oversight program designed, among other things, to ensure that listed contracts are not readily susceptible to manipulation and to detect and prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process. Without adequate visibility into the underlying spot markets, an exchange has diminished ability to effectively identify and address risks in the trading of listed virtual currency derivatives. Accordingly, as part of Commission staff's review of an exchange's surveillance program, staff will assess the exchange's visibility into the underlying spot markets.[198]

The CFTC's self-certification process, under the CEA, allows DCMs and SEFs with the option to either: (1) submit a certification to the CFTC; or (2) submit the contract for Commission approval.[199] To self-certify a new product, the exchange must file its submission with the CFTC no later than the close of business on the Com-mission's business day preceding the initial listing of the product.[200] Without a finding by the Commission "that a new product would

193. *Trading Organizations*, COMMODITY FUTURES TRADING COMM'N: INDUSTRY OVERSIGHT, https://www.cftc.gov/IndustryOversight/TradingOrganizations/index.htm [https://perma.cc/MWW9-3V3J].

194. Michael McCaffrey, *An Introduction to Swaps*, INVESTOPEDIA, https://www.investopedia.com/articles/optioninvestor/07/swaps.asp [https://perma.cc/3LAE-4FY9] (Mar. 28, 2022).

195. *Trading Organizations*, *supra* note 193.

196. COMMODITY FUTURES TRADING COMM'N, PUB. DOC. 18-14 (2018).

197. *Id.*

198. *Id.*; *see also* 7 U.S.C. §§ 7(d)(3), 7(d)(4), 7b-3(f)(3), 7b-3(f)(4) (2022).

199. COMMODITY FUTURES TRADING COMM'N, *supra* note 196.

200. *Listing Procedures, supra* note 192.

violate the CEA or Commission regulations, the DCM may list the new product no sooner than one full business day following the self-certification."[201] When an exchange self-certifies a new contract it must determine that the offering complies with the CEA and Commission regulations, including that the new contract is not readily susceptible to manipulation.[202] "To date, the existing self-certification process for new contracts has worked well. Typically, exchanges reach out to Commission staff in advance of launching a new contract."[203]

According to the CFTC, "virtual currency platforms present heightened concerns about potential impacts on CFTC-regulated markets, including potential market manipulation, because they lack the transparency and robust regulation as U.S. derivatives platforms."[204] The significant risks associated with cryptocurrency justify close scrutiny by both CFTC staff and registered entities, and the CFTC stated it generally believes that the self-certification process will help exchanges effectively and efficiently discharge their statutory and self-regulatory responsibilities, while keeping pace with the unique challenges of emerging virtual currency derivatives.[205]

2. Self-Regulatory Organizations: National Securities Exchanges & Broker-Dealers

The second regulatory scheme that will inform our self-designation framework is the role of national securities exchanges and broker-dealers, both of which have a prominent role in regulating the markets.[206] Congress recognized the regulatory role of national securities exchanges in section 6 of the '34 Act when they required all existing securities exchanges to register with the SEC and to function as SROs.[207] After the enactment of the Securities

201. *See* COMMODITY FUTURES TRADING COMM'N, CFTC BACKGROUNDER ON SELF-CERTIFIED CONTRACTS FOR BITCOIN PRODUCTS (2017) [hereinafter BACKGROUNDER]; 17 C.F.R. § 40.2(a)(2) (2022).

202. BACKGROUNDER, *supra* note 201.

203. COMMODITY FUTURES TRADING COMM'N, *supra* note 196, at 7.

204. *Id.* at 3.

205. *Id.* at 2–3.

206. *See generally* Kenneth Durr & Robert Colby, *The Institution of Experience: Self-Regulatory Organizations in the Securities Industry, 1792-2010*, SEC. & EXCH. COMM'N HIST. SOC'Y, https://www.sechistorical.org/museum/galleries/sro/index.php [https://perma.cc/A4BY-THMJ].

207. *See* 15 U.S.C. § 78f(a).

