

MEMORANDUM

To: Crypto Task Force Meeting Log
From: Crypto Task Force Staff
Re: Meeting with Representatives of Zero Hash LLC

On February 18, 2025, Crypto Task Force Staff met with the representatives from Zero Hash LLC.

The topic discussed was approaches to addressing issues related to regulation of crypto assets. Zero Hash LLC representatives provided the attached documents, which were discussed during the meeting.

Modernization of Federal Financial Services Laws for the Twenty-First Century

A Comprehensive Policy Framework to Address Crypto
Spot Markets, Custodial, and Transfer Activities

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I. INTRODUCTION

Since the invention of Bitcoin in 2009, the crypto ecosystem has rapidly developed into a multi-trillion dollar industry employing tens of thousands of Americans in high-paying, high-skilled jobs.¹ Crypto, which is fundamentally a technology, is used as a store and transfer of value, can serve as an interchange for the development and deployment of decentralized applications, and represents real-world assets that settle by and between buyers and sellers instantly. Increasingly, crypto assets are being integrated into the backbone of cheaper and faster global payments and transactions.²

A unified federal clarification of the crypto industry and its players is long overdue. However, discussions surrounding the subject can elicit strong emotions. Legislators and regulators must avoid the temptation to allow bad actors to engender bad, narrow and unworkable law and policy. While there may be pressure to subsume all crypto activities into a securities regulatory framework or within the obligations of registered commodities intermediaries, it is vitally important to first consider the **design and use of crypto technology and by extension the underlying assets within existing law. Crypto can be many things - a security, commodity, payment and remittance instrument, or stored value account. Federal law should not constrain the broad set of existing applications, nor inhibit innovation as this technology continues to be adopted.**

The core tenet is that crypto is a technology vs. a stand alone asset class - the assets (such as Bitcoin (“BTC”) and Ether (“ETH”)) are the economic incentives that underpin a non-intermediated technology stack, which is the foundation for multiple and varied use cases. Applying the framework that “crypto is technology” ensures that regulatory policy considers use cases that are operational today, as well as not inhibiting applications that are more experimental or yet to be even considered applications, that could unlock enormous value.³

This White Paper proposes that the **most prudent federal approach to crypto activities is to avoid the paradigm of market structure and avoid establishing new rules around this narrow view of crypto. Rather, we believe that clarifications, buttressed with budgetary support, enables the proper application and enforcement of regulatory authority already in place.**⁴ As such, we believe that there is a path that is relatively simple to implement and also supports innovation for a new technology that can create value across multiple verticals.

Please note that this White Paper does not specifically cover stablecoin issuances (defined as tokenized representations of fiat currency) or the treatment of stablecoins as apart from other crypto assets.

We are encouraged by conversations with legislators as well as the appointees in the new administration with whom we have socialized these proposals with. We are grateful to other industry participants who have helped review this policy proposal.

II. EXECUTIVE SUMMARY

Crypto service providers that service end-users for on-chain functions can, and should largely already be, regulated under existing federal and state laws and regulations, and meaningful penalties are available to combat unlicensed activities.

Our proposal is simple: before federal lawmakers and policymakers attempt to overhaul an entire regulatory landscape and multi-trillion-dollar industry, they should first address the application of regulatory powers already granted by federal law.

A. GOALS

A comprehensive federal approach to crypto regulatory reform should accomplish three goals:

1. **Foster Innovation and Fairness for Crypto Technology:** Establish a safe, transparent and equitable environment for the adoption and growth of crypto technologies, providing a clear and level playing field for innovators in the United States.
2. **Ensure Effective Anti-Money Laundering Protections:** Ensure the effective application of anti-money-laundering (AML) and know-your-customer (KYC) requirements for service providers interacting with end users through robust enforcement of federal prohibitions against unlicensed money transmission activities.⁵
3. **Combat Scam & Criminal Activity:** Effectively combat the misuse of crypto assets in fraud, scams, market manipulation and money laundering, in part through implementation of critical consumer protection rules.

B. POLICY FRAMEWORK

The common thread of our policy framework is:

1. clarifying where certain securities, commodities, money services, and banking regulatory frameworks apply to crypto asset service providers; and
2. providing regulators with the resources to enforce those rules and regulations.⁶

We propose updates and/or clarifications to the following financial services regulatory structures:

Clarity on the Application of Securities Laws

- **Define when Crypto Tokens are Securities in line with the spirit and intent of Congress to avoid judicial or regulatory lawmaking:** Two federal courts have now granted appellate review through extraordinary relief citing the need for clarity over the applicability of securities law to crypto tokens.⁷ The definition of security under the Securities Act of 1933 and the Securities Exchange Act of 1934 should be amended to (i) include specific clarity for an “investment contract”⁸ and, (ii) define a “security token”.
- **Maintaining Defined Roles of Trusts:** Codify the role of Trusts for regulated entities to ensure that State-chartered trusts companies can act as “Qualified Custodians” under federal securities laws. Any proposal that prohibits state-chartered trusts from acting as Qualified Custodians in any capacity should be rejected.

Clarity on CFTC Jurisdictional Oversight

- **Support & Enhance CFTC oversight of spot commodity token markets:** The Commodities Exchange Act should be amended to explicitly define “crypto commodities” as “commodities.” This definition will remove any ambiguity on the CFTC’s authority to enforce rules against fraud and manipulation in spot crypto markets. Additionally, Congress should provide the CFTC sufficient resources to properly apply its fraud and manipulation mandate over growing spot crypto markets.
- **Issue Best Practice Guidance to best protect markets & customers:** The CFTC and DOJ should provide joint-guidance on what activities would constitute spot commodity trading

market abuse, including trading ahead of customer orders, and what controls would eliminate or mitigate damages against firms that facilitate market abuse or fraud, including the application of reasonable market surveillance programs.

Enforcement of Money Services Businesses and AML Regulations

- **Effectively Enforce Current Law to ensure robust application of AML requirements and consumer protections:** FinCEN should prioritize the enforcement of federal law with respect to unlicensed money transmitters in order to ensure that crypto financial service activities fall under federal and state oversight and within the federal AML/KYC regulations. FinCEN should be provided with sufficient resources to effectively meet its enforcement priorities. There should be stiff penalties for failing to register at the federal level and to obtain state licensing where required.
- **Modernize rules to better protect customers and prevent illicit practices:** FinCEN should issue new rulemaking requiring that MSBs: (a) disclose crypto services risks to end-customers and which entity is legally responsible for the crypto services; (b) transaction monitoring obligations including on-chain transaction tools; and (c) implement customer identification program requirements that parallel those applied to banks for account-like standing customer relationships.

Access to Crucial Banking Infrastructure for Crypto Services Providers

- **Codifying Fair Access to Banking:** To respect the existing stated mandates of fair access to banking by federal regulatory bodies, federal law should clarify that banking regulators are prohibited from encouraging, including through indirect means, banks to engage in the termination of entire categories of customers engaged in lawful activities, nor directing banks to open, close, or maintain individual accounts, without regard to the risks presented by an individual customer or the bank's ability to manage the risk.⁹
- **Optionality of Regulatory Structures:** The Federal Reserve should provide guidance for a path to membership in the Federal Reserve System to state chartered trusts that are empowered fiduciaries¹⁰ and that support the storage, transfer, and exchange of crypto assets, including any additional controls or obligations for trusts doing crypto asset business.

III. BACKGROUND

A. THE INVENTION OF BLOCKCHAIN AND DISTRIBUTED LEDGER TECHNOLOGY

In 2008, Satoshi Nakamoto released “Bitcoin: A Peer-to-Peer Electronic Cash System” (“[Bitcoin Whitepaper](#)”).¹¹ The Bitcoin Whitepaper outlined a network built on a proof-of-work consensus mechanism that powered a public distributed ledger allowing for ultra-secure immutable records of transactions distributed across several computers only connected by the internet. This event is generally understood as the invention of the “blockchain,” although the foundations of cryptography have been around for decades.¹²

The Bitcoin network relies on miners who dedicate computing power for the purpose of completing complicated computational problems. The first miner to complete each problem is rewarded with a distribution of BTC. The dedicated computing power provides the needed storage space for the network, and solving computational problems enforced the security and accuracy of the distributed ledger.

