

Political Reality and Crypto Regulation

Carol R. Goforth*

This Article compares and contrasts the SEC's and CFTC's approach to crypto regulation, as impacted by their respective missions and scope of authority. It then considers some of the largest gaps in the current regulatory system as it applies to cryptoassets. In light of that information, the Article then looks at three of the most widely discussed legislative proposals for regulatory reform and considers the potential impact of such legislative intervention. The conclusion of the Article is that some expansion of CFTC authority may be necessary and desirable, but political realities are likely to dictate small, incremental steps towards broader reforms that are unlikely to be achievable in the short term. The first step towards regulation might even be outside the remit of either the SEC or CFTC, and it might be limited to stablecoins—a narrow class of cryptoasset that has been particularly problematic for regulators. However, the bills currently before Congress have problems that will need to be addressed in order to make progress in crypto regulation, no matter how important, a reality.

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* Carol R. Goforth is a University Professor and the Clayton N. Little Professor of Law at the University of Arkansas in Fayetteville. She has decades of experience with corporate, securities, and business law issues in the United States and has recently published a number of articles dealing with the regulation of crypto transactions. She is also the co-author of REGULATION OF CRYPTOASSETS (2d ed. West Academic, 2022), with Professor Yuliya Guseva.

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INTRODUCTION

Following the spectacular implosion of the FTX Trading Ltd. (“FTX”) crypto exchange,¹ which went from an estimated value of \$32 billion to virtually nothing almost overnight in early November 2022,² there was an immediate surge in calls for enhanced regulatory oversight for the crypto industry.³ The most important questions ask what such regulation should look like, and who should be the lead regulator.

For some time, there have been suggestions that the Commodity Futures Trading Commission (“CFTC”) would be a better regulator for crypto businesses (particularly issuers and exchanges) than the Securities and Exchange Commission (“SEC”) has proven to be to date.⁴ On the other hand, the SEC also has its

¹ See David Yaffe-Bellany, *How Sam Bankman-Fried’s Crypto Empire Collapsed*, N.Y. TIMES (Nov. 14, 2022), <http://www.nytimes.com/2022/11/14/technology/ftx-sam-bankman-fried-crypto-bankruptcy.html> [<http://perma.cc/WZ2K-UC6L>].

² MacKenzie Sigalos, *Sam Bankman-Fried Steps Down as FTX CEO as His Crypto Exchange Files for Bankruptcy*, CNBC (Nov. 11, 2022, 5:23 PM), <http://www.cnbc.com/2022/11/11/sam-bankman-frieds-cryptocurrency-exchange-ftx-files-for-bankruptcy.html> [<http://perma.cc/DHC5-F32E>] (“FTX went from a \$32 billion valuation to bankruptcy as liquidity dried up . . .”).

³ See Stephen Katté, *Calls for Regulation Get Louder as FTX Contagion Continues to Spread*, COINTELEGRAPH (Nov. 29, 2022), <http://cointelegraph.com/news/calls-for-regulation-get-louder-as-ftx-contagion-continues-to-spread> [<http://perma.cc/UDG8-KM3H>] (“Crypto executives and politicians are becoming louder in their calls for crypto regulation as the aftermath of the FTX collapse continues to reverberate . . .”); see also Peter Whoriskey & Dalton Bennett, *Crypto’s Free-Wheeling Firms Lured Millions. FTX Revealed the Dangers*, WASH. POST (Nov. 16, 2022, 1:14 PM), <http://www.washingtonpost.com/business/2022/11/16/ftx-collapse-crypto-exchanges-regulation/> [<http://perma.cc/DWY7-UDVD>] (complaining that crypto exchanges operate “outside the traditional banking system,” and “are not subject to the same type of regulation, insurance and disclosure rules that protect customers of traditional banks”).

⁴ See, e.g., Rosemarie Miller, *Bitcoin, Ethereum Regulation Likely to Wind Up Mainly Under CFTC*, FORBES (Sept. 1, 2022, 5:06 PM), <http://www.forbes.com/sites/rosemariemiller/2022/09/01/bitcoin-ethereum-regulation-likely-to-wind-up-mainly-under-cftc/?sh=11adce03c488> [<http://perma.cc/U8TJ-6EP3>] (noting that “[t]he crypto industry seems to prefer the CFTC”); see also Geoffrey A. Manne & M. Todd Henderson, *Let Congress Decide Who Gets to Regulate Crypto*, THE HILL (Sept. 9, 2022, 5:00 PM), <http://thehill.com/opinion/congress-blog/3636402-let-congress-decide-who-gets-to-regulate-crypto/> [<http://perma.cc/LW82-5SYC>] (“The CFTC is the right agency to deliver on sensible regulation that balances the needs of investor protection with regulatory discretion to

share of supporters.⁵ Some observers insist that the SEC's approach is superior because the agency has the experience and resources that would enable it to carry out such a mission,⁶ although additional reasons for favoring the SEC have also been suggested.⁷ While regulators, not surprisingly, are among the most prolific of commentators,⁸ other groups have also been quite vocal about expressing their opinions, including, legislators,⁹ crypto

encourage innovation.”). For academic commentary on this issue, see Lindsay Sain Jones, *Beyond the Hype: A Practical Approach to CryptoReg*, 25 VA. J.L. & TECH. 175, 230 (2022) (“[R]elative to the SEC, the CFTC is better positioned to be the primary regulator of cryptocurrency markets.”); see also Jack J. Longley, *The Crypto-Currency Act of 2020: Evaluating First Steps Toward Clarifying the Digital-Asset Regulatory Landscape*, 54 SUFFOLK U. L. REV. 549, 570 (2021) (“[T]he SEC and CFTC should determine an agreeable way to make the CFTC the primary federal regulatory agency for cryptocurrency . . .”).

⁵ Naturally, the chair of the SEC takes this position. See *Gary Gensler Still Backing the SEC to be the Best Crypto Regulator*, PROTOS (Sept. 8, 2022, 7:33 PM), http://protos.com/gary-gensler-still-backing-the-sec-to-be-the-best-crypto-regulator_trashed/ [<http://perma.cc/HP5V-CRMW>] (“SEC chairman Gary Gensler has reiterated his position that crypto exchanges should register with his organisation.”); see also Carol R. Goforth, *Cinderella’s Slipper: A Better Approach to Regulating Cryptoassets as Securities*, 17 HASTINGS BUS. L.J. 271, 271 (2021) (suggesting “the SEC is the appropriate agency to oversee transactions in cryptoassets, but the underlying legislation should be amended to create a new category of securities, with different disclosure requirements and exemptions”).

⁶ See James Field, *CFTC: The Not-So Friendly Regulator*, COINGEEK (Nov. 7, 2022), <http://coingeeek.com/cftc-the-not-so-friendly-regulator/> [<http://perma.cc/F2LT-9727>] (noting that “the SEC boasts a 4,500-strong bench of investigators, case workers, and prosecutors, the CFTC has a comparatively light 700-strong headcount”).

⁷ One source suggests that the SEC is likely to rise to the top as the preeminent regulator of crypto because of the Commission’s active enforcement division and the array of incentives for companies to cooperate with the SEC. See John Joy, *The Race to Regulate Crypto: CFTC vs. SEC*, JURIST (Nov. 24, 2021, 7:44 AM), <http://www.jurist.org/commentary/2021/11/john-joy-crypto-sec/> [<http://perma.cc/C8N7-VJCZ>] (citing “strategy, resources and industry dynamics” as supporting the SEC’s overall position in the crypto space); see also Alfredo Dally et al., *A Call for Regulation: The SEC Should Oversee Crypto With its Ever-Growing Similarities in Risk and Opportunity to Securities*, 76 U. MIAMI L. REV. 24, 41–42 (2022).

⁸ For example, Brian Quintenz, a former CFTC Commissioner, has complained that the SEC’s approach is “threatening the entire [crypto] ecosystem.” Brenden Rearick, *A Danger to DeFi? SEC Crypto Powers Challenged by Former CFTC Commissioner*, INVESTORPLACE (Oct. 3, 2022, 2:41 PM), <http://investorplace.com/2022/10/a-danger-to-defi-sec-crypto-powers-challenged-by-former-cftc-commissioner/> [<http://perma.cc/Q7LE-QXZ6>]. On the other hand, “SEC Chair Gary Gensler has made clear that the agency intends to be the lead regulator of the US crypto market.” Mark Bini & Joanna Howe, *Here’s Why the SEC Will Likely Be the Primary Cryptocurrency Cop*, BLOOMBERG L. (Oct. 17, 2022, 1:00 AM), <http://news.bloomberglaw.com/us-law-week/is-the-sec-the-new-crypto-sheriff-in-town> [<http://perma.cc/74BB-AMVV>]; see also Hannah Lang, *U.S. Can Regulate Cryptocurrencies Without New Law, Think Tank Says*, REUTERS (Mar. 1, 2022, 11:37 AM), <http://www.reuters.com/business/us-can-regulate-cryptocurrencies-without-new-law-think-tank-says-2022-03-01/> [<http://perma.cc/U4LX-CWVC?type=image>] (suggesting that “[r]egulators have not yet determined how best to regulate cryptocurrencies”).

⁹ Outside observers have noted the Congressional divide. “Cryptocurrency advocates and regulators can agree on one thing: Congress should pass new laws for crypto. Whether Congress can agree on what those laws look like remains uncertain.” Colin Wilhelm &

entrepreneurs,¹⁰ and various other commentators.¹¹ Each of these groups offer opinions and continue to debate who is in the best position to effectively regulate crypto transactions and crypto-based businesses. Bills that appear to run the gamut in their approach have been introduced,¹² without much progress to date in terms of bringing any substantive updates to a vote.¹³ Some bills also

Stephanie Murray, *Despite Call for Congress to Act, New Crypto Laws Look Unlikely This Year*, THE BLOCK (Oct. 5, 2022, 2:00 PM), <http://www.theblock.co/post/175080/despite-call-for-congress-to-act-new-crypto-laws-look-unlikely-this-year> [http://perma.cc/S684-2TN8]. Representative Patrick McHenry (R-North Carolina) has called for legislation “to end Gary Gensler’s regulation by enforcement, and ensure the digital asset ecosystem can thrive here in the U.S.” *Id.* In stark contrast to this position, Senator Elizabeth Warren (D-Massachusetts) has opined that the industry is following the “well-worn path of financial innovation,” which begins with promise but eventually collapses in “crippling losses.” Savannah Fortis, *US Sen. Elizabeth Warren Says Crypto Will Ruin Economy — Community Responds*, COINTELEGRAPH (Nov. 23, 2022), <http://cointelegraph.com/news/us-sen-elizabeth-warren-says-crypto-will-ruin-economy-community-responds> [http://perma.cc/3FEY-PH6W]. She would arrange for the SEC to have control and was reportedly working on a proposal that would do just that: “[c]rypto skeptic Senator Elizabeth Warren is working on a crypto bill that would reportedly give the Gary Gensler-led Securities and Exchange Commission (SEC) most of the regulatory authority over the crypto space.” Brian Quarmby, *Crypto Will Be Regulated as Securities — ICE Boss and Senator Warren*, COINTELEGRAPH (Dec. 7, 2022), <http://cointelegraph.com/news/crypto-will-be-regulated-as-securities-ice-boss-and-senator-warren> [http://perma.cc/8ABQ-MEGK]. On December 14, 2022, she proposed a bill called the “Digital Asset Anti-Money Laundering Act of 2022” that would impose know-your-customer requirements on a wide swath of participants in the crypto ecosystem while limiting use of privacy tools such as mixers and privacy coins. See Leo Schwartz, *Elizabeth Warren’s New Crypto Bill Sent Shockwaves Through the Industry. Here’s What it Could Mean*, YAHOO! (Dec. 21, 2022), <http://www.yahoo.com/finance/news/elizabeth-warren-crypto-bill-sent-120000157.html> [http://perma.cc/A2D2-QB33]. Yet another point of view was articulated by Senate Banking Committee chair Sherrod Brown (D-OH). He has “told reporters he was unsure about the need for legislation, which he noted could be heavily influenced by the crypto industry itself.” Zachary Warmbrodt & Eleanor Mueller, *Elizabeth Warren Wants to Pass a Major Crypto Bill. Sherrod Brown Says Not So Fast*, POLITICO (Nov. 15, 2022, 4:39 PM), <http://www.politico.com/news/2022/11/15/ftx-sec-cftc-crypto-regulations-00067040> [http://perma.cc/WXX4-5YB7].

¹⁰ “Recently, Kara Calvert, the Head of United States Policy at crypto exchange Coinbase, spoke about crypto regulations. Speaking with industry news sources at the Messari Mainnet conference in New York, Calvert expressed support for proposals giving the CFTC oversight of the crypto market.” Jimmy Aki, *If the CFTC Becomes the Main Crypto Regulator in US Would That Be a Win for Sector?*, BUS. 2 CMTY. (Oct. 5, 2022), <http://www.business2community.com/crypto-news/if-the-cftc-becomes-the-main-crypto-regulator-in-us-would-that-be-a-win-for-sector-02556272> [http://perma.cc/AF7W-WE9E].

¹¹ See Fortis, *supra* note 9 (noting conflicting opinions from legislators, entrepreneurs, and others). Two experts, former CFTC Chair Timothy Massad and Harvard Law Professor Howell Jackson, simply note that “there is no consensus on the path forward to achieve better regulation.” Timothy G. Massad & Howell Jackson, *How to Improve Regulation of Crypto Today—Without Congressional Action—and Make the Industry Pay for it*, BROOKINGS (Oct. 13, 2022), <http://www.brookings.edu/research/how-to-improve-regulation-of-crypto-today-without-congressional-action-and-make-the-industry-pay-for-it/> [http://perma.cc/4GHJ-3B3M].

¹² See *infra* Part I.

¹³ See, e.g., Wilhelm & Murray, *supra* note 9.

suggest that at least certain parts of the crypto ecosystem need to be regulated by someone other than either the SEC or CFTC.¹⁴

Following this introduction, this Article provides a comparison of the regulatory approaches taken by the SEC and CFTC. The second section includes an analysis of the largest gaps in current regulations. The third part describes the most commonly discussed legislative proposals that seek to allocate power between the SEC and CFTC and otherwise address perceived gaps in crypto regulation. The fourth section considers whether a comprehensive bill or a more limited approach offers a better chance for progress, along with analyzing which issues are most likely to generate sufficient consensus for approval. The fifth section reminds readers of the stakes involved in appropriately regulating cryptoassets in order to explain why forward progress is so important, even if it is piecemeal. The conclusion notes why small steps forward are the most likely to be realistically achievable.

I. THE SEC'S AND CFTC'S APPROACH TO CRYPTO REGULATION

A. The Role of the SEC

According to the SEC's official website, its mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."¹⁵ In furtherance of those objectives, the SEC regulates trading of securities and various participants in the capital markets. In very general terms, the Securities Act of 1933 (the '33 Act)¹⁶ requires that an issuer register any security with the SEC before selling it or even offering it for sale, unless there is an available exemption.¹⁷ In addition, the Securities Exchange Act of 1934 (the '34 Act)¹⁸ imposes ongoing obligations on companies with publicly registered securities and also regulates market professionals and facilities operating as exchanges that assist in the trading of securities.¹⁹

¹⁴ For example, Senator Pat Toomey (R-Pennsylvania) has advocated giving the Office of the Comptroller of the Currency authority over stablecoin issuers. *See infra* Part I and notes 177–182.

¹⁵ *Our Goals*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/our-goals> [<http://perma.cc/ULK3-XERY>].

¹⁶ The '33 Act is codified at 15 U.S.C. §§ 77a–77aa.

¹⁷ This requirement appears in Section 5 of the '33 Act. *See* 15 U.S.C. § 77e.

¹⁸ The '34 Act is codified at 15 U.S.C. §§ 78a–78qq.

¹⁹ For example, it is "unlawful for any broker, dealer, or exchange" to use any exchange subject to U.S. jurisdiction "to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as national securities exchange . . . or (2) is exempted." 15 U.S.C. § 78e.

The foundational issue for the SEC with regard to crypto regulation has been whether and when cryptoassets are securities, because obviously nothing like digital assets could have been included in statutes that were drafted decades before the first cryptoasset was created.²⁰ It wasn't until 2017 that the SEC first articulated its approach to regulating crypto,²¹ when it issued a report concluding that cryptoassets issued by The DAO were "investment contracts" and therefore securities under federal law.²² That document is generally referred to as the DAO Report.²³

The phrase "investment contract," which is included in the statutory definition of "security,"²⁴ is not defined in the federal securities statutes, but rather by case law, most notably the 1946 U.S. Supreme Court opinion in *SEC v. W.J. Howey Co.*²⁵ In that case, the Court concluded that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party"²⁶

²⁰ The introduction of Bitcoin, the first successful cryptoasset, did not come until the end of 2008, with a whitepaper entitled, "Bitcoin: A Peer-to-Peer Electronic Cash System." See SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM (2008), <http://bitcoin.org/bitcoin.pdf> [<http://perma.cc/AQ4M-SHXZ>].

²¹ Report of Investigation: The DAO, Exchange Act Release No. 81207 (July 25, 2017), <http://www.sec.gov/litigation/investreport/34-81207.pdf> [<http://perma.cc/5MY5-9ZV5>] [hereinafter DAO Report].

²² Technically, the first action brought by the SEC involving a cryptoasset was filed in July 2013. *SEC Charges Texas Man With Running Bitcoin-Denominated Ponzi Scheme*, Press Release No. 2013-132, U.S. SEC. & EXCH. COMM'N (July 23, 2013), <http://www.sec.gov/news/press-release/2013-132> [<http://perma.cc/G6DD-TGDT>]; see also Complaint at 1–2, *SEC v. Shavers*, No. 4:13CV00416, 2013 WL 3810441 (E.D. Tex. July 23, 2013). This case, however, involved interests in Bitcoin Savings and Trust that were a sham, rather than a purchaser relying on Bitcoin itself as a security. See *SEC v. Shavers*, No. 13-cv-00416, 2022 WL 14318269, at *1 (E.D. Tex. Oct. 24, 2022).

²³ For example, see Securities Act of 1933 § 2(a)(1), 15 U.S.C.A. § 77b (West); and Securities Act of 1934 Act § 3(a)(10), 15 U.S.C.A. § 78c (West) which define the term "security" to include investment contracts.

²⁴ See DAO Report, *supra* note 21. The name of the group that created these tokens was "The DAO" (though "DAO" typically is a generic acronym for decentralized autonomous organization). *Id.* The DAO was, in fact, a decentralized autonomous organization, which sometimes creates confusion when describing what happened and what the SEC concluded. See generally Ian Allison, *Ethereum Reinvents Companies with the Launch of The DAO*, INT'L BUS. TIMES (Apr. 30, 2016, 9:00 AM), <http://www.ibtimes.co.uk/ethereum-reinvents-companies-launch-dao-1557576> [<http://perma.cc/WL9Y-3D7D>] (explaining that The DAO is a decentralized organization in which its members have voting power and control over funds).