Exchange Act of 1934 ("'34 Act"), the New York Stock Exchange ("NYSE") and the American Stock Exchange ("AMEX") both formally registered as statutorily recognized SROs.[208] Notwithstanding the mandate in the '34 Act granting the SEC supervisory authority over broker-dealers and exchanges, the agency has continuously acquiesced to the nation's 150-year tradition of permitting broker-dealers and exchanges to operate as SROs or private trade industry associations.[209]

While deferential to the SEC's interpretations and guidance on federal securities law, SROs operate as the primary supervisors of broker-dealers.[210] Like the duty that comes with the self-designation proposed in this Paper, SROs have a duty to comply with various requirements under the '34 Act, such as filing proposed rule changes with the SEC.[211] SROs adopt, implement, and enforce rules governing eligibility, conduct, capitalization, and similar matters.[212] "Th[e] [unified self-regulatory] approach has relied upon the primary markets . . . to play a vital role in the oversight of trading activity in the securities markets and develop the extensive mechanisms required to meet the statutory mandates of fair and orderly markets, investor protection, and perfecting a national market."[213] This approach of collective governance continues to be a hallmark of U.S. securities regulation.[214]

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208. Letter from Joan C. Conley, Sec'y, NASD, Nasdaq, and NSAD. Reg., to Jonathan G. Katz, Esq., Sec'y, U.S. Sec. & Exch. Comm'n (Oct. 10, 1997), https://www.sec.gov/rules/concept/s71697/conley1.htm [https://perma.cc/K9WL-H69K].

209. A broker-dealer must become a member of a SRO that will serve as a primary regulator, directly supervising the broker-dealer's compliance with SRO rules and indirectly monitoring the broker-dealer's compliance with federal statutes and SEC regulations. *See* 15 U.S.C. § 78s(a)–(b).

210. U.S. SEC. & EXCH. COMM'N, STAFF PAPER ON CROSS-MARKET REGULATORY COORDINATION § II(a) (2020), https://www.sec.gov/tm/staff-paper-cross-market-regulatory-coordination [https://perma.cc/HSH2-795Y].

211. 15 U.S.C. § 78s(b); 17 C.F.R. § 240.19b-4(b)(1) (2021); *see also* U.S. SEC. & EXCH. COMM'N, FORM 19B-4, https://www.sec.gov/files/form19b-4.pdf [https://perma.cc/KJ98-QUAZ] (June 10, 2013). The rule filing requirements of Section 19(b) also apply to other SROs, such as national securities associations, clearing agencies, and the Municipal Securities Rulemaking Board ("MSRB").

212. 15 U.S.C. § 78s(b).

213. Letter from Joan C. Conley, *supra* note 208, at § I.

214. Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71,256 (proposed Dec. 8, 2004) (to be codified at 17 C.F.R. pt. 240); Durr & Colby, *supra* note 204. The SEC supervises numerous SROs, including: BATS Exchange, Inc. (BATS); Board of Trade of the City of Chicago, Inc. (CBOT); CBOE Futures Exchange, LLC (CFE); Chicago Board Options Exchange (CBOE); Chicago Mercantile Exchange (CME); Chicago Stock Exchange (CHX); Depository Trust Company (DTC); Financial Industry Regulatory Authority (FINRA) (formerly the National Association of Securities Dealers, or NASD); Fixed Income Clearing

3. Self-Regulatory Organizations: FINRA

The third regulatory scheme that we will pull from is the regulatory role of the Financial Industry Regulatory Authority. "In July 2007, the National Association of Securities Dealers ("NASD") and the member regulation, enforcement, and arbitration functions of the . . . . NYSE merged and formed . . . FINRA."[215] Before its merger with the NYSE, the NASD was the world's largest SRO for the securities markets—regulating almost every securities broker-dealer in the United States.[216] FINRA proposes and implements rules governing broker-dealer conduct and supervises the examination and licensing requirements for broker-dealers.[217] FINRA evaluates broker-dealers' compliance with these obligations and enforces its adopted rules, adjudicating claims involving broker-dealers through its national dispute resolution forum.[218] The rules governing broker-dealer conduct aim to ensure that market transactions comply with the normative goals that frame the SEC's mission and inspired the adoption of federal securities laws investor

Corporation (FICC) (formerly Government Securities Clearing Corporation); International Securities Exchange (ISE); Municipal Securities Rulemaking Board (MSRB); NASDAQ OMX BX, Inc. (BX) (formerly Boston Stock Exchange); NASDAQ OMX PHLX, Inc. (PHLX) (formerly Philadelphia Stock Exchange); National Futures Association (NFA); Options Price Reporting Authority (OPRA); National Securities Clearing Corporation (NSCC); National Stock Exchange (NSX) (formerly Cincinnati Stock Exchange); New York Stock Exchange (NYSE); NYSE Amex LLC (NYSEAmex) (formerly NYSE Alternext US LLC); NYSE Arca, Inc. (NYSE Arca) (formerly Pacific Exchange, Inc.); Options Clearing Corporation (OCC); Stock Clearing Corporation of Philadelphia (SCCP) (acquired by NASDAQ OMX). *See* Richard G. Wallace & Benjamin R. Dryden, *Self-Regulation: Background and Recent Developments*, ALI-ABA BUS. L.J. 43, 44–45 (2009), https://www.foley.com/-/media/files/insights/publications/2009/12/selfregulation-background-and-recent-developments/files/selfregulation-background-and-recent-developments/fileattachment/cmj0912wallacedryden.pdf [https://perma.cc/HC78-S8G6].