In Satoshi’s vision, Bitcoin could operate a secure distributed network that would replace the need for traditional banking infrastructure. In essence, each person with a Bitcoin wallet, it was proposed, would be able to act on their own behalf as the custodian and transactor for all of their BTC tokens and transactions; replacing the need for financial intermediaries altogether.

Different utility based blockchain networks quickly followed, including “proof-of-stake” consensus mechanisms, which require token holders to delegate their assets to the network in order to complete blockchain functions, including verifying on-chain transactions and to securing the network.¹³ The technology now powers what is colloquially called “Web2” and “Web3” use cases and applications, expanding upon the information sharing opportunities originally developed by early internet pioneers.

B. DLT AND CRYPTO AS A TECHNOLOGY

“Crypto,” “cryptocurrency,” “crypto asset” and “digital asset” are all terms used to refer to a cryptographically secure digital representation that can be stored and transferred within a network that is built on a form of immutable distributed ledger technology (“[DLT](#)”). The digital units, or “tokens,” can generally be categorized as:

- Native tokens, like BTC, which are mined or generated through mining or staking on the affiliated network;
- Asset-backed tokens, or those tokens that represent a real-world asset like gold;
- Tokens that are pegged to a reference value like the U.S. Dollar (also referred to as “stablecoins”); and
- Non-Fungible Tokens, or “NFTs.”

Simply put, DLT is cybersecurity infrastructure and crypto is technology that represents digital units on a distributed ledger. Like all technological infrastructure, DLT and crypto do not carry any inherent status as a regulated financial instrument.¹⁴ Crypto technology can be integrated into an endless number of applications and may fulfil several utility functions. These applications include enhanced inventory management tracking for retailers of goods, distributed filesharing networks, securely digitizing vehicle titles for state departments of motor vehicles, and facilitating rapid global payments and remittances. New applications and use cases are developed and applied daily.

C. THE APPLICATION OF CRYPTO TO FINANCIAL SERVICES

Crypto technology service providers may, and often do, engage in activities through their application of crypto technology that trigger existing regulatory and licensing obligations. However, these existing regulatory frameworks need to be modernized and clarity is needed to address where and when crypto, the technology, meets a regulatory requirement to obtain licensing and registration. Such activities may include:

- Issuance and distribution of new crypto tokens;
- A centralized spot trading marketplace for crypto tokens;
- Crypto custodial services; and
- Crypto transfer services (including payments, remittances, and payouts powered by crypto technology).

Fungibility is a key distinguishing feature of crypto. As recently stated by the United States Court of Appeals for the Third Circuit, “[s]ome [tokens] resemble bank accounts, others seem like commodities, and still others defy traditional labels altogether.”¹⁵ Unlike other assets, tokens are not static: they carry the characteristics of multiple functions throughout the day. The same token that can be pledged to a network to enhance its security, reliability, and speed can be used to develop an application on a decentralized protocol, or it can be traded for fiat, another token, or used to purchase goods and services. Placing any one of the above activities into the wrong regulatory box will break the value chain and decimate innovation.

For example, an entity using crypto assets to power remittances may operate several functions, including: (1) an on-ramp or exchange to source the crypto asset on the spot market; (2) custodial infrastructure to hold and store the crypto asset, and (3) a transmission service to send the crypto asset to the destination wallet in compliance with state and federal licensing and fund transfer rules.

Because DLT abstracts the need for traditional trusted intermediaries (the blockchain ensures proper transfer and recordkeeping), all of these services can be provided within the same instance of crypto infrastructure. It would be overly burdensome for services providers, regulators, and end-users if the United States were to create unworkable tests designed to awkwardly force any particular crypto or token into an unfit regulatory regime.

While there may be momentum to direct crypto asset service providers under the SEC’s and/or the CFTC’s licensing authority, we contend that these solutions would cripple the key benefits of crypto assets themselves and would relegate crypto in the United States to purely a speculative investment vehicle. As soberly stated by the Third Circuit, classifying crypto tokens “as securities could strangle them in their cribs.”¹⁶

D. FINCEN REGISTRATION AND STATE-LEVEL LICENSING

Most crypto services businesses are required to be registered with the Financial Crimes Enforcement Network (“FinCEN”) as a money services business¹⁷ and licensed with various state financial regulatory bodies.

“Money transmission services” is defined by FinCEN as “the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.”¹⁸ FinCEN has clarified that this would include the receipt of virtual currency within a hosted wallet on behalf of a customer (a/k/a custody).¹⁹

States have been proactive in crypto regulation since April of 2014.²⁰ This includes the state of New York, which has required that those offering services in the state of New York hold a virtual currency business license with the New York State Department of Financial Services (“NYDFS”) (“Bitlicense”).²¹ While there are mildly varying definitions of “money transmission” between the state, nearly all crypto asset services are tackled on the state level, including, for example:

Crypto Services Activity	Example Regulation/Guidance
<i>Sending and Receiving Crypto</i>	Florida: A money transmitter is a person “which receives...virtual currency for the purpose of acting as an intermediary to transmit... virtual currency from one person to another location or person by any means.” ²²
<i>Exchange Activity</i>	Connecticut: “Digital currency exchanges which hold or transmit fiat or virtual currency on behalf of Connecticut residents are engaging in money transmission.” ²³
<i>Custody of Crypto</i>	North Carolina: The definition of money transmission “includes maintaining control of virtual currency on behalf of others.” ²⁴
<i>Transmitting Stablecoins</i>	Texas: Stablecoins that provide the holder with a redemption right for sovereign currency is money under the Texas Money Services Act. ²⁵

FinCEN-registered money services businesses are subject to several anti-money laundering and know-your-customer (“AML/KYC”), record retention, and reporting requirements under the BSA.²⁶ Licensed money transmitters are subject to routine examination by state banking authorities,²⁷ strict permissible investment and bonding requirements, minimum capital requirements, and must complete an annual audit of their financial statements.

State examination authorities have issued stiff penalties for compliance failures, including a \$50,000,000 penalty against Block Inc. for its subsidiary CashApp’s failure to implement a proper compliance program.²⁸ Even more, Bitlicense holders are required to enact robust risk-based compliance, market surveillance, cyber security, and transaction monitoring procedures, which are subject to examination by NYDFS.

In addition to the outlined state supervision, FinCEN has the authority to examine registered money services businesses and to review and rely on state supervisory examination reports, providing important federal oversight of these crypto businesses. While we are not proposing a state-only approach to crypto services regulation, these regulatory bodies have proven more equipped to adapt to the practical applications of crypto assets for their residents.

Regulation of financial services activities has long been a shared responsibility between the states and the federal government. Securities, banking, and money services businesses are all regulated at both the state and federal levels. Crypto oversight requires the consideration of state and federal interplay.

IV. POLICY FRAMEWORK

A. SECURITY TOKENS: APPLICATION OF SECURITIES LAWS

As an initial matter, cryptography is a technology. Of course, this technology can be applied to the structure and sale of tokens which are themselves securities. Indeed, there are significant efforts from global securities clearing houses and brokers to tokenize existing securities.²⁹ However, the same technology that can underpin the transfer of securities is the same that can power the transfer of tokenized representations of pictures of apes, cats and dogs.

At the federal level, securities regulation began with the Securities Act of 1933 (the “33 Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”). There are two critical areas that the 33 Act laid out:

- **Issuance:** Generally speaking, the 33 Act laid out the conditions under which “securities”³⁰ could be issued to the public, and the Exchange Act created the Securities and Exchange Commission (the “SEC”) and sets forth rules for the secondary trading of securities. The issuance of securities requires either registration of the securities with the SEC or compliance with certain registration exemptions outlined in the 33 Act.
- **Secondary Trading:** Markets and firms offering the secondary trading of securities must be licensed and registered with the SEC.