²⁵ See 15 U.S.C.A. § 77b (West).

²⁶ *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

²⁷ *Id.* at 298–99.

Now simply called the *Howey* test, this approach has been clarified over time in various ways. Modern courts have essentially explained that the *Howey* test requires all of the following:

- (i) an investment of money (or something else of value);²⁷
- (ii) in a common enterprise;²⁸
- (iii) where the purchaser expects to receive profits;²⁹ and
- (iv) the expectation of profits is from the essential entrepreneurial efforts of others.³⁰

However, application of the *Howey* test is not always simple.³¹ The DAO Report itself was not generally regarded as clarifying the

²⁷ While the *Howey* Court test originally spoke of “money,” subsequent opinions make it clear that “cash is not the only form of contribution or investment that will create an investment contract. *Uselton v. Com. Lovelace Motor Freight, Inc.*, 940 F.2d 564, 574 (10th Cir. 1991). Instead, the ‘investment’ may take the form of ‘goods and services’ or ‘some other exchange of value.’” *Id.* (internal citations omitted).

²⁸ See *Howey*, 328 U.S. at 299. This is the element of the *Howey* test that is most difficult to apply, in part because there is a divergence among the federal circuits. As to what it requires, see Maura K. Monaghan, Note, *An Uncommon State of Confusion: The Enterprise Element of Investment Contract Analysis*, 63 *FORDHAM L. REV.* 2135, 2137–38 (1995). Some courts appear to require “horizontal commonality,” some accept “strict vertical commonality,” while others accept “broad vertical commonality.” See *id.* at 2152–63 (discussing the various judicial applications of the *Howey* “common enterprise” element). Horizontal commonality requires that investors’ contributions be pooled together so their fortunes rise and fall together; strict vertical commonality requires the investor and promoter or investment manager to have interests that are tied together; and broad vertical commonality generally looks to whether the investor is depending heavily on the promoter in deciding whether to invest. See *id.*; see also Benjamin Akins et al., *The Case for the Regulation of Bitcoin Mining as a Security*, 19 *VA. J.L. & TECH.* 669, 690 (2015).

²⁹ See *Howey*, 328 U.S. at 299. The U.S. Supreme Court held in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), that in order for this element to be met, “the primary motivation for investing must be to achieve a return on the value invested.” Akins et al., *supra* note 28 at 691.

³⁰ Although the *Howey* Court said the expectation of profits needed to be based “solely” on the efforts of others, the rule appears to have been clarified over time. See *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 481–82 (9th Cir. 1973) *cert. denied*, 414 U.S. 821 (1973) (finding that the appropriate inquiry is “whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise”); see also *Hocking v. Dubois*, 885 F.2d 1449, 1455 (9th Cir. 1989) (applying the *Glenn W. Turner Enters.* interpretation of this prong and holding that the test should determine whose efforts are “significant” and “essential”).

³¹ Application of the *Howey* test is not always straightforward—even for transactions that predate the advent of cryptoassets. See, e.g., Marc I. Steinberg & William E. Kaulbach, *The Supreme Court and the Definition of ‘Security’: The ‘Context’ Clause, ‘Investment Contract’ Analysis, and Their Ramifications*, 40 *VAND. L. REV.* 489 *passim* (1987). In fact, *Howey* has spawned hundreds of cases and clarifications, resulting in a range of disagreements among the circuits about how to apply the test. See *id.*; see generally Theresa A. Gabaldon, *A Sense of a Security: An Empirical Study*, 25 *J. CORP. L.* 307 (2000); see also Miriam R. Albert, *The Howey Test Turns 64: Are the Courts Grading this Test on a*

issue of which cryptoassets would be securities because the tokens involved in that instance were unusual, having been specifically designed as an investment vehicle for other crypto projects.³² Thus, the report was not sufficient to prevent considerable uncertainty about when the federal securities laws would apply to cryptoassets.³³ This confusion continues to exist, notwithstanding ongoing enforcement activity against a range of crypto issuers.³⁴

As an example of the on-going confusion, consider the SEC's decision to initiate an insider trading case in the summer of 2022 alleging that nine of the twenty-five cryptoassets that had been traded by the insider's brother and friend were securities.³⁵ The complaint did not explain why nine of the cryptoassets were singled out as securities while the others were not, despite

Curve?, 2 WM. & MARY BUS. L. REV. 1 (2011) (concluding that “the benefits of the flexibility of the *Howey* test outweigh the costs” in terms of the circuit split).

³² For a more detailed consideration of how the SEC applied *Howey* to the DAO tokens, see Goforth, *supra* note 5, at 280–83; Michael Mendelson, *From Initial Coin Offerings to Security Tokens: A U.S. Federal Securities Law Analysis*, 22 STAN. TECH. L. REV. 52 (2019); Ethan D. Trotz, *The Times They Are A Changin': Surveying How the Howey Test Applies to Various Cryptocurrencies*, 11 ELON L. REV. 201, 210–12 (2019).

³³ Despite the SEC's position to the contrary, some authorities have argued that cryptocurrencies do not generally fit *Howey* at all. See Florian Uffer, *Application of the Howey Test to Cryptocurrency*, UNIV. OF RICH. SCH. OF L., JOLT BLOG (Mar. 11, 2019), <http://jolt.richmond.edu/2019/03/11/application-of-the-howey-test-to-cryptocurrency/> [<http://perma.cc/776H-PP62>]; Boris Richard, *What The Howey Test Misses About Crypto Assets*, LAW360 (June 28, 2019), <http://www.fticonsulting.com/~media/Files/us-files/insights/articles/2019/jul/what-howey-test-misses-about-crypto-assets.pdf> [<http://perma.cc/G72U-J3XJ>]; *Token Issue Considerations: Why Howey Test is Ineffective for Blockchain and Crypto Space?*, CRYPTOTAPAS (Jan. 7, 2019), [<http://perma.cc/TG6E-PFET>].

³⁴ See Alexander C. Drylewsk et al., *15th Annual Securities Litigation and Regulatory Enforcement Update: State of the Cryptocurrency Market*, SKADDEN INSIGHTS (Nov. 15, 2022), <http://www.skadden.com/insights/publications/2022/11/state-of-the-cryptocurrency-market> [<http://perma.cc/UT9N-GA7B>].

From 2013 to 2021, the SEC brought a total of 97 enforcement actions involving cryptocurrency activity. In 2021 alone, the SEC brought a total of 20 enforcement actions. The majority of SEC cases to date have focused on two allegations: an unregistered offering of securities or fraud in the offer or sale of securities.

Id.

³⁵ See generally Complaint, SEC v. Wahi, No. 2:22-cv-01009 (W.D. Wash., July 21, 2022), <http://storage.courtlistener.com/recap/gov.uscourts.wawd.312176/gov.uscourts.wawd.312176.1.0.pdf> [<http://perma.cc/C2TK-HVSA>]. Backlash to the uncertainty caused by this choice was swift. According to Caroline D. Pham, a CFTC commissioner, “[t]he case *SEC v. Wahi* is a striking example of ‘regulation by enforcement.’” *Public Statements & Remarks, Statement of Commissioner Caroline D. Pham on SEC v. Wahi*, COMMODITY FUTURES TRADING COMM'N (July 21, 2022), <http://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement072122> [<http://perma.cc/R9WJ-T457>].

repeated pronouncements from the agency or its chair that almost all cryptoassets are securities.³⁶

In addition to asserting jurisdiction over crypto issuers, beginning with the DAO Report, the SEC has taken the position that any exchange facilitating transactions in cryptoassets that are securities is required to register as a securities exchange³⁷ or comply with an exemption such as being a registered Alternative Trading System (“ATS”).³⁸ The registration process for exchanges includes filing detailed disclosure documents with the SEC and compliance with requirements for self-regulated organizations such as the Financial Industry Regulatory Authority (“FINRA”).³⁹ Recent proposals from the SEC would further broaden the requirement of registration, adding computer protocols to the definition of exchange,⁴⁰ meaning that even “platforms that do not function as traditional exchanges” could be required to register with the SEC or find and comply with the requirements of an exemption.⁴¹ To date, most crypto exchanges have resisted the call

³⁶ See Mat Di Salvo, *Senator Toomey Challenges Gensler’s View That Nearly ‘All Crypto Tokens Are Securities,’* DECRYPT (Sept. 15, 2022), <http://decrypt.co/109847/toomey-gary-gensler-sec-crypto-tokens-securities> [<http://perma.cc/ZB4A-XASN>] (discussing “the chairman’s view that nearly all cryptocurrencies currently trading today are likely unregistered securities”).

In a more recent development involving Coinbase, the company revealed on March 22, 2023, that it had received notice from the SEC that the commission has concerns “regarding an undefined portion of [its] listed digital assets.” Paul Grewal, *We Asked the SEC for Reasonable Crypto Rules for Americans. We Got Legal Threats Instead.*, COINBASE BLOG (Mar. 22, 2023), <http://www.coinbase.com/blog/we-asked-the-sec-for-reasonable-crypto-rules-for-americans-we-got-legal>. According to Grewal, Coinbase’s Chief Legal Officer, the company “asked the SEC specifically to identify which assets on [Coinbase’s] platforms they believe may be securities, and they declined to do so.” *Id.* Grewal also reported that “[a]t no point in this investigation has the SEC told us a single specific concern about a single asset on our platform.” *Id.*

³⁷ See DAO Report, *supra* note 21, at 18 (explaining that with regard to businesses facilitating trades in cryptoassets that are securities, “any entity or person engaging in the activities of an exchange . . . must register as a national securities exchange or operate pursuant to an exemption from such registration”).

³⁸ Rule 3a1-1(a)(2) under the Securities Exchange Act of 1934 (the ‘34 Act) exempts from the definition of “exchange” under Section 3(a)(1) an ATS that complies with Regulation ATS. See 17 C.F.R. § 240.3a1-1(a)(2) (2018).

³⁹ See *The Laws That Govern the Securities Industry*, INVESTOR.GOV, <http://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> [<http://perma.cc/9VNY-TVNY>].

⁴⁰ See Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, Exchange Act Release No. 34-94062, <http://www.sec.gov/rules/proposed/2022/34-94062.pdf> [<http://perma.cc/Y6AR-3T9H>].

⁴¹ Donna Parisi & Jennifer D. Morton, *SEC’s Proposed Amendments to Definition of ‘Exchange’: A Potential Game-Changing Impact on Crypto Companies*, REUTERS LEGAL NEWS (May 11, 2022), <http://www.shearman.com/-/media/files/perspectives/2022/05/secs->

to register with the SEC,⁴² although there have been scattered enforcement actions and continued warnings from the agency.⁴³ This sets the stage for considering how the CFTC regulates cryptoassets, transactions, and businesses.

B. The CFTC and Crypto Regulation

Commodities regulation in the United States originally focused on derivative contracts relating to agricultural products,⁴⁴ which are regulated according to the terms of the Commodity Exchange Act (“CEA”).⁴⁵ It wasn’t until 1974 that the Commodity Futures Trading Commission was established⁴⁶ and charged with acting “to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation.”⁴⁷ The definition of “commodity” has been broadened over the years so that the term now includes not only a large number of specifically listed agricultural products, but also “all other goods and articles, . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.”⁴⁸

In contrast to the SEC, which regulates both securities and the markets in which they are traded,⁴⁹ the CFTC does not have jurisdiction over the physical or spot markets in which commodities are traded, except to the extent that fraud or

proposed-amendments-to-definition-of-exchange-potential-gamechanging-impact-on-crypto.pdf [http://perma.cc/S973-WHLR].

⁴² For example, following the SEC’s decision to initiate an insider trading action against a former Coinbase manager, the Coinbase exchange publicly and definitively denied that it was trading any securities. See Paul Grewal, *Coinbase Does Not List Securities. End of Story.*, COINBASE BLOG (July 21, 2022), <http://www.coinbase.com/blog/coinbase-does-not-list-securities-end-of-story> [http://perma.cc/9EBW-EVU6].

⁴³ See, e.g., *In re Poloniex, L.L.C.*, Exchange Act Release No. 92607 (Aug. 9, 2021), <http://www.sec.gov/litigation/admin/2021/34-92607.pdf> [http://perma.cc/58LU-BV72] (imposing a cease-and-desist order against the exchange). In addition, there are reports that, as of August 2022, the SEC was investigating “every U.S. crypto exchange.” Michael Del Castillo, *Every U.S. Crypto Exchange (And Binance) Is Being Investigated By The SEC, Says Senator Lummis Staffer*, FORBES (Aug. 4, 2022), <http://www.forbes.com/sites/michaeldelcastillo/2022/08/04/every-us-crypto-exchange-and-binance-is-being-investigated-by-the-sec-says-senator-lummis-staffer/?sh=25ea21be22c2> [http://perma.cc/C37D-ZVEE].

⁴⁴ See *About The Commission*, COMMODITY FUTURES TRADING COMM’N, <http://www.cftc.gov/About/AboutTheCommission> [http://perma.cc/BF7W-5GUP] (last visited Feb. 7, 2023) (outlining a general history of the history of the CFTC).

⁴⁵ See generally Commodity Exchange Act, 7 U.S.C. §§ 1–27f.

⁴⁶ The Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, was signed into law in October 1974, and it both overhauled the CEA and created the CFTC. See H.R. 13113, 93d Cong. (1974).

⁴⁷ *About The Commission*, *supra* note 44.

⁴⁸ Commodity Exchange Act, 7 U.S.C. § 1a(9). The material that has been omitted from the quote references onions and motion picture box office receipts, which are excluded from the definition of commodity for historical reasons.

⁴⁹ See *supra* Part I.A.

manipulation is involved (a “spot” market is where the actual commodity is traded, rather than where derivative contracts or indirect interests in the commodity are exchanged).⁵⁰ Instead, the CFTC regulates derivatives by requiring registration of and exercising supervision over derivative market participants and infrastructures.⁵¹ Pursuant to the CEA, derivative contracts, each of which are based on underlying commodities, may only be traded on designated contract markets (“DCMs”)⁵² or swap execution facilities (“SEFs”), whichever is applicable.⁵³

The other major distinction between the regulatory approach of the SEC and the CFTC is that the SEC’s registration process is very rule-oriented, requiring compliance with specific disclosure and operational requirements.⁵⁴ The CFTC operates under a principles-

⁵⁰ See COMMODITY FUTURES TRADING COMM’N, THE CFTC’S ROLE IN MONITORING VIRTUAL CURRENCIES 2 (2020) (“While its regulatory oversight authority over commodity cash markets is limited, the CFTC maintains general anti-fraud and manipulation enforcement authority over virtual currency cash markets as a commodity in interstate commerce.”). Under the terms of the CEA, it is unlawful for any person:

[T]o use or employ, or attempt to use or employ, in connection with any contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the [CFTC] shall promulgate. . . .

Commodity Exchange Act, 7 U.S.C. § 9(1).

⁵¹ See Carol Bavousett Mattick, *CFTC Regulation*, 2021 TEX. CLE ADVANCED BUS. L. ch. 10.2-IV (2021), WL 6427448.

⁵² DCMs are defined by the CFTC as “exchanges that may list for trading futures or option contracts based on all types of commodities and that may allow access to their facilities by all types of traders, including retail customers.” *Trading Organizations*, COMMODITY FUTURES TRADING COMM’N [hereinafter *Trading Organizations*], <http://www.cftc.gov/IndustryOversight/TradingOrganizations/index.htm> [<http://perma.cc/6R2Y-SV99>] (last visited Feb. 7, 2023).

⁵³ Speaking very generally, swaps are derivative contracts that involve the exchange of cash flows or liabilities from two different financial instruments. See Commodity Exchange Act, 7 U.S.C. § 1a(47). Under the CEA, no person is allowed to operate a facility for trading or processing swaps unless they are registered as a DCM or SEF. See *id.* § 7b-3(a)(1); see also *Trading Organizations*, *supra* note 52.

⁵⁴ See Lydia Beyoud & Allyson Versprille, *Why the Crypto World Flinches When the SEC Calls Coins Securities*, BLOOMBERG (July 29, 2022) <http://www.bloomberg.com/news/articles/2022-07-29/why-crypto-flinches-when-sec-calls-coins-securities-quicktake> [<http://perma.cc/JSB4-B4GZ>] (last visited Feb. 7, 2023) (explaining this result because the “SEC was formed in the wake of the market crash of 1929 and sees its core mission as protecting investors by requiring copious disclosures by financial entities”). In the context of exchanges, for example, classifying assets as securities “would make running a cryptocurrency exchange more expensive and complex. Under US rules, the label carries strict investor-protection requirements for platforms and issuers.” *Id.*

based approach⁵⁵ which focuses on achieving certain objectives.⁵⁶ Moreover, the CFTC allows self-certification of compliance, creating a nimbler and more flexible regulatory framework.⁵⁷

Despite its more limited scope of operations and significantly smaller budget as compared to the SEC, the CFTC acted early to assert its jurisdiction over cryptoassets, or at least over derivatives based on such assets. The CFTC made its first official statement on its jurisdiction over cryptoassets in 2014, when then-Chairman Timothy Massad testified before the Senate Committee on Agriculture, Nutrition and Forestry:

The [Commodity Exchange Act] defines the term commodity very broadly so that in addition to traditional agricultural commodities, metals, and energy, the CFTC has oversight of derivative contracts related to Treasury securities, interest rate indices, stock market indices, currencies, electricity, and heating degree days, to name just a few underlying products. Derivative contracts based on a virtual currency represent one area within our responsibility.⁵⁸

⁵⁵ The CFTC requires derivatives exchanges to comply with twenty-three core principles in order to list a new contract. Commodity Exchange Act, 7 U.S.C. § 7(a)(2). These principles range from things like preventing manipulation to overseeing member conduct. *Id.* However, so long as the exchange provides a plan for achieving all of the listed objectives, the CFTC has limited power to delay listing of the contract. *Id.* In fact, it may do so only if there are “novel or complex issues that require additional time to analyze, an inadequate explanation by the submitting registered entity, or a potential inconsistency” with the CEA or CFTC regulation. *Id.*

⁵⁶ Obviously, there are detailed regulations that explain what is meant by each of the principles, but the CFTC does not require that the principles be satisfied in exactly the same way. As a former CFTC Commissioner once explained, “principles-based approach allows enormous flexibility. It allows the industry and the CFTC to look around the corner, to be nimble and quick and to react – in real time – to changes or potential changes in the marketplace.” *Public Statements & Remarks, Speech of Comm’r Bart Chilton, Let’s Not “Dial M for Merger”: CFTC’s Principles-Based Regulation – A Success Story*, COMMODITY FUTURES TRADING COMM’N (Nov. 13, 2007), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opachilton-4> [<http://perma.cc/V37S-FGES>] (also explaining that “principles-based regulation” means the agency sets “broad principles for which we expect industry adherence”).