215. Wallace & Dryden, *supra* note 214, at 49.

216. *Working Towards Improved Regulation: Hearing on Consolidation of NASD and the Regulatory Functions of the NYSE*, 110th Cong. (2007) (testimony of Mary L. Schapiro, Chairman and CEO, NASD), https://www.banking.senate.gov/imo/media/doc/ACF24.pdf [https://perma.cc/8A35-S9MD].

217. *Enforcement*, FIN. INDUS. REGUL. AUTH. https://www.finra.org/rules-guidance/enforcement [https://perma.cc/X4YJ-EZGG]; *see also Reporting Requirements*, FIN. INDUS. REGUL. AUTH. https://www.finra.org/rules-guidance/rulebooks/finra-rules/4530 [https://perma.cc/V H5M-7GVD] (Oct. 29, 2020).

218. *What We Do*, FIN. INDUS. REGUL. https://www.finra.org/rules-guidance/enforcement#what [https://perma.cc/GL5F-MWDE]; *FINRA Dispute Resolution Services: Arbitration & Mediation*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/arbitration-mediation [https://perma.cc/Z6D9-2DJQ].

protection and maintenance of orderly, fair, and efficient capital markets.[219]

In 2010, the OECD's Committee on Consumer Policy published a report on the effectiveness of SROs that drew from twenty-three case studies where consumer issues were addressed. The report listed many benefits of SROs, including the following:

> Industry self-regulation can help to prevent harm to consumers and . . . to foster improved market functioning in a number of ways. It can, for example, provide support for businesses in overseeing the implementation of existing legal requirements. It can also go beyond legal requirements to address areas where market failures exist and no regulatory actions have been taken . . . This can be particularly important in jurisdictions, where legal frameworks and infrastructures may still be insufficient to provide consumers with a minimum level of protection.[220]

SROs are widely considered experts in their fields, similar to the developers of cryptocurrency, and therefore know a great deal about the markets they work in and are often best situated to make regulatory decisions. Since the creation of SROs, "many professions and industries have seen much improvement, as compared to when they were under direct government supervision."[221]

4. Benefits to Self-Designation

There are several benefits of adopting a self-designation process. First, self-designation creates a clear duty for all firms operating in the cryptocurrency market to register, clearing up any of the recent questions as to whether or not registration is required. Second, the process of a firm declaring their preferred regulatory authority is, in part, a disclosure process. Market participants' filings will provide regulators greater access to information, who they are, the size of their operations, and the specific cryptocurrency they

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219. *See What We Do*, *supra* note 218.

220. ORG. FOR ECON. COOP. & DEV., INDUSTRY SELF-REGULATION: ROLE AND USE IN SUPPORTING CONSUMER INTERESTS 18 (2015), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2014)4/FINAL&docLanguage=En [https://perma.cc/BB5U-86HQ].

221. *Self-Regulatory Organization (SRO)*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/other/self-regulatory-organization-sro/ [https://perma.cc/KQK9-NURY] (May 29, 2020).

offer.[222] This, in turn, will allow regulators to raise important questions regarding market participants' risk management procedures. Similarly, greater access to information better positions regulators to identify and monitor misconduct, such as market manipulation.[223] Third, gathering data across markets will assist the Committee and other regulators in their efforts to recommend and develop meaningful reforms going forward. For example, the need for well-structured compliance programs for anti-money laundering and consumer privacy protections. But the first step to developing these programs that supports our public policy goals is to collect information from the pre-existing market participants.[224] Fourth, and finally, introducing self-designation may enhance innovation because prospective market participants will no longer be in fear of backwards looking enforcement and it will allow the flexibility for a firm to de-register from one agency and register with another if their cryptocurrency evolves and no longer closely aligns with its current designation.