From 1939 through 2012, several bills have amended and/or supplemented these foundational acts governing the securities industry. But none have remotely addressed cryptographic technology. However, it is critical that we draw a distinction between the underlying technology and what constitutes a security. We sometimes draw parallels to the “electronification” of markets, which moved markets from “paper” and “the pits” to online brokerage platforms. As markets electronified, the SEC was forced to modernize rules and regulations to allow for robust adoption of the new technology. As was done for electronic trading, it is more congruent to address some of the nuances and novelties around the technology as opposed to regulating the technology itself.

There are two key aspects that must be addressed to avoid the curtailment of cryptographic and blockchain technology:

- (i) The utility and fungibility of a wide set of non-security token use-cases are effectively eliminated when placed, by the mere characteristic of being a token, into the security framework. As such, **legislation should explicitly define an “investment contract.” This definition should separate the “issuance” of a crypto asset from the secondary market of tokens. The definition should clarify that non-security assets/commodities do not carry contractual rights.**
 - (ii) Some ambiguity has been created by political rulemaking by an agency (not by Congressional decree) as to which regulated entities may custody crypto tokens, **this needs to be clarified.**
1. **Federal securities laws should apply: a) Congress should specifically define an “investment contract” as the issuance of tokens that are effectively public offerings for the purpose of raising funds from the public; (b) to the secondary trading of tokens that carry with them similar rights and obligations of other securities; (c) exclude the mere act of staking from the “security” definition.**

As stated in both the 33 Act and Exchange Act, the starting and endpoint to the application of federal securities regulations is whether or not an asset, instrument, contract, or arrangement is a “security.” If an asset, instrument, contract, or arrangement meets the definition of a security, a host of regulatory obligations follow onto the issuance, sale, custody, trading, clearing, settlement, and transfer of the subject asset. For example, securities must be traded on SEC-registered exchanges,³¹ cleared by SEC-registered clearing agencies,³² and offered by or through SEC and FINRA-registered broker-dealers.³³

Under federal securities laws, a “security” is:

any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.³⁴

With the definition having no clear application to crypto assets, the SEC has focused on Supreme Court precedent from 1946 defining an "investment contract": the "Howey Test."³⁵ In *Howey*, the Court was considering whether investors in "units" of an orange grove, coupled with services contracts to cultivate and maintain the orange grove, constituted an "investment contract" under the 33 Act, thus subject to the registration, filing, and disclosure requirements for issuances of securities. Notably, *Howey* did not address the trading of investment contracts on *secondary* markets. Rather, the *Howey* Court considered a series of contracts between the "issuers" and "investors." *Howey* was not concerned with the secondary market sale of the oranges themselves. The court never drew a connection between the parties that were involved in the funding, growth, and production of orange groves with the commercial sale of the oranges to other third parties, which could involve a series of brokers, merchants, and consumers.

In 2017, the SEC issued the "DAO Report"³⁶ outlining the SEC's view that issuance and sale of crypto assets meeting the criteria of an "investment contract" under the *Howey* Test were, in the view of the SEC, issuances of securities.³⁷ The *Howey* Test requires that the arrangement between the purchaser and seller involves all: (1) an investment of money; (2) in a common enterprise; (3) with an expectation of profit; and (4) from the managerial efforts of others.³⁸

This analysis depends on a case-by-case review of the facts and circumstances of each crypto asset's offer and sale, that is, each purchase of each investment.³⁹ Shortly after the release of the DAO Report, SEC brought several actions against various crypto asset platforms and crypto related companies for failing to register token sales under the 33 Act, such as REcoin Group Foundation, PlexCorps, and Munchee in September and December of 2017.⁴⁰

In 2022,⁴¹ the SEC took an increasingly aggressive interpretation of the *Howey* Test's application to crypto assets. At this point the SEC became both vocal and aggressive in its views against the crypto industry, presumably in an effort to fill the perceived "gap" in crypto's regulatory treatment. In 2023, Former SEC Chair Gary Gensler stated that "the vast majority of crypto assets likely meet the investment contract [*Howey*] [T]est, making them subject to securities laws."⁴²

Additionally, in 2023 the SEC brought actions against crypto platforms Coinbase⁴³ and Binance⁴⁴ claiming that secondary markets in crypto assets are acting as unregistered exchanges in violation of the Exchange Act. The actions brought by the SEC against secondary market trading services expands the *Howey* Test from the "issuance and sale" of an investment contract to "any sale" of any asset that may have previously been the subject of an investment contract.

The SEC has argued that the "economic realities" of the secondary sale of any crypto asset should dictate its treatment as a security under the *Howey* Test.⁴⁵ The SEC is essentially arguing that a case-by-case determination of each and every secondary market transaction is required. This is not workable and provides no discernible protection to consumers or to markets. Specifically, the SEC has been unclear and inconsistent on the application of *Howey* to secondary market transactions. For example, ETH is not a security (no opinion from the SEC on the issuance itself), but Solana and others are (through enforcement actions).⁴⁶

Congress must carefully consider the downstream impacts of aligning with Gensler’s stated view that the “majority” of crypto tokens are a “security,” as this will effectively eliminate the utility and fungibility of such tokens. Defining any particular crypto token itself as a security effectively eliminates its use and purpose in the broader crypto ecosystem and on-chain economy.⁴⁷ This is because categorizing tokens as securities forces the trading and associated liquidity of those assets into exchanges and clearing agencies where they are often locked up for extended long settlement periods and subject to strict transfer requirements. Further, once these assets are purchased for use by an individual, the buyer will have to navigate cumbersome custody restrictions that inhibit the ability to transfer tokens to web applications and their use within crypto ecosystems.

a) Congress should specifically define an “investment contract” in both the 33 Act and Exchange Act.

A clear and updated definition of “investment contract” is needed to align the SEC’s supervisory authority with the intent of Congress through the 33 Act and Exchange Act. The *Howey* Test is a test of relationships. Its application is clear when dealing with issuers and initial purchasers of contractual promises or arrangements. However, the rule breaks down when applied to downstream transactions of underlying assets, such as secondary sales on crypto exchanges.⁴⁸

Congress should take instructive guidance from the *Howey* Test, which was developed by the Supreme Court upon its then-current review of the intent and spirit of the 33 Act. However, the definition must be updated to reflect the technological realities of the twenty-first century. Specifically, it should be clarified that an “investment contract” exists when there is **a contract, promise, or arrangement by and between a seller and a purchaser** that involves the investment of money, or other value, by the purchaser into a common enterprise that is designed to generate a profit or return to the purchaser resulting solely from the managerial efforts of others.

The definition should make it clear that there must be some rights, obligations, responsibilities, or promises that follow with an instrument, including an underlying asset that is subject to an initial offering, for that instrument or underlying asset to carry with it a “securities” classification.

This definitional change would provide clarity of the 33 Act’s spirit and intent of requiring registration and disclosures for the issuance of securities. This clarity will prevent the proven unworkability of applying the *Howey* Test to secondary market trading of crypto asset tokens (or indeed any other non-security asset), which creates an unworkable fact-specific standard that will result in costly, timely, and disparate judicial resolutions. Two federal courts have now granted appellate review through extraordinary relief citing the need for clarity over the applicability of securities law to crypto tokens.⁴⁹

b) Congress should amend the 33 Act and the Exchange Act to define precisely when a token qualifies as a “security.”

The SEC should retain authority over the issuance and secondary trading of tokens that operate like, or otherwise function in the capacity of “securities” as the term is generally applied and understood. While the 33 Act and Exchange Act enumerate a list of instruments and arrangements that qualify as securities, Black’s Law Dictionary, a prominent and widely referenced legal dictionary by legal practitioners, defines a security as “[a]n instrument that evidences the holder’s ownership rights in a firm (e.g., a stock), the holder’s creditor relationship with a firm or government (e.g., a bond), or the holder’s other rights (e.g., an option).”⁵⁰ While it is not authoritative, we believe that this definition can be instructive.