⁵⁷ See Lee Reiners, *Bitcoin Futures: From Self-Certification to Systemic Risk*, 23 N.C. BANKING INST. 61 (2019).

Self-certification allows designated contract markets (“DCMs”) to list any new contract for trading, and approve any new rule or amendment, by providing a written certification to the CFTC that the new contract, rule, or rule amendment, complies with the CEA and CFTC regulations. Unless the CFTC finds the new product or rule change violates the CEA or CFTC regulations, the DCM may list the new product no sooner than one full business day following the self-certification. DCMs also have the option of voluntarily submitting new contracts for approval to the Commission.

Id. at 71.

⁵⁸ *The Commodity Futures Trading Commission: Effective Enforcement and the Future of Derivatives Regulation Before the S. Comm. on Agric., Nutrition & Forestry*, 113th

In 2015, the CFTC brought its first enforcement action involving a virtual currency, in which the CFTC asserted that “Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.”⁵⁹ In 2018, the CFTC’s classification of crypto as a commodity was challenged in two federal courts.⁶⁰ The courts in those cases confirmed the CFTC’s authority to classify virtual currencies as commodities under the CEA, even if no futures contract is listed or traded on a particular cryptoasset.⁶¹

To clarify its position, the CFTC published initial proposals in 2017⁶² and then final interpretive guidance in 2020,⁶³ applying its regulatory authority to retail transactions in crypto, which it called “virtual currencies.”⁶⁴ Since that time, the CFTC has continued to be active in the crypto space, with twenty percent of its enforcement actions in 2022 involving cryptoassets.⁶⁵ These actions included claims based on fraud in connection with the sale of futures contracts as well as actions against derivatives marketplaces, and even the CFTC’s first claim against a DAO.⁶⁶

There is no indication that the CFTC intends to step back from its interest in crypto regulation. In his October 2021 confirmation hearing, CFTC Chairman Rostin Behnam asserted that the CFTC

Cong. 55 (2014) (statement of Timothy Massad, Chairman, Commodity Futures Trading Commission), <http://www.agriculture.senate.gov/imo/media/doc/S.%20Hrg.%20113-640%20-%20THE%20COMMODITY%20FUTURES.pdf>. [<http://perma.cc/6HQZ-EF75>].

⁵⁹ *In re Coinflip, Inc.*, CFTC Docket No. 15-29, Order Instituting Proceedings Pursuant to Sections 6(C) and 6(D) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions (Sept. 17, 2015), <http://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf> [<http://perma.cc/UDB2-FTA2>] (ordering bitcoin options trading platform operator and its CEO to cease operations).

⁶⁰ *See* Commodity Futures Trading Comm’n v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y. 2018); *see also* Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492 (D. Mass. 2018).

⁶¹ *See My Big Coin Pay, Inc.*, 334 F. Supp. 3d at 498.

⁶² *See A CFTC Primer of Virtual Currencies*, COMMODITY FUTURES TRADING COMM’N (Oct. 17, 2017), http://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labctc_primercurrencies100417.pdf [<http://perma.cc/F65B-Z7LT>].

⁶³ *See generally Digital Assets Primer, Press Release No. 8336-20*, COMMODITY FUTURES TRADING COMM’N (Dec. 17, 2020), <http://www.cftc.gov/PressRoom/PressReleases/8336-20> [<http://perma.cc/P3VQ-MNGA>].

⁶⁴ *See id.* A lack of consistent terminology plagues the crypto space. Among other words and phrases, cryptoassets have been called cryptocurrencies, crypto tokens, virtual currencies, digital assets, and virtual assets. This Article uses “cryptoasset” or simply “crypto,” a generic term designed to encompass all intangible assets that are stored and whose transaction histories are memorialized via blockchain technology on computer networks.

⁶⁵ Sebastian Sinclair, *CFTC Racked Up Crypto Enforcement Record in Past Year*, BLOCKWORKS (Oct. 21, 2022), <http://blockworks.co/news/cftc-racked-up-crypto-enforcement-record-in-past-year> [<http://perma.cc/6ADX-9M2B>].

⁶⁶ *See id.*

could take “primary responsibility” for crypto enforcement. “I think it’s important for this committee to reconsider and consider expanding authority to the CFTC,” he said.⁶⁷ He has also sought additional funding to support this agenda.⁶⁸

The CFTC has also taken issue with suggestions that it is not sufficiently stringent in its regulation of cryptoassets and transactions. Chairman Rostin Behnam has specifically denied that the CFTC is less assertive in its oversight of crypto.⁶⁹ Others have agreed, noting that “there is a misconception in the crypto industry about what it means to be a ‘friendly’ regulator.”⁷⁰ “Friendly” in the context of crypto means being “open to innovation,” not being lax with regard to enforcement.⁷¹ In fact, the CFTC rejects the notion that it should be viewed as friendlier to crypto in the sense of being more tolerant of any abuses.⁷² These efforts do not, however, mean that the current regulatory structure under the CEA is sufficiently comprehensive, or that the SEC and CFTC are the only agencies with a potential interest in crypto oversight.

II. THE LARGEST REGULATORY GAPS

Given that both the SEC and CFTC are actively seeking to oversee crypto transactions and businesses active in the space, it

⁶⁷ James Rubin, *CFTC Chair Indicates Agency Will Increase Crypto Enforcement: Report*, COINDESK (May 19, 2022), <http://www.coindesk.com/policy/2022/05/18/cftc-chair-indicates-agency-will-increase-crypto-enforcement-report/> [<http://perma.cc/RY8N-AZCW>].

⁶⁸ Additionally, in testimony before the Senate Committee on Agriculture, Nutrition and Forestry in February, Behnam urged lawmakers to give the CFTC more authority and a \$100 million increase to the agency’s annual budget of \$300 million to take on additional responsibilities in regulating the digital asset markets. See Allyson Versprille & Robert Schmidt, *CFTC Seeks Bigger Role in U.S. Efforts to Oversee Crypto Trading*, BLOOMBERG (Feb. 9, 2022), <http://www.bloomberg.com/news/articles/2022-02-09/cftc-seeks-bigger-role-in-u-s-efforts-to-oversee-crypto-trading> [<http://perma.cc/YY2J-2WQ5>].

⁶⁹ See Newton Gitonga, *CFTC Chair Dispels Narrative That the Regulator Would be Friendly to the Crypto Industry*, ZYCRYPTO (May 13, 2022), <http://zycrypto.com/cftc-chair-dispels-narrative-that-the-regulator-would-be-friendly-to-the-crypto-industry/> [<http://perma.cc/GE2U-4C6Q>]. This source reported that “CFTC chair Rostin Behnam has disclosed the commission is not going to be more friendly than other regulators.” *Id.* Backing up this claim, the CFTC “has gone after at least 30 different crypto firms in the last seven years, imposing fines totaling over \$787 million.” *Id.*

⁷⁰ In *CoinDesk*, Jeremy Liabo Examines Commodity Futures Trading Commission with Crypto Regulatory Teeth, ROPES&GRAY (Oct. 6, 2022), <http://www.ropesgray.com/en/newsroom/news/2022/october/in-coindesk-jeremy-liabo-examines-commodity-futures-trading-commission-with-crypto-regulatory-teeth> [<http://perma.cc/SZQ5-FUVH>].

⁷¹ *Id.*

⁷² “Its reputation as the ‘crypto-friendly’ regulator has dogged the CFTC since the beginning of its interactions with digital assets, much to the chagrin of current Chairman Rostin Behnam, who . . . gets ‘very irritated when folks start to talk about the CFTC as a more favorable regulator.’” Field, *supra* note 6.

seems obvious that resolving regulatory grey areas should be a high priority.⁷³ One risk of the current approach is that regulation by multiple agencies can result in duplication and over-regulation.⁷⁴ While that is certainly a valid concern, there are also at least three areas where there appear to be more significant issues causing problems for industry, regulators, and the public:⁷⁵ (1) the question of who should have authority over exchanges that deal in crypto that is not a security; (2) the question of what cryptoassets are securities; and (3) the question of how to deal with so-called stablecoins (a cryptoasset that is designed to have a stable value pegged to another asset, typically government currency such as the U.S. dollar or Euro).⁷⁶

A. Regulation of Exchanges for Crypto that is NOT a Security

One of the biggest existing holes in the way in which the United States approaches and regulates cryptoassets involves the lack of an effective regulator for exchanges that deal in cryptoassets that are not securities. As stated above, the SEC regulates securities and exchanges on which securities are traded,⁷⁷ but crypto exchanges continue to argue that the cryptoassets they list are not securities.⁷⁸ The CFTC regulates

⁷³ “Both the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) claim regulatory authority over the digital asset sphere, and the boundaries between the two are unclear. The result has been a jurisdictional grey area.” *Id.*

⁷⁴ Commentators have warned that over-regulation carries risks. “[P]oorly calibrated regulations or overly aggressive oversight not only risks flight to other crypto markets but also threatens a critical US national-security advantage: the dollar’s dominance as the world’s reserve currency . . .” Ian Talley, *Overregulation Could Push Illicit Crypto Transactions into the Market, US Experts Warn*, FIN. NEWS LONDON (Aug. 26, 2021), <http://www.fn london.com/articles/overregulation-could-push-illicit-crypto-transactions-into-the-market-us-experts-warn-20210826> [<http://perma.cc/ZLW4-PBC8>].

⁷⁵ Sheila Bair, former head of the Federal Deposit Insurance Corporation has explained that the lack of effective regulation in the crypto ecosystem has resulted in “more and more people . . . getting hurt.” *Ex-FDIC Head: People ‘Getting Hurt’ by Lack of Crypto Rules*, PYMNTS (Nov. 20, 2022), <http://www.pymnts.com/cryptocurrency/2022/ex-fdic-head-people-getting-hurt-by-lack-of-crypto-rules/> [<http://perma.cc/CRE5-DMHX>]. On October 3, 2022, in light of risks to the broader financial sector, a panel consisting of the leaders of all U.S. banking and financial agencies urged prioritization of crypto enforcement “and recommended that Congress provide regulatory agencies with more resources to police crypto.” Ephrat Livni, *Crypto Needs More Rules and Better Enforcement, Regulators Warn*, N.Y. TIMES (Oct. 3, 2022), <http://www.nytimes.com/2022/10/03/business/cryptocurrency-regulation-stablecoin.html> [<http://perma.cc/6M7V-V7D4>].

⁷⁶ See *infra* Part II.C. for a more detailed discussion of stablecoins.

⁷⁷ See *supra* notes 16–19 and accompanying text.

⁷⁸ Dave Michaels, *SEC Faces Calls to Boost Crypto-Exchange Enforcement After FTX Collapse*, MINT (Dec. 8, 2022, 6:46 PM), <http://www.livemint.com/market/cryptocurrency/sec-faces-calls-to-boost-crypto-exchange-enforcement-after-ftx-collapse-11670503857285.html>

exchanges on which futures and derivatives contracts in commodities are traded,⁷⁹ but does not regulate the spot markets for those commodities. Thus, when there is a cryptoasset that is not a security, which currently includes Bitcoin and possibly Ether,⁸⁰ neither agency has regulatory authority, although the CFTC can step in after the fact to enforce its anti-fraud mandate.⁸¹

This gap in regulatory oversight has not gone unremarked. CFTC Chair Behnam has repeatedly appealed to Congress, seeking authority over crypto spot markets.⁸² In a February 8, 2022, letter to members of the Senate Committee on Agriculture, Nutrition, and Forestry, Behnam wrote that “[t]he cash market for trading digital assets is currently subject to an insufficient patchwork of regulations.”⁸³ In his opinion, “there are important principles missing from the current regulatory framework applicable to digital asset markets that we see in other federally regulated markets, particularly ones that primarily cater to retail investors.”⁸⁴

He repeated this request in July 2022, noting that “there are several unique elements of the digital asset commodity cash

[<http://perma.cc/942P-FXKM>] (from a Wall Street Journal article, noting that “[c]rypto exchanges say the SEC is wrong about which U.S. laws apply to them and have resisted the agency’s warnings”).

⁷⁹ See *supra* note 50 and accompanying text. The CFTC “has two levels of jurisdiction: (a) a broad non-exclusive enforcement jurisdiction over interstate transactions in ‘commodities,’ and (b) an exclusive regulatory authority over the U.S. commodity derivatives markets.” Peter Y. Malyshev & Michael Ena, *In Depth: Regulation and Enforcement of the Digital Assets Markets, Part One – Jurisdiction*, CADWALADER (July 7, 2022), <http://www.cadwalader.com/fin-news/index.php?nid=19&eid=157> [<http://perma.cc/HBA2-775D>].

⁸⁰ The CFTC and SEC chairmen, for example, disagree about whether Ether is a security, although both apparently regard Bitcoin as only a commodity. Scott Nover, *US Commodities Chief Thinks Most Cryptocurrencies are Securities*, QUARTZ (Oct. 24, 2022), <http://qz.com/us-commodities-chief-thinks-most-cryptocurrencies-are-s-1849697645> [<http://perma.cc/AHX8-B8YN>]. This is particularly significant because these are the two most heavily capitalized cryptoassets. As of March 31, 2023, Bitcoin’s market capitalization was just over \$550 billion, and Ether’s was close to \$220 billion. The third most heavily capitalized cryptoasset, Tether, had a total market cap of just over \$66 billion. See *Today’s Cryptocurrency Prices by Market Cap*, COINMARKETCAP, <http://coinmarketcap.com> [<http://perma.cc/56WA-JJHH>].

⁸¹ See *supra* note 50 and accompanying text.

⁸² Nikhilesh De, *CFTC Should Oversee Crypto Spot Markets, Chief Reiterates Before Congress*, COINDESK (Feb. 9, 2022, 10:55 AM), <http://www.coindesk.com/policy/2022/02/09/cftc-should-oversee-crypto-spot-markets-chief-reiterates-before-congress/> [<http://perma.cc/XY5E-6X3V>].

⁸³ Letter from Rostin Behnam, Chairman, CFTC, to Debbie Stabenow, Chairwoman, U.S. S. Comm. on Agric., John Boozman, Ranking Member, U.S. S. Comm. on Agric., David Scott, Chairman, H. Comm. on Agric., and Glenn Thompson, Ranking Member, H. Comm. on Agric. at 6 (Feb. 8, 2022), <http://www.agriculture.senate.gov/imo/media/doc/2022%2002%2008%20Ag%20committees%20digital%20asset%20response%20letter.pdf> [<http://perma.cc/BS2Z-VJCE>].

⁸⁴ *Id.*

market that distinguish it from other cash commodity markets, suggesting it would benefit greatly from CFTC oversight. The most notable difference between the digital asset market and other commodity markets is the level of retail participation.”⁸⁵ Even more recently, following the collapse of FTX referenced at the beginning of this Article,⁸⁶ Behnam repeated the request for broader authority over crypto spot market exchanges.⁸⁷

Nor is Behnam the only person commenting on this gap in regulatory coverage. On December 1, 2022, at a hearing on “*Why Congress Needs to Act: Lessons Learned from the FTX Collapse*,” multiple members of the Senate Agriculture, Nutrition & Forestry Committee “reinforced their support for . . . [a bill], which would grant the CFTC the authority to regulate digital commodities and spot digital asset markets.”⁸⁸

The benefits of adequate regulation for these marketplaces seem clear. As noted elsewhere, adequate regulation “has the potential to protect long-term investors, prevent fraudulent activity within the crypto ecosystem, and provide clear guidance to allow companies to innovate in the crypto economy”⁸⁹ The trick, of course, is to make sure that regulations are appropriately tailored.

B. Lack of Clarity in Defining when Crypto is a Security

A second issue with existing crypto regulations is that they do not provide clarity as to which requirements apply. As a result, businesses often operate under the assumption or based on the position that they are outside the existing framework. This is particularly problematic when it comes to ascertaining when the

⁸⁵ Rostin Behnam, *Keynote Address of Chairman Rostin Behnam at the Brookings Institution Webcast on the Future of Crypto Regulation*, CFTC (July 25, 2022), <http://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam24> [<http://perma.cc/C843-T7R8>].

⁸⁶ See *supra* notes 1–3 and accompanying text.

⁸⁷ Nikhilesh De, *CFTC Chairman Suggests ‘Pause’ to Overhaul Senate Bill Following FTX Debacle*, COINDESK (Dec. 1, 2022, 7:21 PM), <http://www.coindesk.com/policy/2022/12/01/cftc-chair-suggests-pause-to-overhaul-senate-bill-following-ftx-debacle/?outputType=amp> [<http://perma.cc/6RV3-ZFL8>] (suggesting that although current bills might need reworking, it is important “to move forward as soon as possible”).

⁸⁸ Andrew M. Ray et al., *Congressional Hearings on FTX Collapse May Lead to Crypto Regulations*, MORGAN LEWIS BLOG (Dec. 5, 2022), <http://www.morganlewis.com/blogs/finreg/2022/12/congressional-hearings-on-ftx-collapse-may-lead-to-crypto-regulations> [<http://perma.cc/MV4B-UMSP>].

⁸⁹ Alex Gailey, *Why Cryptocurrency Regulation Is Actually ‘A Good Thing’ for Investors, According to These Experts*, TIME (Apr. 17, 2022), <http://time.com/nextadvisor/investing/cryptocurrency/why-crypto-regulation-is-good-for-investors/> [<http://perma.cc/5VKY-T9C7>] (citing Aaron Klein, a senior fellow in economics at the Brookings Institution).

SEC's authority extends to crypto transactions. As noted above, the SEC has significant authority over the sale of securities and over institutions such as exchanges that facilitate such sales.⁹⁰ The question is which cryptoassets are securities.

As of March 2023, the SEC had issued no formal rules or regulations confirming its apparent position that the *Howey* test means most or many cryptoassets are securities. However, the Chairman of the SEC from May 2017 to December 2020, Jay Clayton, was widely quoted as stating that every initial coin offering ("ICO") he had seen involved the sale of securities.⁹¹ The only real deviations from this position were unofficial statements that some widely dispersed or decentralized assets such as Bitcoin and possibly Ether are not securities.⁹²

⁹⁰ See *supra* notes 16–19 and accompanying text.