5. Drawbacks to Self-Designation

There are some issues presented by giving firms the option to register through self-designation. Inherent in any kind of self-regulation is the conflict of interest that exists when an organization both serves the commercial interests of and regulates its own product. Firms may be tempted to self-designate with one agency over the other for strategic business reasons, and not because their cryptocurrency more closely resembles a commodity or security. At first glance this appears problematic because commodity markets are generally regulated less stringently, and thus are often favored more by cryptocurrency firms.[225] In comparison, securities are subject to rules on price transparency, greater reporting demands, and market abuse oversight.[226] Due to this distinction, overseeing a

222. Todd Phillips, THE SEC'S REGULATORY ROLE IN THE DIGITAL ASSET MARKETS (2021), https://www.americanprogress.org/article/secs-regulatory-role-digital-asset-markets/ [https://perma.cc/6PCH-YZS5].

223. *See* STAFF PAPER ON CROSS-MARKET REGULATORY COORDINATION, *supra* note 210.

224. Phillips, *supra* note 222.

225. Tom Wilson, *Is It a Currency? A Commodity? Bitcoin Has an Identity Crisis,* REUTERS (Mar. 3, 2020, 2:08 AM), https://www.reuters.com/article/us-crypto-currencies/is-it-a-currency-a-commodity-bitcoin-has-an-identity-crisis-idUSKBN20Q0LK [https://perma.cc/6UU5-VGNY].

226. *Is Crypto a Commodity or Security?*, SOFI BLOG (Apr. 27, 2021), https://www.sofi.com/blog/crypto-commodity-vs-security/ [https://perma.cc/8HXA-SWA8].

security tends to be much more expensive since it's more work for the firm to ensure that a product complies with regulations.[227] It's because of this that some cryptocurrency industry executives as well as enthusiasts have pushed for the market to be categorized as a commodity market, and not a security.[228]

While this conflict of interest may result in firms self-designating with one agency more than the other, it is not a material concern because the result is that either the CFTC or SEC will now have eyes on the inner-workings of these firms. Furthermore, if any material issues do arise from one agency having a more favorable regulatory framework, then the Committee will be tasked with recommending changes to the framework to mitigate these issues. For example, the Committee may determine after extensive research that the best way to prevent firms from favoring one agency over the other for commercial reasons is to heighten the CFTC's regulatory oversight on cryptocurrency to more closely align with the scrutiny used by the SEC.

Furthermore, considering self-regulation more broadly, the '34 Act, the Maloney Act of 1938 ("Maloney Act"), and the Securities Acts Amendments of 1975 ("1975 Amendments"), reflect Congress' determination to rely on self-regulation as a fundamental component of U.S. market and broker-dealer regulation, despite this inherent conflict of interest.[229] Congress favors self-regulation for several reasons. [230] One of which is that the cost of effectively regulating all the intricacies of the securities industry at the federal level is viewed as cost prohibitive and inefficient.[231] Furthermore, the complexity of securities trading practices makes it desirable for SROs to be intimately involved with the rulemaking and enforcement processes.[232] Moreover, SROs have been able to set standards

227. Wilson, *supra* note 225.

228. *Is Crypto a Commodity or Security?*, *supra* note 226; Benjamin Pimentel & Tomio Geron, *The Crypto Industry is Plotting an End Run Around the SEC*, PROTOCOL (Nov. 19, 2021), https://www.protocol.com/newsletters/protocol-fintech/crypto-sec-regulation-gensler-attack?rebelltitem=13#rebelltitem13 [https://perma.cc/K7GR-8TNA].

229. Securities Exchange Act of 1934, Pub. L. No. 75-719, 52 Stat. 1070 (current version at 15 U.S.C. §§ 78a-qq) (authorizing the U.S. Securities and Exchange Commission to register national securities associations); Maloney Act of 1938, Pub. L. No. 75-719, 52 Stat 1070 (amending 15 U.S.C. § 78o); Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (amending 15 U.S.C. § 78a).

230. *See generally* S. REP. NO. 73-1455 (1934); H.R. DOC. NO. 73-1383, pt. 1, at 6–7 (1934).

231. *See generally* S. REP. NO. 73-1455; H.R. DOC. NO. 73-1383.