A “security token” in the 33 Act and Exchange Act should be defined as:

(1) A digital asset representing a Security, which is an instrument that evidences the holder’s ownership rights in a firm (e.g., a stock), the holder’s creditor relationship with a firm or government (e.g., a bond), or the holder’s other rights (e.g., an option); or (2) any other digital asset that itself confers to the holder of that asset to (a) an enforceable ownership right in an enterprise; or (b) income generated solely through the managerial

efforts of others involved in a common enterprise; or (c) the right to exchange the digital asset for a security or the rights outlined in (a) and (b) at any point in the future.

This definition serves to clarify that the spot secondary sale of a token itself that contains no other promises, covenants, or conveyances beyond the token asset itself are excluded from the definition of a “security” as these tokens’ transactions are more akin to spot commodity transactions in metals, oranges, and other commodities.

c) Congress should amend the 33 Act and the Exchange Act to clarify that the mere act of staking to a blockchain does not itself invoke securities treatment of the asset or the network.

Under Gensler’s leadership, the SEC took the stance that crypto staking and staking services amounted to “securities” transactions. This manifested in actions against Kraken and Coinbase for their respective staking products.⁵¹ However, the SEC ignores the fundamental actions that are being taken. Staking does not involve an arrangement or sale of a token or asset; it is instead a technological function of blockchain networks that is paramount to the distribution and security of a proof-of-stake network.⁵²

As such, Congress should further clarify that the act of staking tokens to a blockchain or distributed ledger network (or other similar network) is not itself evidence of “common enterprise.” Distributed proof-of-stake networks are not common enterprises, and staking itself is both a utility and security-preserving feature of many networks.⁵³ Staking allows users of distributed ledger, and other similar, networks to contribute to the decentralized nature of the applicable blockchain by providing the necessary economic incentives for validating and securing on-chain transactions. These are not in and of themselves the characteristics of “securities.”

2. Clarifying that the Legal Definition of “Qualified Custodian” Includes State Chartered Trusts.

The SEC is the designated authority over registered investment advisers through the Investment Advisers Act of 1940 (the “[Advisers Act](#)”). The Advisers Act requires that registered investment advisers’ custody client assets with “Qualified Custodians.” The current Qualified Custody Rule⁵⁴ includes state-chartered trust companies that exercise fiduciary powers within the definition of “Qualified Custodian.”⁵⁵

However, a rule proposal issued by the SEC in 2023 questions the inclusion of state trust companies in a future definition of “Qualified Custodian.”⁵⁶ This rule proposal is another administrative overreach, similar to SAB 121, designed to undermine the original intent of Congress in the form of punitive action against crypto services providers. This rule proposes that state-chartered trusts should not act as Qualified Custodians for any crypto assets with no basis to support the proposal. State trust companies have acted as trusted Qualified Custodians for decades. These state-chartered institutions provide a key service in their capacity as custodians and offer substantial market diversification. It should also be noted that exclusion of state-chartered institutions would exclude the vast majority of the most sophisticated crypto asset custodians, who have long been regulated at the state level.⁵⁷

State-chartered trust companies, including those that are only regulated at a state level, should be permitted to continue in their long-standing capacity as Qualified Custodians. Note that we are not proposing a state-only approach. There can and should be a path to a federal charter that precludes state licensing altogether, but one does not preclude the other.

B. COMMODITY TOKENS: CLARITY ON CFTC JURISDICTIONAL OVERSIGHT

The Commodity Exchange Act (the “[CEA](#)”) was passed in 1936 and created the modern *regulatory* structure for the oversight of commodity futures contracts by the Commodity Futures Trading Commission (“[CFTC](#)”). The CFTC is responsible for the licensing and oversight of regulated futures contract exchanges, futures commissions merchants, derivatives clearing organizations and swap dealers. The CFTC also has *oversight* of fraud and manipulation in *spot* commodity markets. However, the CFTC does not have rulemaking authority over such *spot* markets.

1. Congress should amend the CEA to provide clarity of jurisdiction of the CFTC over “commodity” crypto tokens.

The CFTC has oversight over commodities. We propose eliminating any uncertainty by explicitly including crypto tokens to the CFTC’s fraud and manipulation oversight mandate.

Since 2015, the CFTC has been clear: it views BTC and other crypto assets as “commodities” under the CEA.⁵⁸ And, although BTC and ETH are currently the basis of multiple derivative contracts and thus clearly fall within the current definition of a commodity, not every crypto commodity will (or should) have a derivative contract.

While the courts have generally given deference to the CFTC in its application of the term “commodity,” there remains room for discussion as to whether or not there must be “contracts for future delivery” with respect to an asset for it to fall under the CEA’s authority. Equally, not everything that we would inherently consider a commodity has a derivative contract. Chickens are clearly an agricultural commodity, but no derivatives exist on chickens. Chickens are no less a commodity than lean hogs, on which futures contracts exist.

Crypto commodities are indeed commodities because these assets provide utility and function to the blockchains on which they are based and to end-users.⁵⁹ The fundamentals that make BTC and ETH a commodity (and widely agreed upon) are the same for every crypto commodity. BTC represents tokens that are generated through a proof-of-work consensus mechanism that are transferred on a distributed ledger between counterparties. ETH is supported on a proof-of-stake consensus mechanism and powers several Web3 utilities, including smart contracts and NFTs, in addition to its distribution through a distributed ledger. The technical fundamentals of these tokens together represent all creation and utility functions of all other crypto assets.

That said, it is important to codify the mandate of the CFTC over spot commodities because the “newness” of these commodity assets has created the space for discussion over jurisdiction. Newness or being “intangible” is not an argument against these assets being commodities, with countless examples of such commodities including event-based contracts and carbon credits. **Providing a codified mandate makes explicit this de facto responsibility into a de jure mandate, which serves as a foundation for budgetary requests.**

Our goal is to: (i) remove the crutch for claims of lack of jurisdiction; and (ii) to provide a clear foundation for additional budgetary requests to provide the necessary oversight by changing the definition of the term “commodity.” Clarity of oversight stated by congress, without extensive re-writes, is best achieved by adjusting the current definition “commodity,” which albeit having a broad definition under the CEA was last amended by Congress in 1974:

*The term “commodity” means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13–1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), **and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.***⁶⁰

To ensure clarity and certainty of oversight, the definition of “commodity” under the CEA should explicitly include crypto tokens, and/or cryptographically secure digital representations that can be stored and transferred within a network that is built on a DLT.

As such, we propose that the definition of “commodity” be amended to include, “a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value, but has not been issued as

currency in any jurisdiction.”⁶¹ **Note** that this does not preclude SEC oversight. Indeed, when a crypto commodity is the basis for a securities contract or otherwise meets the definition of a crypto security, the SEC will have a clear regulatory directive over those assets and securities markets (See Section A: Security Tokens).

2. The CFTC should be focused on enforcement of its manipulation and fraud mandate over spot commodity markets. Congress should provide the CFTC the resources to follow through on those priorities.

Having established that “crypto commodities” are explicitly commodities under the CEA, they would be explicitly subject to Section 6(c)(1) which prohibits manipulation and fraud “in connection [with any] contract of sale of any commodity in interstate commerce.”⁶² The CEA also classifies the manipulation, or attempted manipulation of commodity prices as a felony that is prosecutable by the Department of Justice (“DOJ”).⁶³

If the CFTC or DOJ do not have the tools and resources necessary to enforce Section 6(c)(1), these should be addressed. A lack of budget or understanding of the issues is not a coherent argument for not having the jurisdiction. For example, we would argue that crypto commodity markets are actually more transparent than almost every other spot market given that there is public blockchain data, which is an immutable ledger of every transaction. This blockchain data is a rich source of information for predicting and monitoring potential manipulation and fraud and is used everyday by good industry players for monitoring and surveillance. There is no reason that these on-chain monitoring resources cannot be effectively employed by the CFTC at a federal level.