⁹¹ Beginning in December 2017, SEC Chairman Jay Clayton began repeating the mantra that most, if not all, ICOs involved the sale of securities. Chairman Jay Clayton, *Statement on Cryptocurrencies and Initial Coin Offerings*, U.S. SEC. & EXCH. COMM'N (Dec. 11, 2017), <http://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> [<http://perma.cc/TY9T-MKWX>] ("By and large, the structures of initial coin offerings that I have seen promoted involve the offer and sale of securities and directly implicate the securities registration requirements and other investor protection provisions of our federal securities laws.") In February 2018, in testimony before the Senate Committee on Banking, Housing, and Urban Affairs, he testified that "every ICO token the SEC has seen so far is considered a security . . ." See Joseph Young, *SEC Hints at Tighter Regulation for ICOs, Smart Policies for "True Cryptocurrencies"*, COINTELEGRAPH (Feb. 9, 2018), <http://cointelegraph.com/news/sec-hints-at-tighter-regulation-for-icos-smart-policies-for-true-cryptocurrencies> [<http://perma.cc/Z5KF-BXG9>]. While Chairman Clayton was always careful to explain that the SEC's approach required a consideration of the facts and circumstances of each transaction, his comments were widely accepted as reflecting at least a rebuttable presumption that all ICOs involved the sale of securities. See, e.g., Daniel C. Zinman, et al., *SEC Issues Warning to Lawyers on ICOs*, BLOOMBERG L. (Feb. 22, 2018, 1:31 PM), <http://news.bloomberglaw.com/tech-and-telecom-law/sec-issues-warning-to-lawyers-on-icos> [<http://perma.cc/FBB5-AWF9>]. This source examines a number of recent pronouncements and actions taken by the SEC and concludes that the Commission had "essentially adopted a rebuttable presumption that ICO tokens are securities that must comply with the registration requirements of the securities laws." *Id.*

⁹² In the summer of 2018, the SEC's Director of the Division of Corporate Finance, William Hinman, acknowledged that in his opinion not all cryptoassets fit the definition of investment contract, specifically pointing to Bitcoin and Ether as examples of tokens that should not be viewed as securities. See Dir. William Hinman, *Div. of Corp. Fin., Digital Asset Transactions: When Howey Met Gary (Plastic)*, U.S. SEC. & EXCH. COMM'N (June 14, 2018), <http://www.sec.gov/news/speech/speech-hinman-061418> [<http://perma.cc/H3YU-DX3K>]. In the case of those two assets, Hinman suggested that the underlying network was "sufficiently decentralized," so that "purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts . . ." *Id.* In his April 2018 testimony before the House Appropriations Committee, Chairman Clayton appeared to acquiesce in the view that Bitcoin, at least, would not be a security. He explained that "there are different types of cryptoassets A pure medium of exchange, the one that's most often cited, is Bitcoin. As a replacement for currency, that has been determined by most people to not be a security." Neeraj Agrawal, *SEC Chairman Clayton: Bitcoin is Not a Security*, COINCENTER

Recognizing the need for additional clarity, in 2019 the SEC released a “Framework” to explain its approach in more detail.⁹³ This document was attributed to FinHub, a portal designed to specifically engage with companies using blockchain and other innovative financial technologies. The Framework took the relatively short *Howey* test and expanded it into more than three dozen different elements,⁹⁴ most of which focus on the question of whether purchasers have a reasonable expectation of profits derived from the efforts of others.⁹⁵

Not surprisingly, this approach did little to address the confusion over when to classify cryptoassets as securities.⁹⁶ Even one SEC Commissioner took issue with the Framework:

While *Howey* has four factors to consider, the framework lists 38 separate considerations, many of which include several sub-points. A seasoned securities lawyer *might* be able to infer which of these considerations will likely be controlling and might therefore be able to provide the appropriate weight to each. . . . [N]on-lawyers and lawyers not steeped in securities law and its attendant lore will not know what to make of the guidance. Pages worth of factors, many of which seemingly apply to all decentralized networks, might contribute to the feeling that navigating the securities laws in this area is perilous business.⁹⁷

Commissioner Peirce’s conclusion was that the document “could raise more questions and concerns than it answers.”⁹⁸

(Apr. 27, 2018), <http://www.coincenter.org/sec-chairman-clayton-bitcoin-is-not-a-security/> [<http://perma.cc/S8MF-7AKH>]. Note that neither of these are official statements of the SEC and instead explicitly warn that they reflect only the opinion of the individual speaker.

⁹³ *Framework for “Investment Contract” Analysis of Digital Assets*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [<http://perma.cc/B52V-M99K>] (modified Apr. 3, 2019) [hereinafter *Framework*]. The Framework was accompanied by an explanatory statement from two SEC attorneys. Bill Hinman & Valerie Szczepanik, *Statement on “Framework for ‘Investment Contract’ Analysis of Digital Assets,”* U.S. SEC. & EXCH. COMM’N (Apr. 3, 2019), <http://www.sec.gov/news/public-statement/statement-framework-investment-contract-analysis-digital-assets> [<http://perma.cc/YV6E-MX6D>].

⁹⁴ For a more involved discussion of the *Howey* test, its four elements, and the application of the test to cryptoassets, see Goforth, *supra* note 5.

⁹⁵ *Framework*, *supra* note 93.

⁹⁶ In fact, the Framework itself appeared to add to the uncertainties in the crypto space and, as one law firm contended, confused and conflated the appropriate analysis as to when cryptoassets are securities. *When it Comes to Analyzing Utility Tokens, the SEC Staff’s “Framework for ‘Investment Contract’ Analysis of Digital Assets” May Be the Emperor Without Clothes (or, Sometimes an Orange Is Just an Orange) (Part I)*, WINSTON & STRAWN LLP (Oct. 28, 2019), <http://www.winston.com/en/crypto-law-corner/when-it-comes-to-analyzing-utility-tokens-the-sec-staffs-framework-for-investment-contract-analysis-of-digital-assets-may-be-the-emperor-without-clothes-or-sometimes-an-orange-is-just-an-orange.html> [<http://perma.cc/BB42-9VJW>].

⁹⁷ Comm’r Hester M. Peirce, *How We Howey*, U.S. SEC. & EXCH. COMM’N (May 9, 2019), <http://www.sec.gov/news/speech/peirce-how-we-howey-050919> [<http://perma.cc/9YHW-XMXA>].

⁹⁸ *Id.*

Despite its complexity, the Framework did appear to confirm that not all cryptoassets will be securities. The conclusion of the document notes that it “identifies some of the factors market participants should consider in assessing whether a digital asset is offered or sold as an investment contract and, therefore, is a security.”⁹⁹ It also observes that other factors may be relevant and that under some circumstances crypto that starts as a security may cease being one.¹⁰⁰ The Framework unfortunately does not clearly articulate when that might occur.

The only other information from the SEC under Chairman Clayton consisted of a handful of no-action letters concluding that certain forms of crypto which are not convertible into fiat or have no possibility of appreciation would be outside the securities laws.¹⁰¹ These are widely regarded as having very limited applicability to the vast majority of cryptoassets.¹⁰²

When Chairman Clayton resigned at the end of 2020, he was replaced with Gary Gensler, who was sworn into office on April 17, 2021.¹⁰³ While crypto enthusiasts were briefly hopeful that Chairman Gensler would be more supportive of crypto businesses than his predecessor,¹⁰⁴ this assessment appears to have missed the target. On August 3, 2021, Gensler explicitly announced his agreement with Clayton, explaining that “he believes the vast majority of crypto tokens and initial coin offerings (ICOs) violate

⁹⁹ *Framework*, *supra* note 93.

¹⁰⁰ *See id.*

¹⁰¹ *See, e.g.*, Jonathan A. Ingram, *Response of the Division of Corporation Finance*, U.S. SEC. & EXCH. COMM’N (Apr. 3, 2019), <http://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm> [<http://perma.cc/3EHX-Y4NE>] (the tokens in question had a fixed price and were non-transferable, being redeemable only at a discount); Jonathan A. Ingram, *Pocketful of Quarters, Inc. Response of the Division of Corporation Finance*, U.S. SEC. & EXCH. COMM’N (July 25, 2019), <http://www.sec.gov/corpfin/pocketful-quarters-inc-072519-2a1> [<http://perma.cc/9YNB-YMYE>] (tokens would be locked up in on-line gaming platforms).

¹⁰² *See* Client Alert, *The SEC’s Limited Guidance on Crypto Tokens in No-Action Letters*, KRAMER LEVIN (Nov. 14, 2022), <http://www.kramerlevin.com/en/perspectives-search/the-secs-limited-guidance-on-crypto-tokens-in-no-action-letters.html> [<http://perma.cc/NPE8-38LS>] (noting that “[t]he SEC has not addressed factors that would be common to many other frequently used types of crypto tokens”).

¹⁰³ *Biography Chair Gary Gensler*, U.S. SEC. & EXCH. COMM’N <http://www.sec.gov/about/commissioners/gary-gensler> [<http://perma.cc/P4B2-BAHF>].

¹⁰⁴ *See, e.g.*, Shanny Basar, *Crypto Industry Eyes Gensler at SEC*, TRADERS MAG. (Jan. 21, 2021), <http://www.tradersmagazine.com/departments/brokerage/crypto-industry-eyes-gary-gensler-at-sec/> [<http://perma.cc/7R2X-E397>] (including a tweet from “Machina Trader” commenting hopefully that the appointment of “crypto-savvy Gary Gensler” would be a “move that could be advantageous for the industry . . .”).

U.S. securities laws.”¹⁰⁵ Under his leadership, the SEC has continued to assert the view that the federal securities laws apply broadly to cryptoassets.¹⁰⁶

Some of the SEC’s actions have been quite controversial. For example, in December 2020, the SEC initiated a lawsuit alleging that Ripple’s XRP token was a security.¹⁰⁷ That lawsuit resulted in a class action suit against the SEC joined by tens of thousands of XRP purchasers objecting to this classification.¹⁰⁸ The SEC also made waves in July 2022 when it brought insider trading charges against a former Coinbase manager and two tippees, claiming that trades had been made just before Coinbase listed twenty-five cryptoassets and that “at least” nine of those assets were securities.¹⁰⁹ It did not explain why it singled out those particular assets as securities and did not include the other assets or what the agency meant when it claimed that “at least” those nine were securities.¹¹⁰ Interestingly, it also did not make (and as of the end of 2022, had not made) any formal assertion that Coinbase had been illegally operating as an unregistered securities exchange, despite trading in the assets identified in the insider trading case.¹¹¹

¹⁰⁵ See Nikhilesh De, *SEC Chairman Gensler Agrees with Predecessor: ‘Every ICO Is a Security,’* COINDESK, <http://www.coindesk.com/markets/2021/08/03/sec-chairman-gensler-agrees-with-predecessor-every-ico-is-a-security/> [<http://perma.cc/SHB5-KH75>] (last updated Sept. 14, 2021). “In a speech at the Aspen Security Forum on Tuesday, Gensler said he agreed with Jay Clayton, his predecessor at the SEC, who once famously said that in his view, ‘every ICO I’ve seen is a security.’” *See id.*

¹⁰⁶ For a list of various enforcement actions brought by the SEC involving cryptoassets, see *Crypto Assets and Cyber Enforcement Actions*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/spotlight/cybersecurity-enforcement-actions> [<http://perma.cc/6QKE-QBSE>] (last visited Jan. 29, 2023).

¹⁰⁷ The SEC initiated enforcement proceedings against Ripple Labs on December 22, 2020, alleging that Ripple’s XRP was a security. *See* Complaint at 2, SEC v. Ripple Labs, Inc. et al., No. 1:20-cv-10832-AT-SN (S.D.N.Y. filed Dec. 22, 2020) (No. 20 Civ. 10832). Note that the Complaint also names Ripple’s original and current CEOs (Christian A. Larson and Bradley Garlinghouse, respectively) as defendants. They are named both for their own sales of XRP and for aiding and abetting in Ripple’s alleged violations. *See id.* at 1.

¹⁰⁸ *See* Qadir AK, *Ripple vs SEC: This Move by John Deaton Could Support XRP Holders*, COINPEDIA (Oct. 8, 2022), <http://coinpedia.org/ripple/ripple-vs-sec-this-move-by-john-deaton-could-support-xrp-holders/> [<http://perma.cc/226L-E9RW>] (reporting that more than 72,000 XRP investors had joined the lawsuit).

¹⁰⁹ *See SEC Charges Former Coinbase Manager, Two Others in Crypto Asset Insider Trading Action*, Press Release No. 2022-127, U.S. SEC & EXCH. COMM’N (July 21, 2020), <http://www.sec.gov/news/press-release/2022-127> [<http://perma.cc/5Q5E-LN3U>].

¹¹⁰ *See* Alexandra C. Scheibe et al., *Inside Out: Is a Recent Crypto Asset Insider Trading Case a Prelude to More SEC Enforcement Actions?*, MCDERMOTT WILL & EMERY (July 21, 2022), <http://www.mwe.com/insights/inside-out-is-a-recent-crypto-asset-insider-trading-case-a-prelude-to-more-sec-enforcement-actions/> [<http://perma.cc/8DQV-SKUZ>].

¹¹¹ On March 22, 2023, Coinbase revealed that the SEC had sent it notice regarding “an unspecified portion” of the platform’s digital assets. *See* Grewal, *supra* note 36. This

To some extent, the SEC's aggressive posture has paid off. The SEC has won victories in several cases to date, including judicial determinations that Kik's sale of its KIN tokens and Telegram's planned distribution of GRAMs involved securities.¹¹² On November 7, 2022, the Commission notched another win, this time in the New Hampshire District Court in *SEC v. LBRY*,¹¹³ when the court granted the SEC's motion for summary judgment on the grounds that the LBRY token was a security.¹¹⁴ Even this, however, has not resolved the ongoing concern that the SEC seems to be regulating by enforcement rather than through consultative rulemaking.¹¹⁵

The lack of clarity in knowing which cryptoassets will be treated as securities, combined with an aggressive regulatory stance from the SEC, has led a number of crypto entrepreneurs to structure their dealings so as to exclude U.S. based participants. For example, it was reported that in the first quarter of 2019, eighty-six ICOs were specifically structured to exclude U.S. based investors, making the United States the single country most likely to be excluded from crypto offerings, followed by North Korea, Iran, and Syria.¹¹⁶ Crypto lending programs are also often structured to

suggests that the SEC may be proceeding in the direction of an enforcement action, although as of the end of March 2023, the SEC had refused to indicate which cryptoassets it believed to be securities. *Id.*

¹¹² See *Telegram to Return \$1.2 Billion to Investors and Pay \$18.5 Million Penalty to Settle SEC Charges*, Press Release No. 2020-146, U.S. SEC. & EXCH. COMM'N (June 26, 2020), <http://www.sec.gov/news/press-release/2020-146> [<http://perma.cc/2LGQ-6MHU>]; *SEC Obtains Final Judgment Against Kik Interactive for Unregistered Offering*, Press Release No. 2020-262, U.S. SEC. & EXCH. COMM'N (Oct. 21, 2020), <http://www.sec.gov/news/press-release/2020-262> [<http://perma.cc/TB28-R9LJ>].

¹¹³ See *SEC Granted Summary Judgment Against New Hampshire Issuer of Crypto Asset Securities for Registration Violations*, U.S. SEC. & EXCH. COMM'N (Nov. 7, 2022), <http://www.sec.gov/litigation/litreleases/2022/lr25573.htm> [<http://perma.cc/M2KL-TZYU>].

¹¹⁴ See Jody Godoy, *U.S. Securities Regulators Win Case Against Crypto Company LBRY*, REUTERS (Nov. 7, 2022), <http://www.reuters.com/legal/transactional/us-securities-regulators-win-case-against-crypto-company-lbry-2022-11-07/> [<http://perma.cc/ACW5-TSRA>].

¹¹⁵ SEC officials acknowledge the issue. Chairman Gensler has noted the frequent complaint that the Commission regulates by enforcement. See Chair Gary Gensler, *Prepared Remarks at the Securities Enforcement Forum*, U.S. SEC. & EXCH. COMM'N (Nov. 4, 2021), <http://www.sec.gov/news/speech/gensler-securities-enforcement-forum-20211104> [<http://perma.cc/C9SC-JEMB>]. His response has been that "[s]ome market participants may call this 'regulation by enforcement.' I just call it 'enforcement.'" See *id.*; see also Gurbir S. Grewal, *2021 SEC Regulation Outside the United States – Scott Friestad Memorial Keynote Address*, U.S. SEC. & EXCH. COMM'N (Nov. 8, 2021), <http://www.sec.gov/news/speech/grewal-regulation-outside-united-states-110821> [<http://perma.cc/687M-572J>] ("In my three months in this role, I have heard more than three times the refrain that we are 'regulating by enforcement.'").

¹¹⁶ See Lukas Hofer, *Why Token Issuers Exclude U.S. Investors*, ICO.LI (Apr. 26, 2019), <http://ico.li/us-investors/> [<http://perma.cc/V8KQ-YNFG>].

exclude U.S. participants.¹¹⁷ Major crypto exchanges exclude U.S. customers, to the confusion and disappointment of many.¹¹⁸ In fact, the CEO of Coinbase has estimated that nearly ninety-five percent of crypto trading activity has been driven to offshore exchanges as a result of the SEC's failure to provide clear regulations.¹¹⁹

The lack of regulatory certainty has been described as a “massive barrier” to responsible innovation in the crypto ecosystem.¹²⁰ Dan Doney, CEO of blockchain infrastructure company Securrency Inc., has opined that the United States has “a responsibility to provide that regulatory certainty if we want to be an innovative leader in financial service technology. If we choose not to lead in innovation in financial technologies, we risk losing that benefit that we’ve had of being an innovative society.”¹²¹

C. Stablecoin Regulation

A third area where events have made it clear that additional clarity is needed is with regard to stablecoins and how they are regulated. Stablecoins are a form of cryptoasset designed to have stable pricing “pegged to an external asset class such as a single fiat currency (with the U.S. dollar being the most popular),” a basket of fiat currencies, “or a tangible commodity (such as gold).”¹²² A stablecoin may be collateralized off-chain, meaning that the issuer or a related entity holds sufficient amounts of the relevant fiat or commodity to ensure price stability, or on-chain,

¹¹⁷ See Chris Grundy, *Crypto Lending in the United States*, SELFKEYBLOG (June 12, 2020), <http://selfkey.org/crypto-lending-in-the-united-states/> [<http://perma.cc/W4H4-GWT9>].

¹¹⁸ “The U.S. remains a challenging environment for centralized cryptocurrency exchanges, with major players significantly scaling back their operations and others heading for the door.” See Kai Sedgewick, *As Crypto Exchanges Exit the US, Which Trading Platforms Will Enter the Breach?*, BITCOIN.COM (Oct. 24, 2019), <http://news.bitcoin.com/as-crypto-exchanges-exit-the-us-which-trading-platforms-will-enter-the-breach/> [<http://perma.cc/7PH9-76PP>]; Benjamin Pirus, *Crypto Exchanges Barring US Citizens is Heartbreaking and Frustrating*, FORBES (Sept. 30, 2020), <http://www.forbes.com/sites/benjaminpirus/2020/09/30/crypto-exchanges-barring-us-citizens-is-heartbreaking-and-frustrating/?sh=18e3f7527c97> [<http://perma.cc/27ZF-BRJU>] (“Part of the difficulty lies in the uncertainty. I am not a legal professional, so I do not know exactly why I am banned from using the top exchanges in the industry. Other average folks likely feel the same.”).