232. 15 U.S.C. §§ 78(a), (o).

that exceed those set by the Commission, such as just and equitable principles of trade.[233] Ultimately, Congress has previously determined that SROs operating in the securities industry would provide a workable balance between federal and industry regulation.[234]

CONCLUSION

Last year was one of feverish institutional adoption, retail-driven memecoin fervor, acceleration into the metaverse, and many other surprises in the digital assets space. As of the fall of 2021, technology investment terms were proliferating. "Non-fungible tokens" were inexplicably garnering millions of investment dollars; meanwhile, a crude form of investor activism is tempting novices into gamesmanship with hedge funds and registered professionals.[235] In response to these rapid developments and growth in the cryptocurrency markets, Biden signed an Order addressing the risks created by the cryptocurrency market.[236] The Order calls for studies and proposals from, and coordination amongst, regulators, suggesting that the White House believes that existing agencies can adequately regulate digital assets, rather than creating a new government entity to regulate digital assets.[237]

Is Legislative Action Required?

In early 2020, SEC Commissioner, Hester M. Peirce, offered a provocative change to the SEC of suing issuers that had gone about issuing digital "tokens" improperly, entitled the Token Safe Harbor Proposal 1.0 ("Token 1.0 Proposal").[238] During a speech in Chicago,

233. *Id.*

234. *Id.*

235. *See, e.g.*, Max Read, *There's Nothing to Do Except Gamble/Welcome to the Nonfungible, Memeified, Cryptodenominated, Degenerate Future of Finance*, N.Y. MAG.: INTELLIGENCER (Apr. 12, 2021), https://nymag.com/intelligencer/2021/04/nft-future-of-money.html [https://perma.cc/VNB5-ZML6] (noting that pandemic stimulus has resulted in "$372 billion handed out to nearly half of the people in the country with no strings attached"); Robyn Conti & John Schmidt, *What Is an NFT? Non-Fungible Tokens Explained*, FORBES ADVISOR: INVESTING, https://www.forbes.com/advisor/investing/nft-non-fungible-token/ [https://perma.cc/EL3N-7RCN] (Apr. 8, 2022, 8:36 AM).

236. Exec. Order No. 14,067, 87 Fed. Reg. 14,143 (Mar. 14, 2022).

237. SULLIVAN & CROMWELL, LLP, *supra* note 122.

238. Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization (Feb. 6, 2020) (transcript

the Commissioner noted the need for practicality in fashioning an overdue regulatory response:

> It is important to write rules that well-intentioned people can follow. When we see people struggling to find a way both to comply with the law and accomplish their laudable objectives, we need to ask ourselves whether the law should change to enable them to pursue their efforts in confidence that they are doing so legally.[239]

The Token 1.0 Proposal was a time-limited exemption that identified three objectives: "requiring disclosures tailored to [issuer] needs, preserving the application of the antifraud provisions of the securities laws, and giving [investors] . . . an ability to participate in networks of interest to them."[240] The Token 1.0 Proposal would exempt: (1) the offer and sale of tokens from the provisions of the '33 Act, other than the antifraud provisions; (2) the tokens from registration under the '34 Act; and (3) persons engaged in certain token transactions as an "exchange," "broker," or "dealer" under the '34 Act.[241] The Token 1.0 Proposal provided token developers with a three-year grace period during which they could develop a functional or decentralized network, exempted from the registration provisions of the federal securities laws, so long as certain conditions are met.[242] Token developers would be required to meet the following conditions to rely on this exemption:

> First, the team must intend for the network on which the token functions to reach network maturity—defined as either decentralization or token functionality—within three years of the date of the first token sale and undertake good faith and reasonable efforts to achieve that goal. Second, the team would have to disclose key information on a freely accessible public website. Third, the token must be offered and sold for the purpose of facilitating access to, participation on, or the development of the network. Fourth, the team would have to undertake good faith and reasonable efforts to create liquidity for users. Finally, the team would have to file a notice of reliance.[243]

Commissioner Peirce welcomed feedback on her proposal and later released a second attempt at rulemaking, the Token Safe

available at https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06 [https://perma.cc/V8C4-P46T]).