In furtherance of the CFTC’s manipulation and fraud prosecutorial powers, the CFTC should issue guidance to spot commodities exchanges, marketplaces, and proprietary commodities traders on the prevention of market manipulation and fraud, including:

- the application of trade surveillance programs and technology that would detect instances of manipulation, such as spoof trading; and
- clarify that spot commodity exchange operators engage in certain activities that would be deemed manipulative and fraudulent, like trading ahead of customer orders or trading on material non-public information.

Such expectation setting would put those offering exchanges in crypto assets on notice to implement robust market abuse prevention programs.

There has been an explosive growth in “meme coins” or “fan coins.” There is little difference between a trading card, however trite or ridiculous the fundamental is. Of course, the distribution power and velocity of cryptographic assets creates a unique opportunity for manipulation. Launching a meme or fan coin is not de facto problematic. The issue is price manipulation and dumping of inventory (commonly termed “rug pulls”), of which there are some egregious examples. Similarly, in furtherance of the CFTC’s *existing* manipulation and fraud prosecutorial powers, the CFTC should issue guidance to creators and platforms on:

- prosecutable manipulation in marketplaces with an emphasis on sentiment-driven markets where popular personalities may have influence over market conditions; and
- activities that indicate manipulative price control, such as front-running announcements or selling significant portions of the creator’s wallet balances solely to take advantage of positive price action.

3. Requiring spot crypto market exchanges, custodians, and other services providers to register with the CFTC would be an overreach and have unintended consequences.

We draw the distinction as to where the CFTC should have an “oversight” mandate vs. a “licensing” mandate. Effective oversight of the spot market with “teeth” does *not* require licensing. The CFTC and DOJ have already been active in enforcing the CEA where the CFTC has identified instances of manipulation and fraud.⁶⁴

As an initial matter, centralized spot markets in virtual currencies are subject to licensing and registration at the state and federal level, and these entities are not "unlicensed" services providers. Moreover, neither Congress nor the CFTC has singled out any other commodity that requires trading through a regulated or licensed commodity venue, custody with a CFTC regulated custodian, or settled and cleared through a derivatives clearing organization. This lack of regulatory licensing has not prevented the CFTC from identifying and prosecuting entities for manipulating the prices and trading on material non-public information including on the global trillion-dollar spot commodity market in gasoline.⁶⁵

More seriously though, requiring licensing of the spot would have material consequences, including:

3.1 *A capricious and two-tiered system based on the technology stack vs. the fundamentals*

Requiring the trading of spot crypto assets on a regulated exchange would force inequitable outcomes, based purely on the underlying technology stack. Technological advances are not new - in hindsight, it would be incongruent to state that a market trading electronically vs. in the pit should have a different regulatory status.

For example, a token representing a barrel of gasoline or an ounce of gold would be subject to a higher regulatory standard than a webpage connecting buyers and sellers of gasoline or gold on the spot market. Forcing the "tokenized" gold to be on a regulated entity vs. an electronified representation of gold, which actually create higher costs and frictions for the former, inhibiting the technological adoption of cryptography. Cryptography might not be the best technological mechanism for the transfer of value in all cases, but it should be on an equal playing field.

3.2 *Inhibition of actual use cases and utility of crypto commodities*

As with the securities industry, the intermediaries in a regulated futures market are not designed to, and generally cannot, provide services that would be applicable to all crypto use cases. As noted above, crypto purchased through a CFTC regulated market will pass through multiple intermediaries and are subject to standards that do not translate well. Here are some examples to make tangible the the proposal of a regulated crypto spot market:

- A payments business leveraging stablecoins (stablecoins themselves not touched upon in this White Paper), would need to be an FCM to pay for the "gas" or network fees to generate a wallet for someone to buy a pizza.
- Remittance companies powering cross-boarder payment using crypto tokens would require a Derivatives Clearing Organization. There are several hundred licensed money transmitters in the United States, many of which are exploring crypto services. Under a CFTC registration framework, each of these would need to be registered with the CFTC to oversee what is essentially a money services business.

Some of the objections around this approach conflate the technology of "tokenization" with "securitization." The push back is around protections of "what's in the token?" However, this is a false conflation. An ounce of gold that is a token is not "securitized" nor a "basket." There are of course "securitized" tokens, which would meet our proposed definition of a security token (See Section A), and these should be addressed differently. However, the exact same underlying of a spot gold contract of one ounce should *not* sit in a formal regulatory structure based on the precise ledger management software.

Note that these proposals have no impact on the CFTC's regulatory framework over the following crypto products:

- Leveraged trading of crypto commodities for retail customers; or
- Crypto token contracts for future delivery.

C. SPOT CRYPTO EXCHANGES SHOULD CONTINUE AS MONEY SERVICE BUSINESSES, BUT THERE MUST BE ROBUST ENFORCEMENT OF UNLICENSED ACTIVITY & AML REGULATIONS

As outlined above in the Background Section, the provision of spot crypto exchange services, crypto transfer services, and crypto custodial services already requires federal registration, *in addition* to state-by-state licensing. FinCEN-registered money services businesses must comply with the Bank Secrecy Act and the PATRIOT ACT by implementing risk-based AML/KYC programs.⁶⁶ It is a violation of federal law to provide unlicensed money transmission services in the United States or to U.S. persons.⁶⁷ That is, it is a violation of *federal* law to provide money transmission services to Oklahomans without a money transmitter license in the state of Oklahoma. FinCEN has historically brought actions against persons for failing to register with FinCEN as a money services business.⁶⁸ Federal prosecutors have also enforced this provision in federal actions against individuals.⁶⁹

1. Federal authorities, including FinCEN, should prioritize enforcement of the prohibitions against unlicensed money transmission and Congress should provide the resources necessary to follow through on those enforcement priorities.

In order to ensure that crypto platforms are subject to and complying with federal AML/KYC requirements, federal agencies should prioritize enforcement of the prohibitions against unlicensed activities. Forcing these businesses to register with FinCEN and obtain state-level licensing will create a level-playing field across crypto platforms and force the adoption of AML/KYC best practices across the industry, as well as ensuring regulatory oversight.

State and federal regulatory bodies have made clear that many of the services offered by crypto asset providers require registration and licensing.⁷⁰ These licensed entities are subject to crucial ongoing examinations. FinCEN relies on the shared responsibility between itself and states for the oversight of money services business activities.⁷¹ When entities fail to register with FinCEN and to obtain licensing, federal and state regulatory bodies are deprived of proper oversight of regulated activities, including examinations testing compliance with federal and state law. These unlicensed entities not only violate law, they: (a) inhibit proper oversight of federal compliance requirements; (b) lead to the facilitation of criminal activities, whether through the application of crypto technology or the use of traditional fiat rails; and (c) deprive end-users of key protections.

It is our view that there is no excuse for failure to register and obtain licensing. Nonetheless, several entities continue to make obscure arguments and to structure crypto asset services in a manner that attempts to obfuscate the regulated activities taking place. Federal regulators should be provided sufficient resources to enforce the laws on the books today. Further, given the growth and impact of crypto asset services, FinCEN and prosecutors should prioritize the enforcement of 18 U.S. Code § 1960 where entities fail to register and/or obtain proper licensing at the state level. This would ensure that all entities providing services meet the requirements of “money transmission” including:

- compliance with the Bank Secrecy Act and PATRIOT ACT, including independent testing and auditing;
- maintenance of minimum net worth requirements;
- maintenance of bonds commiserate w/ transmission and custodial activities of the licensee; and
- being subject to routine examination.

2. FinCEN should formally issue various rules to clarify and shore up a crypto assets service provider’s compliance with customer identification program rules and consumer protections.