¹¹⁹ Prashant Jha, *Regulators Face Public Ire After FTX Collapse, Experts Call for Coordination*, COINTELEGRAPH (Dec. 4, 2022), <http://cointelegraph.com/news/regulators-face-public-ire-after-ftx-collapse-experts-call-for-coordination> [<http://perma.cc/HR6U-SJ65>].

¹²⁰ Betsy Vereckey, *Who Will Regulate Crypto and FinTech in the US?*, MIT MGMT. SLOAN SCHOOL (Nov. 8, 2022), <http://mitsloan.mit.edu/ideas-made-to-matter/who-will-regulate-crypto-and-fintech-us> [<http://perma.cc/Q5CP-ENF2>].

¹²¹ *Id.*

¹²² Carol R. Goforth, *What Does the Decline in the U.S. Dollar’s Global Role Mean for Cryptocurrencies?*, 66 ST. LOUIS U. L.J. 249, 258 (2022).

by holding other cryptoassets.¹²³ It is also possible for a stablecoin to be uncollateralized, depending instead on algorithms and smart contracts governing the buying and selling of the asset to keep a stable price.¹²⁴ Early stablecoins, such as NuBits, experimented with this option,¹²⁵ but the most recently famous (or infamous) example of an algorithmic stablecoin was UST (also referred to as TerraUSD).¹²⁶

Stablecoins present multiple problems for potential regulators. Initially, there was a significant concern about fraud or misrepresentation in connection with how the value of the asset is protected. The most significant illustration of this is provided by the first successful stablecoin, USDT (colloquially known as Tether).¹²⁷ The original concept was that each USDT would be

¹²³ MakerDAO, *Stablecoins: Collateralization Types*, MEDIUM (Dec. 12, 2018), <http://medium.com/@MakerDAO/stablecoins-collateralization-types-2a860624dcd3> [<http://perma.cc/2FH5-52MH>].

¹²⁴ Werner Vermaak, *Stablecoins: The Complete Guide, Part I – Past & Present (2014-2019)*, COOLWALLET (Sept. 22, 2019), [http://www.coolwallet.io/the-complete-guide-to-stablecoins-part-i-2014-2019/#:~:text=BitUSD%20\(July%202014\),and%20Charles%20Hoskinson%20\(Cardano\)](http://www.coolwallet.io/the-complete-guide-to-stablecoins-part-i-2014-2019/#:~:text=BitUSD%20(July%202014),and%20Charles%20Hoskinson%20(Cardano)) [<http://perma.cc/3XA9-8KJG>] (the archived version needs to be viewed in screenshot mode).

¹²⁵ *Id.*

¹²⁶ In early May 2022, an algorithmic stablecoin, UST or TerraUSD, imploded spectacularly, resulting in a spate of headlines and new questions about the need to regulate this asset class. Oliver Povey, *Cryptocurrency Prices: What is the Correlation Between UST and Luna That Explains Its Big Drop?*, AS (May 16, 2022, 7:51 PM), http://en.as.com/latest_news/cryptocurrency-prices-what-is-the-correlation-between-ust-and-luna-that-explains-its-big-drop-n/ [<http://perma.cc/63BE-WC7K>]. “Before May 10, TerraUSD was in the top 10 most valuable cryptocurrencies with an estimated market value of more than \$40 billion. However, a huge market crash sent the value tumbling (understatement) to \$500 million, a drop of nearly 99 percent.” *Id.* It appears that the “network as it once was can’t be salvaged.” Daniel Kuhn, *UST Won’t Be the End of Algorithmic Stablecoins*, COINDESK (May 16, 2022, 11:14 AM), <http://www.coindesk.com/layer2/2022/05/16/ust-wont-be-the-end-of-algorithmic-stablecoins/> [<http://perma.cc/UFK5-P6LR>]; see also Matt Phillips, *Broken Stablecoin Could Intensify Crypto Regulation Push*, AXIOS (May 12, 2022), <http://www.axios.com/2022/05/12/broken-stablecoin-could-intensify-crypto-regulation-push> [<http://perma.cc/AC5M-43JW>].

¹²⁷ David Hamilton, *What Is Tether? Everything You Need to Know*, SECURITIES.IO, <http://www.securities.io/what-is-tether-a-look-at-the-worlds-most-popular-stablecoin/> [<http://perma.cc/E8YC-D6RP>] (Mar. 20, 2022). One point of confusion or ambiguity frequently encountered in the crypto space is the inconsistent use of terminology. For example, “Bitcoin” refers both to the network and the underlying cryptoasset. See *Frequently Asked Questions*, BITCOIN, <http://bitcoin.org/en/faq> [<http://perma.cc/Z22G-LBYP>] (last visited Jan. 11, 2023) (describing Bitcoin as both “a consensus network,” and “pretty much like cash for the internet,” referring to the asset). That may not be terribly confusing when talking about a cryptoasset like Bitcoin that is the only cryptoasset associated with the underlying computer network. However, Ethereum (the network) supports a huge variety of cryptoassets, including Ether (its native token). The confusing part is that “Ethereum” is very widely used to refer to Ether as well as the network.

backed by one U.S. dollar, although Tether Limited (the issuer) has since maintained that it is not contractually obligated to guarantee that USDT can be redeemed or exchanged for dollars or other fiat.¹²⁸ With rumors circulating that Tether did not have adequate reserves and in the absence of reliable audit information, USDT dropped below one dollar in October 2018.¹²⁹

Subsequent investigation revealed that Tether had made multiple false claims about how USDT was backed¹³⁰ and had also falsely denied the company's connection to BitFinex.¹³¹ These actions led not to an enforcement action by the SEC, but to a

Toshendra Kumar Sharma, *Is Ether the Same as Ethereum?*, BLOCKCHAIN COUNCIL (Oct. 4, 2019), <http://www.blockchain-council.org/blockchain/is-ether-the-same-as-ethereum/> [<http://perma.cc/42W6-DX9P>] (noting that “Ether and Ethereum are often used in the same context”). Similarly, “Tether” is both the name of the company, and the word used to describe the token (identified in this Article as USDT, its trading symbol). See, e.g., Ryan Browne, *Why Tether, the World’s Third-Biggest Cryptocurrency, Has Got Economists Worried*, CNBC (July 7, 2021, 11:39 AM), <http://www.cnbc.com/2021/07/07/tether-cryptocurrency-usdt-what-you-need-to-know.html> [<http://perma.cc/TPQ7-GYH3>] (talking about Tether as both the cryptoasset itself and the underlying enterprise that holds the assets backing the stablecoin). This Article generally uses USDT to refer to the cryptoasset and Tether to refer to the underlying network and associated entities. Terra was the company and network, but it is also the label used to describe UST (one of two cryptoassets native to the network, the other being Luna). Q.ai, *What Really Happened to LUNA Crypto?*, FORBES (Sept. 20, 2022, 11:57 AM), <http://www.forbes.com/sites/qai/2022/09/20/what-really-happened-to-luna-crypto/?sh=4ddf9e444ff1> [<http://perma.cc/G6U4-F9EY>]; see also *What Is Terra in Crypto? Definition, How It Works, Vs. Luna*, INVESTOPEDIA (Sept. 26, 2022), <http://www.investopedia.com/terra-5209502#:~:text=Terra%20is%20an%20open%2Dsource%20blockchain%20protocol%20that%20underpins%20algorithmic,the%20other%20one%20being%20Luna> [<http://perma.cc/4QYU-EX7M>] (reporting that “Terra is an open-source blockchain protocol” and that it “is one of the two main cryptocurrency tokens under this protocol”). This Article uses UST to refer to the cryptoasset and “Terra” to talk about the companies involved in creating the UST-Luna ecosystem.

¹²⁸ David Dinkins, *The Strange Story of Tether, the Digital Money That Claims It Isn’t Money*, COINTELEGRAPH (Aug. 17, 2017), <http://cointelegraph.com/news/the-strange-story-of-tether-the-digital-money-that-claims-it-isnt-money> [<http://perma.cc/EVP7-Q5VH>].

¹²⁹ Gareth Jenkinson, *Untethered: The History of Stablecoin Tether and How It Has Lost Its \$1 Peg*, COINTELEGRAPH (Oct. 17, 2018), <http://cointelegraph.com/news/untethered-the-history-of-stablecoin-tether-and-how-it-has-lost-its-1-peg> [<http://perma.cc/2PMP-8L4S>]. Historical pricing information about USDT can be obtained on CoinMarketCap.com. *Historical Data for Tether*, COINMARKETCAP, <http://coinmarketcap.com/currencies/tether/historical-data/> [<http://perma.cc/8PSU-S29X>] (last visited Mar. 2, 2023). While USDT did drop to \$.9771 on October 17, 2018, it was again trading at \$1.00 in early December of that year. *Id.*

¹³⁰ Paul Vigna, *Bitfinex Used Tether Reserves to Mask Missing \$850 Million, Probe Says*, WALL ST. J. (Apr. 25, 2019, 11:21 PM), <http://www.wsj.com/articles/bitfinex-used-tether-reserves-to-mask-missing-850-million-probe-finds-11556227031> [<http://perma.cc/5JSC-SGBK>]. As described in this story, the New York Attorney General leveled these accusations as part of its investigation against Bitfinex and its parent, iFinex. *Id.*

¹³¹ See Jordan Atkins, *Crypto Crime Cartel: The End Is Nigh for Tether*, COINGEEK (Jan. 15, 2021), <http://coingeek.com/crypto-crime-cartel-the-end-is-nigh-for-tether/> [<http://perma.cc/YGP7-XRN7>].

lawsuit by the New York State Attorney General that was finally settled in February 2021.¹³² On May 13, 2021, Tether released the asset breakdown for its reserves, indicating that cash accounted for only 2.9% of the reserves, while the company relied on commercial paper and fiduciary deposits of unclear liquidity and security for most of its backing.¹³³

While there have been indications that the SEC might be investigating Tether,¹³⁴ in the absence of any actual action, in October 2021, the CFTC announced an order that both initiated and settled “charges against Tether Holdings Limited, Tether Limited, Tether Operations Limited, and Tether International Limited (d/b/a Tether)” for lying about USDT.¹³⁵ The CFTC’s primary concern in this action was that Tether had engaged in a pattern of deceit about the way in which the stablecoin was supposed to be backed.¹³⁶

¹³² See Attorney General James Ends Virtual Currency Trading Platform Bitfinex’s Illegal Activities in New York, NY ATTY GEN. (Feb. 23, 2021), <http://ag.ny.gov/press-release/2021/attorney-general-james-ends-virtual-currency-trading-platform-bitfinexs-illegal?ref> [<http://perma.cc/S4J7-F6DX>]; see also Duncan Riley, *iFinex Agrees to Pay \$18.5M to Settle New York Tether Lawsuit*, SILICONANGLE (Feb. 23, 2021, 11:45 PM), <http://siliconangle.com/2021/02/23/ifinex-agrees-pay-18-5m-settle-new-york-tether-lawsuit/> [<http://perma.cc/48D3-3RUC>].

¹³³ ValExplorer, *Should We Worry About Tether?* MEDIUM (May 19, 2021), <http://medium.com/coinmonks/should-we-worry-about-tether-1fc1727ebe4c> [<http://perma.cc/Q4DG-MXKM>].

¹³⁴ See Nikhilesh De, *SEC Hints at Tether Probe in Records Request Denial*, COINDESK (Sept. 24, 2021, 11:42 AM), <http://www.coindesk.com/policy/2021/09/24/sec-hints-at-tether-probe-in-records-request-denial/> [<http://perma.cc/54DW-H3B5>]. The SEC declined to release records about Tether in response to an FOIA request from Jacob Silverman, a staff writer at *The New Republic*, on the grounds that they were collected for enforcement purposes. See *id.*; FOIA Request Response from Adrienne M. Santos, FOIA Branch Chief, to Jacob Silverman, The New Republic Staff Writer (Sept. 22, 2021), <http://www.muckrock.com/foi/united-states-of-america-10/tether-stablecoin-company-securities-and-exchange-commission-118568/#file-972087> [<http://perma.cc/K8JM-QHE4>].

¹³⁵ *CFTC Orders Tether and Bitfinex to Pay Fines Totaling \$42.5 Million*, Press Release No. 8450-21, COMMODITY FUTURES TRADING COMM’N (Oct. 15, 2021), <http://www.cftc.gov/PressRoom/PressReleases/8450-21> [<http://perma.cc/YL9E-BC2H>]. At the same time, Bitfinex was ordered to pay \$1.5 million for illegal transactions while it operated the Bitfinex crypto exchange. See *id.*

¹³⁶ The order included the following findings:

Tether misrepresented to customers and the market that Tether maintained sufficient U.S. dollar reserves to back every USDT in circulation with the “equivalent amount of corresponding fiat currency” held by Tether and “safely deposited” in Tether’s bank accounts. In fact Tether reserves were not “fully-backed” the majority of the time. The order further finds that Tether failed to disclose that it included unsecured receivables and non-fiat assets in its reserves, and that Tether falsely represented that it would undergo routine, professional audits

Id.

Even following these legal actions, USDT continues to be very actively traded. According to CoinMarketCap, the circulating supply of USDT as of March 30, 2023, exceeded 79.5 billion tokens.¹³⁷ The same source listed a 24-hour trading volume on that day of nearly 32 billion USDT.¹³⁸

In addition to problems with outright fraud in the stablecoin space, the recent collapse of UST provides evidence of an additional issue.¹³⁹ UST was designed as an algorithmic stablecoin pegged to the U.S. dollar, but its issuer, Terra, never intended to invest in U.S. dollars or U.S. dollar-denominated assets.¹⁴⁰ Instead, Terra matched UST to another cryptoasset used in its ecosystem: Luna.¹⁴¹ At its highest value, a single Luna was listed at approximately \$116—a 135% increase from the trading price a mere two months earlier.¹⁴² When the value of the crypto markets plunged, the value of Luna also dropped, threatening the pegged value of UST, but it might have been the sudden withdrawal of over \$2 billion in UST from the Anchor platform on May 7, 2022, that triggered the system's ultimate demise.¹⁴³ These events led to an escalating pattern of withdrawals as the value of UST continued to drop,¹⁴⁴ which eventually led to a complete collapse of the system.¹⁴⁵

¹³⁷ See *Historical Data for Tether*, COINMARKETCAP, <http://coinmarketcap.com/currencies/tether/historical-data/> [<http://perma.cc/Z3CX-SUQE>] (last visited Mar. 30, 2023).

¹³⁸ *Id.*

¹³⁹ This is a particular issue because both the CFTC and SEC only generally concern themselves with issues such as adequate disclosures or actual fraud, leading some authorities to suggest that stablecoins have, to date, escaped systematic regulation. See Timothy G. Massad, *Regulating Stablecoins Isn't Just About Avoiding Systemic Risk*, BROOKINGS (Oct. 5, 2021) [hereinafter Massad, *Stablecoins*], <http://www.brookings.edu/research/regulating-stablecoins-isnt-just-about-avoiding-systemic-risk/> [<http://perma.cc/ZF44-RJEZ>] (“Stablecoins are currently not regulated in any meaningful way.”).

¹⁴⁰ See Q.ai, *supra* note 127. Instead of being backed by U.S. dollars or similarly liquid investments readily convertible into U.S. dollars, UST was backed by another token on the Terra network: Luna. See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.* One reason for this rapid rise in value was the ability for owners to stake UST on the Anchor crypto lending program for an annual yield of 20%. *Id.*

¹⁴³ See Vremaroiu Alin, *What Are Terra and UST and Which Was the Cause for Terra Crash?*, MEDIUM (May 15, 2022), <http://medium.com/coinmonks/what-are-terra-and-ust-and-which-was-the-cause-of-terra-crash-e2cd46643922> [<http://perma.cc/K9DV-D9D5>].

¹⁴⁴ See Krisztian Sandor, *Investors Flee Terra's Anchor as UST Stablecoin Repeatedly Loses \$1 Peg*, COINDESK (May 9, 2022, 3:12 PM), <http://www.coindesk.com/markets/2022/05/09/investors-flee-terras-anchor-as-ust-stablecoin-repeatedly-loses-1-peg/> [<http://perma.cc/Q7DD-UBSH>].

¹⁴⁵ See *The Trades That Triggered TerraUSD's Collapse*, CHAINALYSIS (June 9, 2022), <http://blog.chainalysis.com/reports/how-terrausd-collapsed/> [<http://perma.cc/4F5W-P2T6>].

One source has estimated that the collapse of UST (and the associated Luna token) led to an economic loss of nearly half a trillion in U.S. dollars across the crypto markets.¹⁴⁶ The interconnectedness in the crypto ecosystem contributed to this impact. Reliance on UST and Luna eventually contributed to a host of bankruptcies in crypto companies, including those of crypto lender Celsius, hedge fund Three Arrows Capital, trading and lending platform BlockFi, and crypto brokerage firm Voyager Digital.¹⁴⁷

There appears to be general agreement that stablecoins need a clearer regulatory framework,¹⁴⁸ ideally one that encompasses “prudential regulation standards, but also operational risk measures, consumer protection standards, and standards to achieve interoperability.”¹⁴⁹ On November 1, 2021, the President’s Working Group on Financial Markets and other federal regulators issued a report on stablecoins.¹⁵⁰ This report concludes that there are gaps in existing regulations applicable to stablecoins suggesting the need for Congressional action,¹⁵¹ specifically with regard to prudential considerations.¹⁵²

¹⁴⁶ *What Happened to Terra?*, CORP. FIN. INST., <http://corporatefinanceinstitute.com/resources/cryptocurrency/what-happened-to-terra/> [<http://perma.cc/M7GC-F8CD>] (last updated Feb. 1, 2023).

¹⁴⁷ See George Glover, *The FTX Implosion Wasn’t Crypto’s Darkest Hour of the Year – These 2 Crises Were Even More Disastrous for Digital Assets*, MARKETS INSIDER (Dec. 17, 2022), <http://markets.businessinsider.com/news/currencies/ftx-bankruptcy-collapse-crypto-crash-3ac-celsius-terra-luna-chainalysis-2022-12> [<http://perma.cc/NQ3S-8TX2>]; see also Allyson Versprille et al., *US Investigating Bankrupt Crypto Hedge Fund Three Arrows Capital*, BLOOMBERG TAX (Oct. 17, 2022), <http://news.bloombergtax.com/crypto/us-investigating-bankrupt-crypto-hedge-fund-three-arrows-capital> [<http://perma.cc/TK6Z-CCNE>]. For a discussion of the link between Terra’s collapse and Three Arrows Capital, see Hamza Shaban, *Crypto Broker Voyager Digital Files for Bankruptcy as Industry Falters*, WASH. POST (July 6, 2022), <http://www.washingtonpost.com/business/2022/07/06/voyager-bankruptcy-three-arrows/> [<http://perma.cc/S8P8-LFH3>].

¹⁴⁸ USDT has become so important to the crypto ecosystem that a number of observers have expressed concern that it poses a possible systemic risk to the entire crypto market. See Elizabeth Lopatto, *The Tether Controversy Explained*, THE VERGE (Aug. 16, 2021), <http://www.theverge.com/22620464/tether-backing-cryptocurrency-stablecoin> [<http://perma.cc/V5T3-3TKT>].