239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*

Harbor Proposal 2.0 ("Token Proposal 2.0").[244] The Token Proposal 2.0 proposed three changes to the original. First, a requirement for semi-annual updates by the developers of the cryptocurrencies.[245] Second, a mandatory "exit report" at the end of the three-year grace period.[246] And third, it includes guidance for outside counsel that will likely have to prepare the filings for the SEC.[247]

The Token Proposal 2.0 has not been adopted by the SEC, but it has a powerful sponsor in Congress and it could spark other proposals.[248] On October 5, 2021, Representative Patrick McHenry, ranking member on the Financial Services Committee and leading capital markets reform advocate, introduced a bill called the Clarity for Digital Tokens Act of 2021 which would effectively codify Commissioner Peirce's Safe Harbor 2.0 proposal.[249] While this Bill may encourage more firms to make disclosures with the SEC, it doesn't solve the jurisdictional disputes that currently exist between the CFTC and SEC. December 2021 saw significant congressional hearings, with major players in the digital asset industry testifying before lawmakers.[250] Although, most of the hearings were just exploratory. [251] Congress has been called by the cryptocurrency market to act by enacting legislation providing for a single regulator for crypto asset markets, recognition of crypto market infrastructure as distinct from traditional financial market

244. Hester M. Peirce, Comm'r, U.S. Sec & Exch. Comm'n., Token Safe Harbor Proposal 2.0 (Apr. 13, 2021) (transcript available at https://www.sec.gov/news/public-statement/peirce-statement-token-safe-harbor-proposal-2.0 [https://perma.cc/Y4BP-ESJX]).

245. *Id.*

246. *Id.*

247. *Id.*

248. Press Release, Republican Fin. Servs. Comm., McHenry Introduces Legislations to Provide Legal Clarity & Certainty for Digital Asset Projects (Oct. 5, 2021) (on file at https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=408154 [https://perma.cc/8W3R-EZHB]).

249. *Id.*

250. *See generally Digital Assets and the Future of Finance: Understanding the Challenges and Benefits of Financial Innovation in the United States: Hearing Before H. Comm. on Fin. Servs.*, 117th Cong. (2021); *Stablecoins: How Do They Work, How Are They Used, and What Are Their Risks?: Hearing Before S. Comm. on Banking, Hous., & Urb. Affs,* 117th Cong. (2021) [hereinafter *Stablecoins*], https://www.banking.senate.gov/hearings/stablecoins-how-do-they-work-how-are-they-used-and-what-are-their-risks [https://perma.cc/A92V-NHFK].

251. *Digital Assets and the Future of Finance*, *supra* note 2450; *Stablecoins*, *supra* note 250.

infrastructure, and simple clarity as to which existing regulator has jurisdiction over which crypto assets.[252]

In 2022, several more Bills related to cryptocurency were introduced in Congress, two of which took the spotlight on Capitol Hill.[253] In June 2022, Senator Cynthia Lummis and Senator Kirsten Gillibrand co-sponsored the bipartisan "Responsible Financial Innovation Act of 2022," and in August 2022, Agriculture Chairwoman Debbie Stabenow and Ranking Member John Boozman introduced the "Digital Commodity Consumer Protection Act of 2022" ("DCCPA").[254] However, Capitol Hill's attention temporarily swayed in December of 2022 when the SEC charged FTX CEO, Samuel Bankman-Fried, with defrauding investors in his cryptocurrency trading platform.[255] The week these charges were brought, John Boozman, co-sponsor of the DCCPA, said "[t]he events that have transpired this week rein-force the clear need for greater federal oversight of the digital asset industry . . . . In light of these developments, we are taking a top-down look to ensure it establishes the necessary safe-guards the digital commodities market desperately needs."[256]

Despite this push for new legislation, regulators already maintain significant authority from decades-old statutes to begin addressing the vast majority of concerns that cryptocurrencies

252. *See* Response to Request for Proposals for Clarifying Laws Concerning Cryptocurrency and Blockchain Technologies from Andreesen Horowitz to S. Comm. on Banking, Hous., & Urb. Affs. (Sept. 27, 2021), https://a16z.com/wp-content/uploads/2021/10/Andreessen-Horowitz-Senate-Banking-Proposals.pdf [https://perma.cc/R5TH-SGHJ]; Faryar Shirzad, *Digital Asset Policy Proposal: Safeguarding America's Financial Leadership*, COINBASE (Oct. 24, 2021), https://www.coinbase.com/blog/digital-asset-policy-proposal-safeguarding-americas-financial-leadership [https://perma.cc/V4P3-NCW9]; Craig Stevens, *Congress Should Deliver Crypto Clarity and Reassert Its Authority*, ROLL CALL (Aug. 18, 2021, 6:00 AM), https://rollcall.com/2021/08/18/congress-should-deliver-crypto-clarity-and-reassert-its-authority/ [https://perma.cc /EB79-NBK3].