FinCEN can implement targeted rules that would clarify crypto risks to consumers, reduce customer confusion, and increase required operation controls to reduce the use of crypto in criminal activity, including the following requirements:

- (i.) All crypto asset service providers to publish risk disclosures, like those outlined in New York’s Part 200, that describe to end-users risks that are unique to crypto assets, including the volatility, liquidity, manipulation, fraud, and transaction finality risks (i.e., on-chain transaction may be irreversible).⁷² These disclosures

- should be required when a user is directly accessing crypto assets or when a crypto asset is used as the structural rails to facilitate a transaction or services.
- (ii.) That, in all cases, it is made clear that a regulated entity is legally responsible for the regulated money services business services utilized by end-users and customers. Service providers should be easy to identify and contact for the purposes of requesting information about a particular transaction or services or to register complaints.⁷³
 - (iii.) On-chain transactional monitoring, with regular on-chain re-screens.
 - (iv.) Automated blocking of OFAC-sanctioned addresses as soon as “technologically practicable.”
 - (v.) Application of the Customer Identification Program (CIP) rule to money services business activities that more closely resemble bank account services.⁷⁴

Robust anti-money laundering programs are needed to combat the illicit use of fiat and crypto assets. Strong AML/KYC programs will foster trust in financial markets. We believe that there is currently a gap in the compliance programs of money services businesses when compared to other financial institutions.

In prior years, money services businesses primarily cashed checks, issued money orders and prepaid cards, and delivered remittances on an in-person transactional basis. Technology now allows money services businesses to offer digital wallet account services, like those offered by PayPal, Venmo, and many crypto asset exchanges. We believe that treating those money services business customer relationships that offer “account”-like features as opposed to those that are transactional in nature should be held to a higher know-your-customer standard, similar to those required by banks.⁷⁵ Therefore, FinCEN should issue rulemaking to define both transactional accounts and standing customer accounts. FinCEN should further clarify that standing customer accounts are subject to customer identification program requirements similar to those applied to banks, provided that the rule for money services businesses should be tailored for those entities' statutory obligations.⁷⁶

D. BANKING AND TRUST REGULATIONS: A MODERN RISK BASED APPROACH FOR ACCESS

At the federal level, there is a robust set of regulatory regimes that oversee banking and trust institutions. Herein, we focus on the following:

- The Office of the Comptroller of Currency (the “OCC”) is responsible for issuing nation bank charters and national trust bank charters, which provides the permission and authority for institutions to act in the capacity of a depository institution (i.e., a bank) or a fiduciary (i.e., a trust).
- State banking regulatory agencies may also issue state bank and trust charters, however these entities do not benefit from national preemption of state law at the level of a nationally chartered institution.
- The Federal Depository Insurance Corporation (the “FDIC”) oversees federal and state banking institutions that have sought and qualify for FDIC depository insurance coverage. In its capacity as the administrator of the federal insurance backstop to qualifying bank deposits, the FDIC has substantial enforcement and oversight powers of its participating institutions.
- The Federal Reserve Board (the “Federal Reserve”) is the central banking authority in the United States. The Federal Reserve and its branch office (the “Federal Reserve System”) oversees its member institutions which include federally and state chartered banks and trust institutions. State banking and trust institutions that qualify for participating in the Federal Reserve System are subject to the Federal Reserve’s oversight and examination.

Banking and trust institutions play an important role in the development and distribution of crypto asset services to end users. Crypto services providers require robust banking support to enable fiat services through their platforms, including holding stored value fiat balances. Thus, crypto institutions that maintain banking accounts with OCC-charted banks, FDIC member banks, and/or member banks of the Federal Reserve System are indirectly under the supervision of these banking authorities.

1. **Congress should pass a law prohibiting all banking regulatory bodies from instructing their supervised institutions to withhold from engaging in the banking of legal and legitimate industries or classes of customers.**

Crypto services providers and end-users have been de-banked or unbanked as a direct result of certain federal regulatory efforts against the industry, which has been termed “regulation by implication.”⁷⁷ Debanking is the pervasive attempt to limit financial access to a specific industry, as opposed to taking a risk-based approach to each player in that space. These efforts by regulators including the FDIC have started to come to light with the FOIA releases of “the pause letters.”⁷⁸ This is broader than crypto and applies to any legal industry.

The OCC has issued guidance stating that *“the OCC does not direct banks to open, close, or maintain individual accounts, nor does the agency encourage banks to engage in the termination of entire categories of customers without regard to the risks presented by an individual customer or the bank’s ability to manage the risk. The OCC has always taken the position that banks must apply the requirements of the Bank Secrecy Act based on their own assessment of risk for all customer accounts... the agency expects OCC-regulated banks to assess the risks posed by each MSB customer on a case-by-case basis.”*⁷⁹ The Supreme Court has also stated that banking supervisors cannot use their authority to pressure banks and insurers into cutting ties with unfavorable non-profit organizations.⁸⁰

While we understand the importance of a financial institution’s ability to assess and determine its own risk and the customers that it will and will not serve, we believe that Congressional action is needed to protect access to banking for all U.S. persons. Congress should codify that all federal and state banking supervisors are not permitted to *“direct their supervised entities to open, close, or maintain individual accounts, nor encourage [supervised entities] to engage in the termination of entire categories of customers”* engaged in lawful activity *“without regard to the risks presented by an individual customer or the [supervised entity’s] ability to manage the risk.”*

2. **The Federal Reserve should issue guidance for a path to Federal Reserve System membership to state-chartered banking and trust institutions engaged in crypto asset services.**

Access to the Federal Reserve System would allow state-chartered entities to have access to key Federal Reserve services, including Fedwire, FedACH, and other settlement services. Additionally, these entities would be allowed to maintain a “master account” with a Federal Reserve member bank, which would help facilitate liquidity and payment processing. These services would exponentially improve the overall services that state-chartered entities could provide. The Federal Reserve has admitted several state-chartered banks and trust companies to its membership. However, no crypto assets services provider with a state charter has been admitted to date.

The Federal Reserve should provide guidance to membership access for those entities providing crypto asset services that are eligible for Federal Reserve membership. Note that we are not proposing a state-only or federal-only approach. There can and should be a path to a federal charter that precludes state licensing altogether, but one does not preclude the other.

V. CONCLUSION

Crypto is not a monolith and there are a myriad of technological applications. Crypto assets are used by businesses and individuals in a myriad of ways. Federal policy's objective should not be curtailing innovative technologies and depriving tens-of-millions of Americans the right to invest, spend, remit, hold and ultimately innovate.⁸¹ Equally, bad actors must be effectively prevented from implementing fraudulent practices and thwarting important regulatory guardrails.

A clear, unified federal approach should build on the fact that crypto activities fall within existing robust regulatory and supervisory regimes. Congress and federal agencies should work together to add teeth (through agency prioritization and resourcing) as well as clarity (through modernizing legislation and rulemaking) to existing frameworks.