¹⁴⁹ Massad, *Stablecoins*, *supra* note 139.

¹⁵⁰ PRESIDENT’S WORKING GRP. OF FIN. MKT., THE FED. DEPOSIT INS. CORPS., & THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, REPORT ON STABLECOINS (2021), http://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf [<http://perma.cc/8WG3-PA5T>] [hereinafter STABLECOIN REPORT].

¹⁵¹ “Because responsibilities within many of these arrangements are widely distributed, and currently fall within the jurisdiction of different regulatory agencies, or outside of the regulatory perimeter altogether, there is a risk of incomplete or fragmented oversight.” *Id.* at 15.

¹⁵² See *id.* at 16–18.

III. POTENTIAL LEGISLATIVE FIXES

There is no clear consensus on whether the SEC or the CFTC is in a better position to oversee cryptoassets and transactions, or whether other agencies might need to be involved. Certainly, both the SEC and CFTC would like to take a leadership position in the space.¹⁵³ This disagreement is one of the barriers to new legislation and updated regulations.¹⁵⁴ In addition, there are significant differences of opinion over how stringent crypto regulation should be. Some officials seem to be opposed to the new technology,¹⁵⁵ while others are much more optimistic about its potential.¹⁵⁶

Because of that, it may not be surprising that there have been a number of different approaches urged by legislators to improve crypto regulation. More than fifty bills and resolutions relating to cryptoassets were introduced in 2021 and 2022.¹⁵⁷ The

¹⁵³ “The complex nature of cryptos has led to different interpretations of how cryptocurrency should be understood or regulated, leading to varying proposals from the [SEC] and [CFTC], among others.” *The State of Crypto: Making Sense of US Cryptocurrency Regulations*, THOMSON REUTERS (July 15, 2021), <http://legal.thomsonreuters.com/en/insights/articles/how-will-emerging-us-regulations-impact-cryptocurrencies> [<http://perma.cc/M28F-48FU>].

¹⁵⁴ “As players in the financial services and crypto industries seek more regulatory clarity from the SEC, CFTC, Treasury, and Federal Reserve, friction among regulators is a key obstacle to a quick rollout of new regulations in the U.S.” *Id.*

¹⁵⁵ “Calls to bring crypto ‘within the regulatory perimeter’ should be careful to tame, not accommodate, the new technology, the United States’ acting comptroller of the currency Michael Hsu has warned his fellow regulators.” Emma Siponmaa, *Skeuomorphism and the “Gold Rush Vibe”: OCC’s Hsu Expands on Crypto Caution Call*, GLOBAL BANKING REGUL. REV. (Oct. 18, 2022), <http://globalbankingregulationreview.com/article/skeuomorphism-and-the-gold-rush-occs-hsu-expands-crypto-caution-call> [<http://perma.cc/7GBG-7A69>]. Senator Elizabeth Warren has also been noted for her robust criticisms of the crypto industry. See Fortis, *supra* note 9 (noting that “Warren has been a major critic of the crypto industry over the last year”).

¹⁵⁶ Consider this excerpt from an opinion piece published in the Wall Street Journal:

No matter what regulators do, they shouldn’t stifle the innovation that is at the heart of this market. Blockchain is the first technology that enables two parties to transact without a centralized intermediary such as an exchange, broker or bank. The implications are profound. Blockchain technologies have significant potential to increase transparency, reduce risk in capital markets and democratize finance. The settlement and counterparty risk concerns that emerged in the 2008 financial crisis might not have been an issue if blockchain had been widely used.

Arthur Levitt & Ram Ahluwalia, *A New Framework for Crypto Regulation*, WALL ST. J. (Oct. 20, 2022), <http://www.wsj.com/articles/framework-crypto-cryptocurrency-sec-investors-decentralized-regulators-banks-stablecoins-rules-blockchain-financial-crisis-11666294238> [<http://perma.cc/9WTM-2524>].

¹⁵⁷ Jason Brett, *Congress Has Introduced 50 Digital Asset Bills Impacting Regulation, Blockchain, and CBDC Policy*, FORBES (May 19, 2022), <http://www.forbes.com/sites/jasonbrett/2022/05/19/congress-has-introduced-50-digital-asset-bills-impacting-regulation-blockchain-and-cbdc-policy/?sh=91482694e3f0>

bills covered a wide range of topics including central bank digital currencies (“CBDCs”), national security concerns, and how to support blockchain technology in the United States.¹⁵⁸ Other proposals advanced particular ideas about how to improve regulatory clarity with regard to cryptoassets and transactions.¹⁵⁹ Some of the proposed regulations related to the application of Bank Secrecy Act provisions,¹⁶⁰ while others focused more on whether cryptoassets should be regulated as securities or commodities.¹⁶¹ Unfortunately many of these bills have been criticized for lack of clarity or for being a poor fit with cryptoassets more generally.¹⁶²

While proposed legislation based on a recommendation from SEC Commissioner Hester Peirce to establish a limited safe harbor

[<http://perma.cc/LNY9-YV7Q>]. While the source claims that the bills were introduced in the 118th Congress, the bills discussed in the article were introduced in the 117th Congress. *See, e.g.*, Clarity for Digital Tokens Act of 2021, H.R. 5496, 117th Cong. (Oct. 5, 2021), <http://www.congress.gov/bill/117th-congress/house-bill/5496/text?r=5&s=1> [<http://perma.cc/B6NP-G5WR>].

¹⁵⁸ Other topics, such as the taxation of crypto-based businesses and transactions, were also addressed in some of the bills. Some of the tax-related bills would have modified the definition of brokers required to report information to the I.R.S., and some would have added de minimis exemptions for small-value transactions. Brett, *supra* note 157.

¹⁵⁹ *See id.*

¹⁶⁰ *See, e.g.*, Blockchain Regulatory Certainty Act, H.R. 5045, 117th Cong. § 2(a) (2021) (exempting certain non-controlling blockchain participants from the requirement to register as money transmitters or financial institutions). One problem with this particular bill was the breadth of the proposal, which included language exempting the providers of blockchain services from any licensing or registration requirement (with no limitation) unless they had “control” over a digital currency. *Id.* This would presumably have completely exempted trading platforms that do not have their own cryptoassets from any registration requirement. This could have made detecting and dealing with money-laundering, fraud, and market-manipulation much more difficult, and is doubtless broader than would be wise.

¹⁶¹ *See, e.g.*, Token Taxonomy Act, H.R. 1628, 117th Cong. (2021). This bill would have removed cryptoassets (referred to in the bill as digital tokens) from the definition of “security,” unless they represented “a financial interest in a company or partnership, including an ownership interest or revenue share.” *Id.*

An additional bill focused on the question of whether cryptoassets should be regulated as securities. *See* Securities Clarity Act, H.R. 4451, 117th Cong. (2021). This bill provided that “investment contract assets”—which specifically included, without being limited to, intangible assets in digital form—were not to be included within the definition of security unless they fell within one of the other enumerated categories. *Id.* Obviously, this language is substantially broader than just cryptoassets, but it reflects an unease with the current regulatory approach of the SEC with regard to cryptoassets.

¹⁶² *See State of Regulation Report 2022: Untangling the Web of Federal Crypto Regulation*, PRIME TRUST 1, 3 (2022) [hereinafter PRIME TRUST], http://go.primetrust.com/rs/152-APF-177/images/Prime_Trust_State_of_Regulation_Report_2022.pdf [<http://perma.cc/J4HE-BYU6>] (noting that “legislators remain divided on what that regulation should entail” and that many of these proposed bills “are confusing or don’t fit our new digital economy”).

for certain offerings resulted in substantial early attention,¹⁶³ more recently bills allocating additional responsibility to the CFTC appear to have garnered the most attention.¹⁶⁴

On June 7, 2022, Senators Cynthia Lummis (R-Wyoming) and Kirsten Gillibrand (D-New York) introduced the Lummis-Gillibrand Responsible Financial Innovation Act.¹⁶⁵ This particular bill was far more detailed and encompassing than most other proposals initiated by the end of 2022.¹⁶⁶ As filed, the bill included eight distinct parts and fifty-six sections, covering definitions, taxation, securities regulation, commodities regulation, consumer protection, payments innovation, and

¹⁶³ SEC Commissioner Hester Peirce proposed a three-year safe harbor to allow responsible innovation in the crypto ecosystem. See Commissioner Hester M. Peirce, *Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization*, U.S. SEC. & EXCH. COMM'N (Feb. 6, 2020), <http://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06> [<http://perma.cc/T69A-5ABK>]. This idea has provided the basis for multiple legislative reform proposals. See Clarity for Digital Tokens Act of 2021, H.R. 5496, 117th Cong. (2021). The stated purpose of this bill was to exclude certain offerings of digital tokens (i.e., a digital representation of value or rights recorded on a publicly available ledger) from securities registrations. *Id.* On September 29, 2022, Senator Bill Hagerty (R-Tennessee) introduced the Digital Trading Clarity Act of 2022 to achieve the same result. *Hagerty Introduces Legislation to Provide Crucial Regulatory Clarity for Digital Assets*, BILL HAGERTY U.S. SENATOR FOR TENN. (Sept. 29, 2022), <http://www.hagerty.senate.gov/press-releases/2022/09/29/hagerty-introduces-legislation-to-provide-crucial-regulatory-clarity-for-digital-assets/> [<http://perma.cc/P2YT-JBAB>]. This bill would generally exclude from the definition of “security” any cryptotassets listed through intermediaries that meet requirements such as custody and disclosure along with other investor protections. Bill Flook, *Senate Bill Establish Temporary SEC Safe Harbor for Crypto Exchanges*, THOMPSON REUTERS: TAX & ACCT. (Oct. 7, 2022), <http://tax.thomsonreuters.com/news/senate-bill-establish-temporary-sec-safe-harbor-for-crypto-exchanges/> [<http://perma.cc/E82M-YPHA>]. This would change upon issuance of a final judgment to the contrary by a federal court or if the SEC issues “a statement, formal rulemaking, or enforcement action, and without objection from the Commodity Futures Trading Commission” and determines that a digital asset is a security. *Id.*

¹⁶⁴ See Jacquelyn Melinek, *As Crypto Regulation Looms Ahead, Here are the Bills to Look Out For*, TECHCRUNCH (Oct. 11, 2022, 5:00 AM), <http://techcrunch.com/2022/10/11/as-crypto-regulation-looms-ahead-here-are-the-bills-to-look-out-for/> [<http://perma.cc/ZY77-FYBK>] (suggesting that of the fifty bills related to cryptoassets, two of the three that stand out the most were “the Lummis-Gillibrand Responsible Financial Innovation Act and the Digital Commodities Consumer Protection Act of 2022”).

¹⁶⁵ Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. (2022) [hereinafter Lummis-Gillibrand Bill]; see also Lummis, *Gillibrand Introduce Landmark Legislation to Create Regulatory Framework for Digital Assets*, KIRSTEN GILLIBRAND U.S. SENATOR FOR N.Y. (June 7, 2022), <http://www.gillibrand.senate.gov/news/press/release/-lummis-gillibrand-introduce-landmark-legislation-to-create-regulatory-framework-for-digital-assets> [<http://perma.cc/5PZG-S9XH>].

¹⁶⁶ See, e.g., Lummis, *Gillibrand Introduce Landmark Legislation to Create Regulatory Framework for Digital Assets*, KIRSTEN GILLIBRAND U.S. SENATOR FOR N.Y. (June 7, 2022), <http://www.gillibrand.senate.gov/news/press/release/-lummis-gillibrand-introduce-landmark-legislation-to-create-regulatory-framework-for-digital-assets> [<http://perma.cc/5PZG-S9XH>].

interagency coordination.¹⁶⁷ A section-by-section overview of the bill, released alongside the draft bill, described the objectives of the proposal.¹⁶⁸ Those include a clearer division of responsibility between the SEC and CFTC with more tailored disclosure requirements for cryptoassets, additional regulatory authority for the CFTC, and additional disclosures and operational requirements to protect consumers.¹⁶⁹

Senator Lummis has publicly claimed that this bill would have prevented the FTX collapse if the exchange had operated in compliance with its provisions.¹⁷⁰ The bill's requirements included a prohibition on bundling custody and other trading activities, and it would also have required segregation of customer accounts.¹⁷¹ Lummis has also indicated that she is hopeful that the FTX fiasco will encourage Congress to act expeditiously on the proposal in 2023.¹⁷²

On August 3, 2022, Senators Debbie Stabenow (D-Michigan) and John Boozman (R-Arkansas), along with Cory Booker (D-New Jersey) and John Thune (R-South Dakota) introduced the Digital Commodities Consumer Protection Act of 2022 (the "DCCPA").¹⁷³ A section-by-section analysis of the bill explains how it was designed to give the CFTC additional authority over spot markets in cryptoassets defined as digital commodities, including the requirement that any market for those assets be registered with the CFTC.¹⁷⁴ That is the primary focus of the bill, which specifically left

¹⁶⁷ See *id.*

¹⁶⁸ See generally *Lummis-Gillibrand Responsible Financial Innovation Act: Section-by-Section Overview*, <http://www.lummis.senate.gov/wp-content/uploads/Lummis-Gillibrand-Section-by-Section-Final.pdf> [<http://perma.cc/8KG5-6PAQ>] (last visited Feb. 5, 2023).

¹⁶⁹ See *id.*

¹⁷⁰ See Shanny Basar, *Lummis Said Bill Would Have Prevented FTX Collapse*, MARKETSMEDIA (Nov. 28, 2022), <http://www.marketsmedia.com/lummis-said-bipartisan-bill-would-have-prevented-ftx-collapse/> [<http://perma.cc/W34N-KEG2>].

¹⁷¹ See *id.*

¹⁷² See *Sen. Lummis: FTX Collapse Should Speed Consideration of Crypto Bill*, PYMNTS (Nov. 28, 2022), <http://www.pymnts.com/cryptocurrency/2022/sen-lummis-ftx-collapse-should-speed-consideration-of-crypto-bill/> [<http://perma.cc/4STZ-DYEV>].

¹⁷³ See *Boozman, Stabenow, Booker and Thune Introduce Legislation to Regulate Digital Commodities*, JOHN BOOZMAN: U.S. SENATOR FOR ARK. (Aug. 3, 2022), <http://www.boozman.senate.gov/public/index.cfm/2022/8/boozman-stabenow-booker-and-thune-introduce-legislation-to-regulate-digital-commodities> [<http://perma.cc/V67K-7BFU>]. The text of the bill is found at Digital Commodities Consumer Protection Act of 2022, S. 4760, 117th Cong. (2022), <http://www.congress.gov/bill/117th-congress/senate-bill/4760/text> [<http://perma.cc/6G8M-7MHB>].

¹⁷⁴ See *Digital Commodities Consumer Prot. Act of 2022 Section-by-Section*, U.S. SENATE COMM. ON AGRIC., NUTRITION, & FORESTRY, 1 (2022), http://www.agriculture.senate.gov/imo/media/doc/crypto_bill_section_by_section1.pdf [<http://perma.cc/Z78G-R27Z>].

the SEC as the sole regulator for any cryptoasset classified as a security.¹⁷⁵ The bill did not attempt to change existing classification standards, although it did provide improved cybersecurity standards for intermediaries and outlined disclosure and registration requirements for brokers in the space.¹⁷⁶

The recent FTX collapse also has ramifications for this bill. CFTC Chair Behnam has suggested if the Stabenow-Boozman bill had been law, the collapse could have been avoided.¹⁷⁷ After noting that his agency had no existing authority over FTX's transactions with its affiliate, Alameda Research, Behnam explained "this sort of activity would be prohibited" if the DCCPA was enacted.¹⁷⁸

Finally, on December 21, 2022, Senator Pat Toomey (R-Pennsylvania), ranking member of the Banking Committee, introduced legislation designed to "establish the first federal regulatory framework for payment stablecoins."¹⁷⁹ This legislation was called the "Stablecoin Transparency of Reserves and Uniform Safe Transactions Act of 2022" or the "Stablecoin TRUST Act of 2022."¹⁸⁰ The bill would have given the Office of the Comptroller of the Currency authority to design a license for payment stablecoin issuers,¹⁸¹ in addition would have provided definitions for digital assets and payment stablecoins.¹⁸² Only regulated entities would be allowed to issue payment stablecoins, but this would include entities licensed under the new rules.¹⁸³ New, standardized disclosure obligations would be specified, and all issuers would be required to fully back their stablecoins with

¹⁷⁵ *See id.*

¹⁷⁶ *See generally id.*

¹⁷⁷ *See De, supra* note 87 ("The collapse of crypto exchange FTX may not have happened if the firm was under the Commodity Futures Trading Commission's watch, the agency's head argued Thursday.")

¹⁷⁸ *See id.*

¹⁷⁹ *See Toomey Introduces Legislation to Guide Future Stablecoin Regulation*, S. COMM. ON BANKING, HOUS., & URB. AFFS. (Dec. 21, 2022) [hereinafter *Toomey Introduces*], <http://www.banking.senate.gov/newsroom/minority/toomey-introduces-legislation-to-guide-future-stablecoin-regulation> [<http://perma.cc/LJS2-4EGQ>].

¹⁸⁰ A copy of the bill is available at Stablecoin Transparency of Reserves and Uniform Safe Transactions Act of 2022, S. 5340, 117th Cong. (2022), http://www.banking.senate.gov/imo/media/doc/stablecoin_trust_act.pdf [<http://perma.cc/VMB8-PGWF>]. A section-by-section analysis of the proposed act is available at U.S. SENATE COMM. ON BANKING, HOUS., & URB. AFFS., 117TH CONG., THE STABLECOIN TRUST ACT SECTION-BY-SECTION (Comm. Print 2022), http://www.banking.senate.gov/imo/media/doc/stablecoin_trust_act_section-by-section.pdf [<http://perma.cc/TC5D-X6SD>].

¹⁸¹ *See* Stablecoin Transparency of Reserves and Uniform Safe Transactions Act of 2022, S. 5340, 117th Cong. § 6 (2022).

¹⁸² *See id.* § 2.

¹⁸³ *See id.* § 3.

reliable, liquid assets.¹⁸⁴ Although the bill was introduced very late in 2022, Senator Toomey had been soliciting proposals and seeking input since August 2021, and an earlier discussion draft had been circulated in April 2022 so there have been opportunities for input by various interested-parties.¹⁸⁵

Obviously, the late 2022 introduction of this bill meant that there was insufficient time in 2022 for discussion in committee or by the Senate or House, but Senator Toomey indicated his belief that there is a reasonable chance for this bill's eventual success notwithstanding his retirement.¹⁸⁶

Despite considerable attention to failures in crypto regulation by the media and widespread agreement that change is needed, these efforts at reforming crypto regulation have not yet succeeded.¹⁸⁷ With this reality in mind, what is the best way forward?