253. Jason Brett, *2022 Year in Review: Crypto Policy Experiences Massive Turbulence in Congress Amid TerraUSD and FTX Failures*, FORBES (Dec. 23, 2022, 10:25 AM), https://www.forbes.com/sites/jasonbrett/2022/12/23/2022-year-in-review-crypto-policy-experiences-massive-turbulence-in-congress-amid-terrausd-and-ftx-failures/ [https://perma.cc/5PXE-BBYM].

254. *Id.*

255. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX (Dec. 13, 2022) (on file at https://www.sec.gov/news/press-release/2022-219 [perma.cc/VZ9S-9BS4]).

256. Jason Brett, *Sam Bankman-Fried's Collapsed Crypto Empire Creates Regulatory Chaos in Washington*, FORBES (Nov. 14, 2022, 04:50 PM), https://www.forbes.com/sites/jasonbrett/2022/11/14/sam-bankman-frieds-collapsed-crypto-empire-creates-regulatory-chaos-in-washington/?sh=7effe2a12438 [https://perma.cc/2UVM-L3E7].

pose.[257] While cryptocurrencies are different in form, the economics of digital asset transactions is the same as that surrounding traditional securities, allowing them to be regulated without the need for additional congressional action.[258] Cryptocurrencies present the very type of situation that spurred Congress to give regulators these authorities in the first place: unforeseen circumstances arise that require immediate and expert attention from Washington.[259] Time and again, Congress—recognizing that regulatory agencies can frequently act more quickly than it can with a broader toolkit of both promulgating regulations and bringing enforcement actions—has made the decision to provide regulators broad authority to act within their regulatory capacity to achieve clear, congressionally mandated policy objectives that allow legitimate market participants to thrive.[260]

Applying the Regulatory Framework to Exchanges

Another point to consider, while it is not the topic of this Paper, is applying this regulatory framework to exchanges and other actors in the cryptocurrency markets. Market regulators face similar challenges when trying to regulate cryptocurrency exchanges, clearinghouses, cryptocurrency ETFs, and other actors in the market, as they do when trying to regulate cryptocurrency issuers.[261] As of 2022, cases against cryptocurrency issuers remain the most highly prosecuted cases brought by SEC, but thirty-five percent of the cases brought by the SEC are against non-issuers, such as cryptocurrency exchanges, third-party endorsers, and other various market participants. The chart below shows a demarcation by the nature of the defendant:

257. *See* Todd Phillips & Alexandra Thornton, *Congress Must Not Provide Statutory Carveouts for Crypto Assets*, CTR. AM. PROGRESS (Mar. 1, 2022), https://www.americanprogress.org/article/congress-must-not-provide-statutory-carveouts-for-crypto-assets/ [https://perma.cc/94WY-6P6W].

258. *See* INVESTMENT CONTRACT ANALYSIS, *supra* note 64.

259. Phillips & Thornton, *supra* note 257.

260. *Id.*

261. *See* Maria Demertzis & Guntram B. Wolff, *The Economic Potential and Risks of Crypto Assets: Is a Regulatory Framework Needed?*, BRUEGEL 5–6, 11 (Sept. 6, 2018), https://bruegel.org/sites/default/files/wpattachments/PC-14_2018.pdf [https://perma.cc/K3QS-7M56] (discussing the challenge of classifying cryptocurrencies and the financial instability such assets may cause).

Crypto Actions by the Commission[262]

Defendant Type	**Frequency**	**Examples**
Issuers	45 occasions; 2014–2021	*In re* Erik T. Voorhees,[263] *SEC v. Krstic*[264]
Broker-Dealers/ Sellers	10 occasions; 2016–2021	*SEC v. Bitcoin Investment Trus*t (registered broker-dealer)[265]
Third-Party Endorsers	5 occasions; 2018–2021	*SEC v. Khaled*; *SEC v. Mayweather* (celebrities touting digital coin offerings without disclosing compensation received)[266]
Other	10 occasions; 2013–2021	*SEC v. Garza* (Bitcoin mining present company)[267]; *SEC v. Coburn* (trading platform operating as an exchange")[268]

262. The referenced actions are available in chronological format at https://www.SEC.gov/spotlight/cyberSECurity-enforcement-actions [https://perma.cc/2M9L-434H]. Chart pulled from J. Scott Colesanti, *Sorry, They Were on Mute: The SEC's "Token Proposal 2.0" as Blueprint for Regulatory Response to Cryptocurrency,* 3 CORP. & BUS. L.J. 1, 29 (2022). In 2022, the SEC ramped up enforcement action and brought thirty cryptocurrency-related enforcement actions within one-year—-up 50% from 2021. SIMONA MOLA, CORNERSTONE RSCH., SEC CRYPTOCURRENCY ENFORCEMENT 1 (2022).

263. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Bitcoin Entrepreneur with Offering Unregistered Securities (June 3, 2014), https://www.sec.gov/news/press-release/2014-111 [https://perma.cc/WB9Q-ZN68].

264. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Three Individuals in Digital Asset Frauds (Feb. 1, 2021), https://www.sec.gov/news/press-release/2021-22 [https://perma.cc/R49M-44KW].

265. Bitcoin Inv. Trust, Exchange Act Release No. 78,282, 114 SEC Docket 11 (July 11, 2016).

266. Khaled, Securities Act Release No. 10,579, 2018 WL 6266204 (Nov. 29, 2018); Mayweather Jr., Securities Act Release No. 10,578, 2018 WL 6266203, at *2 (Nov. 29, 2018); *see also* Seagal, Securities Act Release No. 10,760, 2020 WL 950728 (ALJ Feb. 27, 2020) (punishing a Hollywood screen actor who touted a digital offering); Gregory Mott, *Actor Steven Seagal Fined by SEC for Touting Bitcoin Offering*, BLOOMBERG (Feb. 27, 2020), https://www.bloombergquint.com/onweb/actor-steve-seagal-fined-by-sec-for-toutingbitcoin-offering [https://perma.cc/E4S2-827M].

267. Complaint at 1–3, SEC v. Garza (D. Conn. Dec. 1, 2015) (No. 3:15-CV-1760).

268. Zachary Coburn, Exchange Act Release No. 84553, 2018 WL 5840155 (ALJ Nov. 8, 2018).

Just as firms know their financial instruments best, so do exchanges, and thus allowing them to self-designate their registration with either the CFTC or SEC, creating a blanket duty to register their financial instruments.

Concluding Remarks

The pace at which the market is moving, the technology is changing, and new cryptocurrencies are being introduced to the market has left many regulators and legislators struggling to keep up with the nuances involved in the cryptocurrency market.[269] The Order and Framework is an acknowledgment from the executive branch that it is necessary to regulate the cryptocurrency market because of its perceived risks. It illustrates the administration's desire for government agencies to work together to regulate the market through a "whole-of-government approach"—the first ever.[270] While the Order and Framework are important, they do not solve the turf war. It is more of a "call to action than [] a specific game plan"—leaving us with the question—what is the game plan?[271]

The game plan I propose involves—a self-designation process, a dual-registration framework overseen by the re-constituted Committee, and FSOC overseeing jurisdictional disputes that arise from the Committee—which would create the new regulatory framework requested by the Order.[272] The framework also addresses other concerns stated in the Order, such as "new and unique uses and functions that digital assets can facilitate may create additional economic and financial risks requiring an evolution to a regulatory approach that adequately addresses those risks."[273] The new regulatory framework I propose creates both a proactive and flexible approach that can maneuver the rapidly-changing market. The Committee will be tasked with evaluating market changes and providing recommendations on how to change the regulatory scheme as the cryptocurrency market evolves. Through this framework the technology of cryptocurrency can

269. Todd Beauchamp, et al., *2021 Digital Asset Regulatory Lookback (US Edition),* JD SUPRA (Jan. 25, 2022), https://www.jdsupra.com/legalnews/2021-digital-asset-regulatory-lookback-7962 629/ [https://perma.cc/CJ3G-XSFA].

270. *Executive Fact Sheet*, *supra* note 183.

271. Klein, *supra* note 133.

272. Exec. Order No. 14,067, 87 Fed. Reg. 14,143 (Mar. 9, 2022).

273. *Id.*

become a common and social good rather than a significant threat to the financial stability of our markets.

The game plan proposed by the Order and Framework, encourage regulators like the CFTC and SEC to "aggressively pursue investigations and enforcement actions against unlawful practices in the digital assets space," but it leaves a lot to be desired. It provides no guidance to the CFTC and SEC on how to actually resolve their turf war.[274] Meanwhile, the cryptocurrency market will continue to evolve in a place of regulatory limbo. It's often stated that "a year in crypto feels equivalent to seven years in other industries."[275] Well, here's to another seven years in 2023.

Taylor Anne Moffett *

274. *Id.*; *Framework Fact Sheet*, *supra* note 4.

275. Beauchamp et al., *supra* note 269.

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