REFERENCES

- ¹ Tom Westbrook, *Global Crypto Market Tops \$3 Trillion on Hopes of Trump-fuelled Boom*, Reuters (Nov. 14, 2024), <https://www.reuters.com/technology/crypto-market-capitalisation-hits-record-32-trillion-coingecko-says-2024-11-14/>; Statista, Cryptocurrencies – Worldwide, <https://www.statista.com/outlook/fmo/digital-assets/cryptocurrencies/worldwide?currency=usd> (last visited Feb. 4, 2025); see also Rsch. and Markets, https://www.researchandmarkets.com/reports/5012722/cryptocurrency-market-share-analysis-industry?utm_source=GNE&utm_medium=PressRelease&utm_code=rl_g2xqn4&utm_campaign=2023643+-Cryptocurr&utm_exec=jocamspi (last visited Feb. 4, 2025); Anders Helseth, *The Emerging Crypto Industry*, K33 (July 6, 2023), <https://k33.com/research/articles/the-global-crypto-industry>.
- ² See, e.g., International Monetary Fund, *G20 Note on the Macroeconomic Implications of Crypto Assets* (February 2023).
- ³ Zero Hash currently powers various use cases with blockchain technology, such as: (i) Tokenization Payment Rails for BlackRock’s BUIDL fund (via Securitize) and Franklin Templeton; (ii) Payments (including Payouts, Treasury, etc.) for Stripe and Shift4; (iii) Remittances for Moneygram, LightSpark, and Felix Pago; (iv) Account funding for Kalshi; and (v) On-ramps for Moonpay, Transak, and Simplex by Nuvei.
- ⁴ There are several who argue for the implementation of a MiCA-like solution in the U.S. However, there are key differences to consider before packaging a crypto solution underneath a single federal financial regulator. Primarily, the number of prudential regulators within the financial landscape in the U.S. versus in Europe. The U.S. has: (i) over fifty money services regulators (49 states, and several territories, including D.C. and Puerto Rico, and FinCEN) who oversee money transmission; (ii) four federal banking regulator authorities (OCC, FDIC, Treasury, and the Federal Reserve); (iii) two federal markets regulatory bodies (the SEC and CFTC); and (iv) one federal AML enforcement arm (FinCEN). In contrast, in a typical European country, all of these regulatory responsibilities are packed into two or three regulatory and licensing bodies. The United States’ financial regulatory expertise and responsibilities are vastly more distributed.
- ⁵ See, e.g., 18 U.S.C. § 1960(a) (“Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both”).
- ⁶ This White Paper does not address the issuance of stablecoins.
- ⁷ See *infra* note 49.
- ⁸ See *Sec. & Exch. Comm’n v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946) (“The [investment contract] test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others”) (hereinafter “*Howey*”).
- ⁹ See Office of the Comptroller for the Currency, OCC Bull. No. 2014-58, *Banking Money Services Businesses: Statement on Risk Management* (Nov. 19, 2014); Supervisory Guidance from the FDIC, *Joint Statement on Crypto-Asset Risks to Banking Organizations* (Jan. 5, 2023) (“Banking organizations are neither prohibited nor discouraged from providing banking services to customers of any specific class or type, as permitted by law or regulation.”); contra Tonya M. Evans, *FDIC At a Crossroads: Debanking, Crypto, And the Fight For Reform*, Forbes (Jan. 13, 2025), <https://www.forbes.com/sites/tonyaevans/2025/01/13/fdic-at-a-crossroads-debanking-crypto-and-the-fight-for-reform/> (discussing the recent revelation that the FDIC sent over twenty “pause letters” to banks requesting that they pause all crypto related activity).
- ¹⁰ See, e.g., North Carolina Uniform Trust Code § 36C-4-404 (2005); §§ 36C-8-801 through 804 (2005, 2015).
- ¹¹ Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (August 21, 2008), <https://perma.cc/59ZY-QPG5>.
- ¹² See, e.g., IBM, <https://www.ibm.com/think/topics/cryptography-history> (last visited Feb. 4, 2025).
- ¹³ Proof-of-stake consensus mechanisms allow crypto holders to contribute their assets to a network. These contributions are crucial to the effectiveness and security of proof-of-stake networks and promote decentralization of the network. While the SEC in the U.S. has previously targeted platforms operating staking programs to U.S. persons, H.M. Treasury in the United Kingdom recently amended the Financial Services and Markets Act 2000 (Collective Investment Schemes) to explicitly state that “qualifying cryptoasset staking do[es] not amount to a collective investment scheme” under the act. See The Financial Services and Markets Act 2000 (Collective Investment Schemes), Amendment Order 2025 No. 17 (Eng.), available at <https://www.legislation.gov.uk/uksi/2025/17/article/2/made>; Jesse Coghlan, *UK order clarifies crypto staking is not a collective investment scheme*, CoinTelegraph (last visited Feb. 4, 2025), <https://cointelegraph.com/news/uk-crypto-staking-not-collective-investment-schemes> (“The way a blockchain works is NOT an investment scheme. It’s cybersecurity”) (citing a social media post by Bill Hughes, a lawyer and global regulatory matters director for Consensus); see also Press Release No. 2023-102, *Sec. & Exch. Comm’n, SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency* (June 6, 2023); Press Release No. 2023-25, *Sec. & Exch. Comm’n, Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay \$30 Million to Settle SEC Charges* (Feb. 9, 2023).
- ¹⁴ See, e.g., *Sec. & Exch. Comm’n v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 324 (S.D.N.Y. July 13, 2023) (Motion for summary judgment granted and denied in part holding that a token was not “in and of itself a ‘contract, transaction[,] or scheme’ that

- embodies the Howey requirements of an investment contract.” Rather, courts examine the totality of circumstances surrounding the token sale and distribution) (hereinafter “*Ripple Labs*”); *Sec. & Exch. Comm’n v. Coinbase, Inc.*, 2025 U.S. Dist. LEXIS 3223 at *36 (S.D.N.Y. Jan. 7, 2025) (“*There is indeed substantial ground to dispute how Howey is applied to crypto-assets and the role of the surrounding digital ecosystem in that analysis. Therefore, the Court agrees with Coinbase [and grants the motion to appeal].*”) (order granting motion for interlocutory appeal and staying proceedings pending appeal) (hereinafter “*Coinbase: Jan. 7, 2025 Case*”); see also *Sec. & Exch. Comm’n, Framework for “Investment Contract” Analysis of Digital Assets*, <https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets> (hereinafter “*SEC Framework*”).
- ¹⁵ *Coinbase, Inc. v. Sec. & Exch. Comm’n*, 2025 U.S. App. LEXIS 653 at *68 (3d Cir. Jan. 13, 2025) (order granting Coinbase’s motion in part to force the SEC to provide a more detailed explanation on why the SEC declined Coinbase’s petition for the SEC to create crypto-specific rules, but denying Coinbase’s motion in part to require the SEC to create such rules).
- ¹⁶ *Id.* at *71.
- ¹⁷ See, e.g., Financial Crimes Enforcement Network Guidance, FIN-2019-G001, *Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies* (May 9, 2019).
- ¹⁸ *Id.* at 4 (citing 31 CFR § 1010.100(ff)(5)(i)(A)).
- ¹⁹ *Id.* at 15-16.
- ²⁰ See, e.g., Press Release, Texas Dep’t of Banking, *Texas Banking Commissioner Issues Supervisory Memorandum on Virtual Currency* (April 3, 2014) (announcing publication of Supervisory Memorandum 1037); Cryptocurrency Guidance Document from the Kansas Office of the State Bank Commissioner titled “*CML Guidance MT 2014-01*” (June 6, 2014); New York Dep’t of Financial Services, https://www.dfs.ny.gov/virtual_currency_businesses (last visited Feb. 4, 2025); Memorandum from Greg Gonzales, Commissioner of the Tennessee Dep’t of Financial Institutions, to All Virtual Currency Companies Operating or Desiring to Operate in Tennessee (Dec. 16, 2015).
- ²¹ See 23 New York Comp Codes Rules and Regs § 200. Other states have since passed laws (such as Louisiana’s “Virtual Currency Business Activity Act” and California’s “Digital Financial Assets Law”) or have introduced legislation (such as Illinois’ “Digital Assets Regulation Act” and “Uniform Money Transmission Modernization Act”) requiring similar virtual currency licenses. See Louisiana Office of Financial Institutions, <https://ofi.la.gov/messages/virtual-currency-businesses-act-2023-legislation/> (last visited Feb. 4, 2025); California Dep’t of Financial Protection & Innovation, <https://dfpi.ca.gov/regulated-industries/digital-financial-assets/> (last visited Feb. 4, 2025); H.B. 3479, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023); S.B. 3666, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024).
- ²² Fla. Stat. § 560.103(24).
- ²³ Connecticut Dep’t of Banking, <https://portal.ct.gov/dob/consumer-credit-licensing-info/consumer-credit-licensing-information/virtual-currency-mtra-faqs> (last visited Feb. 4, 2025).
- ²⁴ North Carolina Gen. Stat. § 53-208.42(13).
- ²⁵ Memorandum from Charles G. Cooper, Banking Commissioner of the Texas Dep’t of Banking, to All Virtual Currency Companies Operating or Desiring to Operate in Texas (April 1, 2019 (rev.)) (“*A licensing analysis will turn on whether the stablecoin provides the holder with a redemption right for sovereign currency thus creating a claim that can be converted into money or monetary value*”).
- ²⁶ Financial Crimes Enforcement Network, <https://www.fincen.gov/bsa-requirements-msbs> (last visited Feb. 4, 2025).
- ²⁷ Several State regulators have entered into a multi-state compact where money transmitter regulatory agencies will conduct “multi-state” examinations of licensed entities with over 40 money transmission licenses.
- ²⁸ Press Release, Conference of State Bank Supervisors, *State Regulators Issue \$80 Million Penalty to Block, Inc., Cash App for BSA/AML Violations* (Jan. 15, 2025).
- ²⁹ For example, BlackRock introduced “BUIDL,” a tokenized fund investing in cash and U.S. Treasury bills. See Press Release, Securitize, *BlackRock Launches Its First Tokenized Fund, BUIDL, on the Ethereum Network* (March 20, 2024). Franklin Templeton also launched “Benji,” a tokenized U.S. Government Money Fund. See Press Release, Franklin Templeton, *Franklin Templeton Enables USDC Conversions on Benji Investments Platform* (June 6, 2024). DTCC then launched ComposerX to streamline token creation and settlement for digital assets. See Press Release, The Depository Trust & Clearing Corporation, *DTCC Announces ComposerX* (Feb. 4, 2025).
- ³⁰ See 15 U.S.C. § 77b(a)(1) (defines “security” under the 33 Act).
- ³¹ 15 U.S.C. §§ 78c(a)(1), 78f; *Sec. & Exch. Comm’n*, <https://www.sec.gov/about/divisions-offices/division-trading-markets/national-securities-exchanges> (last visited Feb. 4, 2025).
- ³² See, e.g., *Sec. & Exch. Comm’n*, <https://www.sec.gov/about/divisions-offices/division-trading-markets/clearing-agencies> (last visited Feb. 4, 2025).
- ³³ See, e.g., *Sec. & Exch. Comm’n*, <https://www.sec.gov/resources-small-businesses/capital-raising-building-blocks/broker-dealers#:~:text=A%20broker%20is%20any%20person,includin%20but%20not%20limited%20to>; (last visited Feb. 4, 2025); Financial Industry Regulatory Authority, <https://www.finra.org/registration-exams-ce/broker-dealers/new-firms#:~:text=To%20conduct%20securities%20transactions%20and,FINRA%2Dregistered%20broker%2Ddealer>. (last visited Feb. 4, 2025).