IV. ANALYSIS OF THE OPTIONS

The first of the bills described in the preceding section of this Article, the Lummis-Gillibrand proposal, was incredibly ambitious, seeking to address myriad issues around crypto regulation in a comprehensive, wholistic manner. This would appear to comport with Senator Warren's preference, as she has said that in her opinion "a digital currency bill must be 'comprehensive,' covering consumer protections, anti-money laundering rules and climate safeguards for crypto mining."¹⁸⁸

The bill was praised for its "thoroughness, thoughtfulness, and generally pro-crypto nature," along with suggestions that it offers "a look into what comprehensive legislation could look like."¹⁸⁹ The bill was bipartisan in its sponsorship, and it "sparked insightful conversations from both sides of the aisle" as a potential compromise between positions advocated by the SEC and CFTC.¹⁹⁰

¹⁸⁴ See *id.* § 4.

¹⁸⁵ See *Toomey Introduces*, *supra* note 179.

¹⁸⁶ See Arturas Skur, *Retiring U.S. Senator Pat Toomey Introduces New Comprehensive Stablecoin Bill*, DAILYCOIN (Dec. 22, 2022, 8:00 PM), <http://dailycoin.com/retiring-u-s-senator-pat-toomey-introduces-new-comprehensive-stablecoin-bill/> [<http://perma.cc/D6ZT-82QX>].

¹⁸⁷ See Allyson Versprille, *Crypto Overhaul Fizzles in Congress, Leaving Industry and Investors in Limbo*, BLOOMBERG (Oct. 5, 2022, 7:22 AM), <http://www.bloomberg.com/news/articles/2022-10-05/crypto-overhaul-fizzles-in-congress-leaving-industry-in-limbo?leadSource=uverify%20wall> [<http://perma.cc/E2FA-BWF9>].

¹⁸⁸ Warmbrodt & Mueller, *supra* note 9.

¹⁸⁹ PRIME TRUST, *supra* note 162, at 21. This report also concludes, "[h]owever, in its current state, the bill is unlikely to pass." *Id.*

¹⁹⁰ *Id.*

On the other hand, the bill also sparked concern that it might weaken existing regulation.¹⁹¹ One commentator suggested the bill “appears to be designed to disarm the public by making them think crypto will be properly regulated while the industry and the insiders know that is simply not true.”¹⁹² Another opined that the bill could give “crypto promoters a free pass to keep avoiding taxes and lining their pockets at the expense of ordinary people”¹⁹³ The bill also did little to slow the “continued wrangling over definitions and jurisdiction between agencies like the SEC and CFTC.”¹⁹⁴

There is much to be said in favor of a comprehensive approach, but that does not necessarily make it the best option at this time. As has been noted elsewhere, “a comprehensive approach may make for greater certainty for the industry. On the other hand, the more comprehensive the legislation, the harder it may be to pass.”¹⁹⁵ In fact, the biggest obstacle to Congressional action appears to be the lack of consensus about how to move forward.¹⁹⁶ Given this, a more realistic alternative could easily be to tackle a discrete problem. This Article identifies three potential discrete issues that need to be resolved, but all three are likely to be hard to address.

Consider first the difficulty in clarifying which cryptoassets should be regulated as securities.¹⁹⁷ While everyone would prefer

¹⁹¹ SEC Chair Gensler, for example, has expressed concern that the bill could “undermine the protections we have.” Derek Andersen, *Lummis-Gillibrand Crypto Bill Comprehensive but Still Creates Division*, COINTELEGRAPH (June 22, 2022), <http://cointelegraph.com/news/lummis-gillibrand-crypto-bill-comprehensive-but-still-creates-division> [<http://perma.cc/DRX5-BS86>].

¹⁹² *Id.*

¹⁹³ *Lummis-Gillibrand Cryptocurrency Bill Would Leave a Dangerous Regulatory Void*, PUB. CITIZEN (June 7, 2022), <http://www.citizen.org/news/lummis-gillibrand-cryptocurrency-bill-would-leave-a-dangerous-regulatory-void/> [<http://perma.cc/QET5-PLZ8>] (quoting Bartlett Naylor, financial policy advocate at Public Citizen).

¹⁹⁴ Jon Southurst, *Will Senator Lummis’ Digital Asset Legislation Provide Clarity or Favoritism?* COINGEEK (Sept. 13, 2022), <http://coingeek.com/will-senator-lummis-digital-asset-legislation-provide-clarity-or-favoritism/> [<http://perma.cc/T54Z-6D76>].

¹⁹⁵ Ray et al., *supra* note 88. Former CFTC Commissioner Giancarlo accurately predicted at the beginning of 2022 that comprehensive reform was too much to expect in the short term. David Hollerith, *Crypto Should be Regulated by CFTC, Not Other Agencies: Ex-Official*, YAHOO! FIN. (Feb. 17, 2022), <http://finance.yahoo.com/news/ex-cftc-chair-explains-why-crypto-should-be-regulated-by-agency-214249207.html> [<http://perma.cc/G5UD-SZYC>].

¹⁹⁶ See Quarmby, *supra* note 9.

¹⁹⁷ “There has been a long-running debate among regulators on which crypto assets should fall under the category of a commodity or a security” *Id.* It has also been noted that “[o]ne of the biggest challenges is resolving the question of whether crypto is an asset or a security.” Betsy Vereckey, *Experts Debate How to Move Crypto Regulation Forward*, MIT SLOAN (Mar. 29, 2022), <http://mitsloan.mit.edu/ideas-made-to-matter/experts-debate-how-to-move-crypto-regulation-forward> [<http://perma.cc/Q4Y2-C9NJ>].

that the jurisdiction of the SEC be defined clearly,¹⁹⁸ some observers are in favor of providing the agency with a very expansive jurisdictional charge.¹⁹⁹ Senator Warren, for one, would take this approach.²⁰⁰ Commentators on this side of the debate are generally insistent that the CFTC's approach to crypto regulation is inadequate.²⁰¹ On the other hand, there are also those who want Congressional clarification in order to temper the SEC's perceived pattern of regulation by enforcement.²⁰² In addition, "[t]he industry has generally viewed the SEC as overstepping its authority — a view shared by multiple politicians, like those who are members of the Congressional Blockchain Caucus."²⁰³

With this stark division in opinion in mind, is there greater agreement that the CFTC should be given regulatory authority over cryptoasset spot markets? Certainly, there is widespread

¹⁹⁸ For example, "[a]s of the afternoon of Aug. 22, 2022, almost 1,700 individuals or organizations signed a form letter specifically asking SEC Chair Gary Gensler for clear rules of the crypto road." Soyoung Ho, *Industry Ratchets Up Pressure on SEC Asking for Crypto Regulation, but Gensler Says Clear Rules Already Exist*, THOMSON REUTERS TAX & ACCT. (Aug. 26, 2022), <http://tax.thomsonreuters.com/news/industry-ratchets-up-pressure-on-sec-asking-for-crypto-regulation-but-gensler-says-clear-rules-already-exist/> [<http://perma.cc/7DAV-M7XF>].

¹⁹⁹ Consider the input of Molly White, a software engineer who runs the *Web3 Is Going Just Great* blog, which documents crypto fraud. White has said the following: "Cryptocurrencies are more like securities because people broadly put money into them hoping for a return on their investment And when someone is engaging with something as an investment, that's a good sign that it should go to the SEC." Connor Donevan & Patrick Jarenwattananon, *There's a New Plan to Regulate Cryptocurrencies. Here's What You Need to Know*, HOUS. PUB. MEDIA (June 14, 2022), <http://www.houstonpublicmedia.org/npr/2022/06/14/1104303982/theres-a-new-plan-to-regulate-cryptocurrencies-heres-what-you-need-to-know/> [<http://perma.cc/7KBM-CYAR>]. It is also her opinion that the CFTC is not equipped to handle the role of primary crypto cop. *Id.*

²⁰⁰ "Anti-crypto Senator Elizabeth Warren has been working hard on a cryptocurrency bill that puts the U.S. Securities and Exchange Commission in charge of the asset class." Martin Young, *Elizabeth Warren Pushes Strict Crypto Bill to Empower the SEC*, BEINCRYPTO (Dec. 7, 2022), <http://beincrypto.com/elizabeth-warren-pushing-strict-crypto-bill-to-empower-the-sec/> [<http://perma.cc/GY3K-LEW7>].

²⁰¹ One of the most strident objections to the CFTC's approach comes from non-profit investor advocacy group Better Markets. According to the group, and as reported in the *Financial Times*, "the CFTC might not have been able to prevent the FTX debacle. Frauds happen. But the agency has consistently acted as a friendly champion of a fraud-riddled dumpster fire it purportedly wants to supervise." *Better Markets Cited in Financial Times Piece on CFTC's FTX Failures*, BETTER MKTS. (Dec. 15, 2022), <http://bettermarkets.org/newsroom/better-markets-cited-in-financial-times-piece-on-cftcs-ftx-failures/> [<http://perma.cc/7MH8-N9VU>].

²⁰² Senator Patrick McHenry, for example, has said that "[i]t's clear that congressional action is the only way to end Gary Gensler's regulation by enforcement, and ensure the digital asset ecosystem can thrive here in the U.S." Wilhelm & Murray, *supra* note 9.

²⁰³ PRIME TRUST, *supra* note 162, at 8.

agreement that marketplaces which facilitate trading in cryptoassets that are not classified as securities, such as Bitcoin, need to be regulated.²⁰⁴ Unfortunately, this does not mean that there is complete agreement that the appropriate regulator should be the CFTC.

While some within²⁰⁵ and outside²⁰⁶ the crypto industry seem to favor the CFTC's approach, there are certainly those who disagree. Mark Hays, senior policy analyst at Americans for Financial Reform and Demand Progress, has opined that “[t]he SEC, with its mandate for investor protection, should remain the primary agency regulating cryptocurrency, and Congress should resist the demands of this industry’s lobby for privileged treatment. Any role the CFTC has should be a narrow one.”²⁰⁷

Moreover, there is also disagreement about the viability of the DCCPA itself. For example, although CFTC Chairman Behnam has not objected to the DCCPA, he has also suggested that while it is important to move forward as quickly as possible to fill regulatory gaps, “we should take a pause and look at the bill and make sure there are no gaps or no holes.”²⁰⁸ Others have objected to the entire tone of the bill. For example, according to Mark Hays “[t]his bill simply does not provide sufficient protections for retail investors and may create regulatory gaps that will legitimize existing harmful industry practices, leading to widespread harm for investors and consumers.”²⁰⁹ A very specific concern stems from the language of the bill, because:

[T]he definition provided for digital commodities could be considered too narrow, and the divisions between the CFTC and SEC authorities are not definitive enough. Without specificity in authorities, legislation that

²⁰⁴ See *supra* Part II.A.

²⁰⁵ “As regulators vie for control and legislation to settle this debate makes its slow march through Congress, many within the industry hope to see the Commodity Futures Trading Commission (CFTC)—often perceived as the friendlier of the two—emerge as the industry’s primary regulator.” Field, *supra* note 6; see also *supra* note 10 and accompanying text.

²⁰⁶ Former CFTC Commissioner J. Christopher Giancarlo has suggested that “it’s time for Congress to take the lead and permit his former agency to run point on the asset class’ regulation.” Hollerith, *supra* note 195; see also *supra* notes 4, 10–11 and accompanying text.

²⁰⁷ *News Release: CFTC Should Have Narrow Role in Crypto to Preserve SEC Primacy*, AMS. FOR FIN. REFORM (Sept. 14, 2022), [hereinafter *CFTC Narrow Role*] <http://ourfinancialsecurity.org/2022/09/news-release-cftc-should-have-narrow-role-in-crypto-to-preserve-sec-primacy/> [<http://perma.cc/M86U-6WDR>].

²⁰⁸ See De, *supra* note 87 (“The collapse of crypto exchange FTX may not have happened if the firm was under the Commodity Futures Trading Commission’s watch, the agency’s head argued Thursday.”).

²⁰⁹ *CFTC Narrow Role*, *supra* note 207.

allows continued regulatory ambiguity about who is the true regulatory agency will not significantly improve current circumstances.²¹⁰

Finally, the collapse of FTX also provides ammunition to those who oppose the bill. Senator Lummis, who has suggested that “FTX was heavily involved in drafting the bill,” has argued that it “needs to be rewritten in a way that is more effective and neutral as to business models, but still very focused on consumer protection.”²¹¹ The fact that the bill was supported by the disgraced former-CEO of FTX, Sam Bankman-Fried, may therefore be a significant obstacle to its enactment.²¹²

Even though the DCCPA did not garner the amount of support (in its original form) necessary to ensure its enactment, there seems to be considerable support for the idea behind that bill.²¹³ A revised document, perhaps with definitions drafted without the involvement of anyone associated with FTX,²¹⁴ might have a better chance for eventual enactment.

The last of the three bills described in the preceding section, the Stablecoin Trust Act,²¹⁵ suggests a different approach to regulation. Rather than dealing with cryptoassets defined inclusively, this bill focuses on a single class of cryptoassets: stablecoins.²¹⁶ The bill was specifically designed to promote competition by declining to entrench existing depository

²¹⁰ PRIME TRUST, *supra* note 162, at 24.

²¹¹ Basar, *supra* note 170.

²¹² Chelsey Cox, *Congress Considers Crypto Consumer Protection Bill that Sam Bankman-Fried Backed Before FTX Collapse*, CNBC (Dec. 13, 2022, 12:44 PM), <http://www.cnbc.com/2022/12/13/digital-commodities-consumer-protection-act-sam-bankman-fried-ftx-fail.html> [<http://perma.cc/H5ZS-H9SZ>]. “Days after FTX’s implosion, Lisa Braganca, a former enforcement branch chief at the SEC, said Bankman-Fried’s close association with those on Capitol Hill made her doubtful that Congress would act on the DCCPA.” *Id.*

²¹³ “Brett Quick, head of government affairs for the trade association Crypto Council for Innovation, said that of all potential crypto legislation, the DCCPA had the most momentum and broadest support . . .” Leo Schwartz, *SBF Is About to be Grilled by Congress. Here’s Where Lawmakers Stand on Crypto Legislation*, YAHOO! (Dec. 12, 2022), <http://www.yahoo.com/now/sbf-grilled-congress-where-lawmakers-191300366.html> [<http://perma.cc/X4JY-EDER>]. The sponsors for the bill are certainly pushing ahead even in light of criticisms, although they have expressed willingness to continue working on the language. See Brayden Lindrea, *US Senators Commit to Advancing Crypto Bill Despite FTX Collapse*, COINTELEGRAPH (Nov. 11, 2022), <http://cointelegraph.com/news/us-senators-commit-to-advancing-crypto-bill-despite-ftx-collapse> [<http://perma.cc/5H3G-FJZM>].

²¹⁴ CFTC Chair Behnam is a strong advocate for this approach. See Kate Berry, *CFTC’s Behnam Urges Lawmakers to Build on Stabenow-Boozman Crypto Bill*, AM. BANKER (Dec. 1, 2022, 4:22 PM), <http://www.americanbanker.com/news/cftcs-behnam-urges-lawmakers-to-build-on-stabenow-boozman-crypto-bill> [<http://perma.cc/UTS9-8A7D>].

²¹⁵ See *supra* note 180 and accompanying text.

²¹⁶ *Id.*

institutions; instead it provided a new option for registration for stablecoin issuers.²¹⁷

There are some concerns that might be raised about the bill in its current form. First, it only applied to assets with a value pegged to one or more fiat currencies, and not assets, such as gold, that might also be used.²¹⁸ The definition of “payment stablecoin” only applied if the asset is “recorded on a public distributed ledger,”²¹⁹ which is not defined, leading to the possibility that a proprietary ledger that is not fully distributed to the public might not qualify. Both of these limitations in the definitions section could have created potential ways for stablecoin issuers to evade application of the bill’s requirements. In addition, the bill in its original form also failed to address decentralized stablecoins.²²⁰ The biggest potential obstacle to Toomey’s bill, however, was that by exempting stablecoins from the purview of the SEC,²²¹ crypto-skeptics who favor aggressive enforcement to protect the investing public are not likely to favor the bill’s approach.

V. THE NEED FOR CHANGE

Although there are problems with the existing regulatory framework (or the lack thereof), there are also problems with all of the bills that were introduced in 2021 and 2022. Nonetheless, a legislative response²²² that focuses on discrete aspects of reform seems more likely to succeed than omnibus legislation, regardless of how theoretically appealing a comprehensive

²¹⁷ See Skur, *supra* note 186. As noted by Toomey, the bill “will also ensure the Federal Reserve, which has displayed significant skepticism about stablecoins, won’t be in a position to stop this activity.” *Id.*

²¹⁸ See Stablecoin TRUST Act, S. 5340, 117th Cong. § 2(9)(A) (2022).

²¹⁹ *Id.* § 2(9)(F).

²²⁰ See *id.* § 2(9)(D); accord Skur, *supra* note 186.

²²¹ Stablecoin TRUST Act, S. 5340, 117th Cong. § 7 (2022) (exemption from securities requirements).

²²² Legislation is likely required because of the SEC’s persistent refusal to enact clear regulations. SEC Commissioner Hester Peirce, admittedly often in the minority on the Commission, has made repeated calls for additional regulatory clarity. See Sarah Milby, *Hester Peirce, “Crypto Mom,”* THE UNIV. OF CHI.: WOMAN IS A RATIONAL ANIMAL (Feb. 12, 2021), <http://womanisrational.uchicago.edu/2021/02/12/hester-peirce-crypto-mom-on-responsible-regulation-and-innovation/> [<http://perma.cc/M5XS-MPYJ>]. However, “Peirce has been unsuccessful in convincing her colleagues in the SEC to abandon the pattern of fractured regulation by enforcement action and to instead consider creating comprehensive, clear regulations for cryptocurrencies that benefit consumers and investors.” *Id.*; see also Brian Croce, *SEC Commissioner Calls on Congress to Pass Crypto Regulatory Bill*, PENSIONS & INVS. ONLINE (Oct. 12, 2022, 4:01 PM), <http://www.pionline.com/regulation/sec-commissioner-calls-congress-pass-crypto-regulatory-bill> [<http://perma.cc/D4PH-N7DB>].

After noting the SEC’s active role in enforcement to date, Pierce specifically claimed that “it is a good time for legislation. It’s up to Congress to figure out how they want to allocate regulatory responsibility.” *Id.*

response sounds.²²³ As others have been saying for years, the difficulty will be “to design laws that stimulate innovation while protecting consumer welfare and satisfaction.”²²⁴

The reason to focus on the CFTC is most definitely not because it will be “friendlier” to crypto enterprises or that it will tolerate abuses.²²⁵ Instead, the CFTC should be assigned the role because the SEC, despite its active enforcement efforts,²²⁶ has failed to provide a compliant path forward.²²⁷ The result is that companies that want to comply with applicable regulations “instead have been bankrupted or driven offshore by regulators’ approach.”²²⁸

If you start from the proposition that blockchain technology and cryptoassets have positive potential, then the need for a balanced approach seems clear.²²⁹ While the desirability of the technology might be up for debate, the Biden administration, with input from a wide array of federal agencies and administrators, has already concluded that there is sufficient merit that innovation in this area must be facilitated.²³⁰ It therefore appears relatively clear that it would be far from ideal to rely on an agency

²²³ See *supra* notes 188–196 and accompanying text.

²²⁴ Scott D. Hughes, *Cryptocurrency Regulations and Enforcement in the U.S.*, 45 W. ST. U. L. REV. 1, 28 (2017).

²²⁵ Gary DeWall, a former CFTC enforcement lawyer, has explained, “[i]f somebody thinks you’re going to get a pass at the CFTC, I think that’s a mistaken belief . . . Any violation is going to be met with enforcement actions by either regulator, and they’re going to be severe.” Jesse Hamilton & Cheyenne Ligon, *US CFTC as Crypto’s Regulatory Savior? Crypto Firms Might Not Like What They Get*, COINDESK (Oct. 6, 2022, 11:31 AM), <http://www.coindesk.com/policy/2022/10/05/us-cftc-as-cryptos-regulatory-savior-crypto-firms-might-not-like-what-they-get/> [<http://perma.cc/XB7G-6J45>]. Current CFTC Commissioner Caroline Pham agrees: “Anybody who thinks that the CFTC is not going to be tough might have missed when we fined all the banks billions of dollars for fraud and manipulation after the financial crisis.” *Id.*

²²⁶ “The SEC is leading the charge for more regulatory oversight of cryptocurrency products and platforms that may be engaging in the sale and offering of securities.” Roger E. Barton et al., *Are Cryptocurrencies Securities? The SEC Is Answering the Question*, REUTERS (Mar. 21, 2022, 9:27 AM), <http://www.reuters.com/legal/transactional/are-cryptocurrencies-securities-sec-is-answering-question-2022-03-21/> [<http://perma.cc/6RHP-JKVN>].

²²⁷ In the words of one observer, “SEC Chairman Gary Gensler has stiff-armed companies that try to ascertain their status, only to turn around and sue them for failing to comply with securities laws.” Molly Ball, *Crypto Goes to Washington*, TIME (Oct. 3, 2022, 7:00 AM), <http://time.com/6215042/crypto-washington-dc-regulation/> [<http://perma.cc/QL55-MXK8>].

²²⁸ *Id.*

²²⁹ “No matter what regulators do, they shouldn’t stifle the innovation that is at the heart of this market.” Levitt & Ahluwalia, *supra* note 156.

²³⁰ On March 9, 2022, President Biden made history by signing an Executive Order on cryptoassets. Exec. Order No. 14067, 87 Fed. Reg. 14143 (Mar. 9, 2022). The Executive Order specifically called for a balanced approach towards cryptoasset regulation, in which agencies were expected to work together to “protect consumers, investors, and businesses,” while acting to “reinforce United States leadership in the global financial system and in technological and economic competitiveness, including through the responsible development of payment innovations and digital assets.” *Id.* § 2(a), (d).

that has declined to provide reasonable alternatives that comply with regulatory requirements.²³¹

To illustrate the problem with relying on the SEC, consider Coinbase, a major cryptocurrency market and dealer. First, it “went public with the SEC’s approval—and then couldn’t get approval from the Financial Industry Regulatory Authority to offer cryptoassets through its own broker dealer since many cryptoassets are considered unregistered securities.”²³² Then, Coinbase approached the SEC with plans to offer Coinbase Lend but the agency waited until just before the program would have been effective to send Coinbase a notice that the plans would likely violate federal securities laws,²³³ even though there were other active unregistered lending programs in effect.²³⁴

Telegram provides another example of how difficult it can be to comply with SEC requirements. The company initiated a two-stage offering pursuant to which functional cryptoassets to be known as Grams were supposed to be issued no later than October 31, 2019.²³⁵ Shortly before the Grams were to be delivered in the fall of 2019, the SEC filed an emergency action alleging that Telegram had violated the federal securities laws by conducting an unregistered digital token offering.²³⁶ As part of its complaint, the Commission requested (and received) an ex parte TRO to prevent Telegram from “flooding the U.S. markets with digital

²³¹ “Market participants who want to work within the securities laws or engage the SEC don’t have a clear path to compliance.” Levitt & Ahluwalia, *supra* note 156.

²³² *Id.*

²³³ The SEC sent Coinbase a Wells Notice, which is “a notification from a regulator that it intends to recommend that enforcement proceedings be commenced against the prospective respondent. The notice references, in broad-strokes, the violation that the Staff believes has occurred.” Mark Astarita, *The Wells Notice SEC/FINRA Investigations*, SECLAW.COM (Mar. 18, 2023), <http://www.seclaw.com/wells-notice-sec-finra-investigations/> [<http://perma.cc/B72K-S9GV>].

²³⁴ Coinbase’s planned crypto lending program would have offered U.S. participants interest on their deposits of USDC at rates substantially higher than those offered for cash deposited with conventional financial institutions; however, it was shuttered just before its planned initiation date. See Paul Grewal, *The SEC Has Told Us It Wants to Sue Us Over Lend. We Don’t Know Why.*, COINBASE (Sept. 7, 2021), <http://www.coinbase.com/blog/the-sec-has-told-us-it-wants-to-sue-us-over-lend-we-have-no-idea-why> [<http://perma.cc/TTC5-6ELJ>]. In 2021, similar programs were available from major crypto businesses such as BlockFi and Celsius. See *What’s the Best Crypto Lending Platform?*, ZENLEDGER (July 26, 2021), <http://www.zenledger.io/blog/best-crypto-lending-platform> [<http://perma.cc/HWG6-RDCZ>].

²³⁵ See Nathaniel Popper, *Telegram Pushes Ahead with Plans for ‘Gram’ Cryptocurrency*, N.Y. TIMES (Aug. 27, 2019), <http://www.nytimes.com/2019/08/27/technology/telegram-cryptocurrency-gram.html> [<http://perma.cc/S5TK-MTWE>].

²³⁶ See Complaint at ¶¶ 2, 9, 120–21, SEC v. Telegram Grp. Inc., No. 19 Civ. 9439 (PKC) (S.D.N.Y. Oct. 11, 2019), <http://www.sec.gov/litigation/complaints/2019/comp-pr2019-212.pdf> [<http://perma.cc/Q5N9-3XFD>].

tokens that . . . were unlawfully sold.”²³⁷ Telegram responded promptly,²³⁸ with a brief claiming that there was no need for an emergency order²³⁹ and requesting the court deny the Commission’s request for a preliminary injunction.²⁴⁰ Part of Telegram’s reasoning was that the SEC had failed to provide notice of how it intended to interpret or apply the securities laws, despite Telegram engaging in eighteen months of dialogue with the Commission about its plans.²⁴¹

Ripple provides yet another example of how difficult it is to comply with SEC requirements. Ripple began issuing XRP tokens in 2013,²⁴² leading to a very public determination in 2015 by FinCEN that the company had engaged in improper money transmission by failing to register and implement required anti-

²³⁷ See *SEC Halts Alleged \$1.7 Billion Unregistered Digital Token Offering*, Press Release No. 2019-212, U.S. SEC. & EXCH. COMM’N (Oct. 11, 2019), <http://www.sec.gov/news/press-release/2019-212> [<http://perma.cc/759K-97DH>].

²³⁸ See Defendants’ Response in Opposition to Plaintiff’s Emergency Application for Preliminary Injunction at 1, SEC v. Telegram Grp. Inc., No. 19 Civ. 9439 (PKC) (S.D.N.Y. Oct. 16, 2019) [hereinafter Telegram Response], <http://storage.courtlistener.com/recap/gov.uscourts.nysd.524448/gov.uscourts.nysd.524448.7.0.pdf> [<http://perma.cc/2UXH-AYB8>] (describing defendants’ response in opposition to the SEC’s emergency request for a preliminary injunction).

²³⁹ This initial response specifically alleged that Telegram had spent the preceding eighteen months in voluntary talks with and soliciting feedback from the SEC, “consistent with the SEC’s publicly stated desire to engage with developers of digital asset technologies.” *Id.* at 1 (citation omitted). As of August 25, 2020, the SEC’s Strategic Hub for Innovation and Financial Technology (“FinHub”) “encourage[d] anyone working with RegTech solutions or implementations to engage with FinHub as part of this initiative.” *Strategic Hub for Innovation and Financial Technology (FinHub)*, U.S. SEC. & EXCH. COMM’N, <http://www.sec.gov/finhub> [<http://perma.cc/4WFH-6HKA>] (last visited Aug. 25, 2020); cf. *Strategic Hub for Innovation and Financial Technology (FinHub)*, U.S. SEC. & EXCH. COMM’N (Aug. 11, 2022), <http://www.sec.gov/finhub> [<http://perma.cc/BHQ8-MSMG>] (noting that as of January 12, 2023, FinHub describes itself as “a public resource for information about the SEC’s views and actions related to FinTech innovation”).

²⁴⁰ See Telegram Response, *supra* note 238, at 1.

²⁴¹ *Id.* at 2. The Telegram response claimed that, despite being fully aware of the terms of the proposed offering, the SEC “(i) never requested that Telegram delay the launch of the TON Blockchain; [and] (ii) never advised Telegram of its intention to seek injunctive relief . . .” *Id.*

²⁴² There is some debate about the original transactions, as the first 32,569 ledger entries on the XRP ledger were accidentally lost due to a bug in the program. See Anton Lucian, *XRP’s Genesis Block Still Has No Record*, BEINCRYPTO (Dec. 15, 2019, 5:20 PM), <http://beincrypto.com/xrps-genesis-block-still-has-no-record/> [<http://perma.cc/CPE9-F9WF>]. While the SEC claims that the initial issuance of XRP was to the company, other versions of the genesis transactions suggest that the initial distribution was to the founders, who contributed or gifted (depending on the source) eighty billion XRP to the company. See *XRPL’s Origin: Provide a Better Alternative to Bitcoin*, XRP LEDGER, <http://xrpl.org/history.html> [<http://perma.cc/JRW3-ZD5C>] (last visited March 17, 2023).

money laundering and know-your-customer protocols.²⁴³ Five years after the settlement of the FinCEN action and public agreement that the company's XRP token was acting as a currency substitute and seven years after the first public sale of the asset, the SEC initiated an action against the company and its current and former CEOs for illegally selling securities.²⁴⁴ The idea that the Commission can wait for that many years before initiating action against a clearly unregistered asset being widely sold and traded flies in the face of the repeated assertions that application of the *Howey* test²⁴⁵ to cryptoassets is clear.²⁴⁶

Thus, there is an argument to be made that the real issue with the SEC is not its experience or its assets, or certainly its willingness to engage with actors in the crypto space; rather, it is a legitimate concern that the Commission has repeatedly failed to provide a compliant path forward.²⁴⁷ Nonetheless, with the pronounced tension between legislators who support the SEC and those who favor the CFTC as crypto enforcers, starting with a bill that favors one over the other may be difficult.

This leaves options such as Senator Toomey's Stablecoin TRUST Act bill.²⁴⁸ Some have considered stablecoin regulation to be the most likely to result in regulation in the short term.²⁴⁹ This bill also faces opposition, including from those who support stablecoin regulation, but under a different approach. U.S. Representative Patrick McHenry (R-North Carolina), has

²⁴³ See *FinCEN Fines Ripple Labs Inc. in First Civil Enforcement Action Against a Virtual Currency Exchanger*, FIN. CRIMES ENFT NETWORK (May 5, 2015), <http://www.fincen.gov/news/news-releases/fincen-fines-ripple-labs-inc-first-civil-enforcement-action-against-virtual> [<http://perma.cc/AR36-NEN6>].

²⁴⁴ *SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering*, Press Release No. 2020-338, U.S. SEC. & EXCH. COMM'N (Dec. 22, 2020), <http://www.sec.gov/news/press-release/2020-338> [<http://perma.cc/CC3P-EY7B>].

²⁴⁵ See discussion *supra* Part I.A.

²⁴⁶ See Kevin Helms, *SEC Chair Gensler Insists Most Crypto Tokens Are Securities — Says 'the Law Is Clear'*, BITCOIN.COM (Oct. 4, 2022), <http://news.bitcoin.com/sec-chair-gensler-insists-most-crypto-tokens-are-securities-says-the-law-is-clear/> [<http://perma.cc/F38C-DDWQ>] (“The chairman of the U.S. Securities and Exchange Commission (SEC), Gary Gensler, has reiterated that most crypto tokens are securities, emphasizing that ‘the law is clear on this.’”).

²⁴⁷ As has been observed elsewhere, “[m]arket participants who want to work within the securities laws or engage the SEC don’t have a clear path to compliance.” Levitt & Ahluwalia, *supra* notes 156.

²⁴⁸ See *supra* notes 179–186 and accompanying text.

²⁴⁹ See Sam Sutton, *House Punts on Stablecoin Bill After Yellen Raises Flags Over Key Provision*, POLITICO (July 25, 2022, 6:26 PM), <http://www.politico.com/news/2022/07/25/house-stablecoin-bill-delay-yellen-00047728> [<http://perma.cc/36RT-KL9L>] (noting that “[m]any industry people have considered this Congress’ clearest shot at developing a rulebook for [cryptoassets]”).

“emphasized the need for federal regulation surrounding stablecoins,” and stated his belief that such registration is “coming.”²⁵⁰ Representative Maxine Waters (D-California) also agrees that stablecoin regulation is a high priority.²⁵¹ They also had a stablecoin bill, which would have reportedly given authority to the Federal Reserve to regulate stablecoins,²⁵² a choice that produced considerable pushback from various interested parties.²⁵³

Even with debate over the details, “U.S. lawmakers generally agree that a stablecoin bill will require full, one-to-one backing with liquid assets such as cash and U.S. Treasury bills.”²⁵⁴ This suggests that a bill such as Toomey’s could be a logical starting point for forward momentum.

CONCLUSION

Blockchain has tremendous potential that has yet to be realized, but in order for this to happen, appropriate regulation needs to be in place.²⁵⁵ Appropriate regulation requires clarity (which does not always appear to exist notwithstanding repeated statements from some that it does)²⁵⁶ and a path forward for

²⁵⁰ Leo Schwartz, ‘An Ugly Baby’: Rep. Patrick McHenry Confident Stablecoin Legislation Will Get Passed, FORTUNE (Oct. 12, 2022, 1:23 PM), http://fortune.com/crypto/2022/10/12/rep-mchenry-confident-stablecoin-legislation/?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_5857332.

²⁵¹ See Joe Light, A \$150 Billion Crypto Market Faces New Regulations Under Lawmakers’ Proposal, BARRON’S (Sept. 20, 2022, 7:03 PM), <http://www.barrons.com/articles/crypto-legislation-congress-51663714348> [<http://perma.cc/524B-63Z9>] (noting that Waters and McHenry worked for months on possible language but ultimately failed to introduce a stablecoin bill in the summer of 2022).

²⁵² Sam Sutton & Declan Harty, House Stablecoin Bill Begins to Take Shape with Circulating Draft, POLITICOPRO (Sept. 20, 2022, 8:58 PM), <http://subscriber.politicopro.com/article/2022/09/house-stablecoin-bill-begins-to-take-shape-with-circulating-draft-00057913>.

²⁵³ See Sam Sutton, Crypto Bill From Maxine Waters Faces Bipartisan Resistance, POLITICOPRO (Sept. 26, 2022, 7:20 PM), <http://subscriber.politicopro.com/article/2022/09/crypto-bill-from-maxine-waters-faces-bipartisan-resistance-00058902>.

²⁵⁴ Jesse Hamilton, The Members of Congress Who Have Stablecoin Issuers Watching Their Next Moves, COINDESK (Dec. 5, 2022, 7:43 PM), <http://www.coindesk.com/consensus-magazine/2022/12/05/maxine-waters-patrick-mchenry-most-influential-2022/> [<http://perma.cc/Y4KS-GSGH>].

²⁵⁵ Levitt & Ahluwalia, *supra* note 156 (“[T]o realize the technology’s full potential, both sides must acknowledge two simultaneous truths: Cryptocurrency markets need oversight, and regulators need to do more than regulate by enforcement.”).

²⁵⁶ See generally Leo Schwartz, ‘Our Rules Have to Evolve’: The Crypto Industry Is Trapped in Regulatory Purgatory, FORTUNE (Sept. 19, 2022, 4:00 AM), <http://fortune.com/crypto/2022/09/19/crypto-industry-trapped-regulatory-purgatory/> [<http://perma.cc/D242-DH5A>]; see also *supra* note 198 and accompanying text.

businesses that want to comply (a path that does not always exist under current rules).²⁵⁷

There are indeed gaps in current crypto regulation. Those include the failure to have a clear definition of when cryptoassets are securities,²⁵⁸ notwithstanding repeated assertions that almost all of such assets should be recognized as such.²⁵⁹ They also include a lack of regulation and oversight for exchanges that facilitate transactions in those cryptoassets that are not securities,²⁶⁰ particularly so long as these businesses have room to argue that the cryptoassets that they list are not securities. Another gap exists when it comes to specifying appropriate oversight of and requirements for stablecoins.²⁶¹ Bills have been proposed to address each of these gaps, but dissension and disagreement among legislators makes forward progress difficult.

While there are theoretical reasons to support comprehensive reform, that appears unlikely to be achievable due to political realities. Thus, a more limited and incremental approach is likely to be necessary. Public debate over the uncertainty about which cryptoassets are securities and who needs to be the primary regulator has garnered the most attention in the popular press and among academic commentators. However, this Article suggests that a more likely first step for Congress would be to address a discrete problem—such as how to handle stablecoins²⁶² or whether to give the CFTC authority over spot markets for crypto that is not a security.²⁶³ Even a baby step forward would mean that there is some progress being made.

²⁵⁷ See *Crypto Venues Ask for Clarity, But About What Isn't Clear*, DIGFIN (Dec. 6, 2021), <http://www.digfingroup.com/gemini-regulation/> [<http://perma.cc/MXZ9-PF3F>] (“[Crypto exchanges are] finding it is impossible to port a crypto business onto TradFi [or traditional finance] regulations, or to simply cut and paste existing regulations onto a crypto business.”)

²⁵⁸ See *supra* Part II.A.

²⁵⁹ Di Salvo, *supra* note 36.

²⁶⁰ See *supra* Part II.B.

²⁶¹ See *supra* Part II.C.

²⁶² A bill taking this approach is the Stablecoin TRUST Act. See Stablecoin TRUST Act of 2022, S. 5340, 117th Cong. (2022); see also discussion at notes 179–185 and accompanying text.

²⁶³ A bill taking this approach is the DCCPA. See *supra* note 173; see also discussion at notes 173–178 and accompanying text.