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- ³⁴ See *supra* note 30.
- ³⁵ *Howey*, 328 U.S. at 298-99.
- ³⁶ Sec. & Exch. Comm’n, Release No. 81207, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO* (2017).
- ³⁷ *Id.* at 17-18.
- ³⁸ *Howey*, 328 U.S. at 298-99.
- ³⁹ *Id.* at 299 (“[The *Howey Test*] embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits”).
- ⁴⁰ Press Release No. 2017-185, Sec. & Exch. Comm’n, *SEC Exposes Two Initial Coin Offerings Purportedly Backed by Real Estate and Diamonds* (Sept. 29, 2017); Press Release No. 2017-219, Sec. & Exch. Comm’n, *SEC Emergency Action Halts ICO Scam* (Dec. 4, 2017); Press Release No. 2017-227, Sec. & Exch. Comm’n, *Company Halts ICO After SEC Raises Registration Concerns* (Dec. 11, 2017); see also Press Release No. 2018-264, Sec. & Exch. Comm’n, *Two ICO Issuers Settle SEC Registration Charges, Agree to Register Tokens as Securities* (Nov. 16, 2018); Press Release No. 2020-338, Sec. & Exch. Comm’n, *SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering* (Dec. 22, 2020) (note that the enforcement action was written broadly to cover secondary trading of XRP, but was not an action against a secondary market); Press Release No. 2023-32, Sec. & Exch. Comm’n, *SEC Charges Terraform and CEO Do Kwon with Defrauding Investors in Crypto Schemes* (Feb. 16, 2023).
- ⁴¹ See, e.g., *SEC Cryptocurrency Enforcement, Cornerstone Research* (2022), <https://www.cornerstone.com/wp-content/uploads/2023/01/SEC-Cryptocurrency-Enforcement-2022-Update.pdf>; see also Press Release, Sec. & Exch. Comm’n, *SEC Announces Enforcement Results for FY22* (Nov. 15, 2022).
- ⁴² Gary Gensler, Chair, Sec. & Exch. Comm’n, Keynote Address at the 2023 Securities Enforcement Forum in Washington D.C.: “Partners of Honest Business and Prosecutors of Dishonesty”: *Remarks Before the 2023 Securities Enforcement Forum* (Oct. 25, 2023).
- ⁴³ *Sec. & Exch. Comm’n v. Coinbase, Inc.*, 726 F. Supp. 3d 260 (S.D.N.Y. 2024).
- ⁴⁴ *Sec. & Exch. Comm’n v. Binance Holdings Ltd.*, Civil Action No. 23-1599 (ABJ), 2024 U.S. Dist. LEXIS 114924 (D.D.C. June 28, 2024).
- ⁴⁵ See, e.g., *SEC Framework* at §§ II.C & II.C.3 (“When assessing whether there is a reasonable expectation of profit derived from the efforts of others, federal courts look to the economic reality of the transaction”); *Ripple Labs* at 323-31; *Coinbase: Jan. 2025* at *6-*11.
- ⁴⁶ See, e.g., Press Release, Sec. & Exch. Comm’n, *SEC Files 13 Charges Against Binance Entities and Founder Changpeng Zhao* (June 5, 2023) (alleging that Solana (SOL), Cardano (ADA), Polygon (MATIC), Filecoin (FIL), Cosmos (ATOM), Sandbox (SAND), Algorand (ALGO), Axie Infinity (AXS), Coti (COTI) were unregistered securities).
- ⁴⁷ *Coinbase: Jan. 7, 2025 Case* at *36 (“There is indeed substantial ground to dispute how *Howey* is applied to crypto-assets and the role of the surrounding digital ecosystem in that analysis”): See also *Ripple Labs*; but see *Sec. & Exch. Comm’n v. Terraform Labs Pte. LTD*, 2023 U.S. Dist. LEXIS 132046 (S.D.N.Y. July 31, 2023).
- ⁴⁸ *Coinbase: Jan. 7, 2025 Case* at *36 (“There is indeed substantial ground to dispute how *Howey* is applied to crypto-assets and the role of the surrounding digital ecosystem in that analysis”): See also *Ripple Labs*; but see *Sec. & Exch. Comm’n v. Terraform Labs Pte. LTD*, 2023 U.S. Dist. LEXIS 132046 (S.D.N.Y. July 31, 2023).
- ⁴⁹ See *Coinbase: Jan. 7, 2025 Case* at *4; *supra* note 15.
- ⁵⁰ *Security*, BLACK’S LAW DICTIONARY 1124 (11th ed. 2019).
- ⁵¹ See *supra* notes 13 & 44.
- ⁵² See *supra* note 13.
- ⁵³ *Id.*
- ⁵⁴ 17 CFR § 275.206(4)-2.
- ⁵⁵ 17 CFR § 275.206(4)-2(d)(6).
- ⁵⁶ Safeguarding Advisory Client Assets, 88 Fed. Reg. 14672 (proposed March 9, 2023) (to be codified at 17 CFR pts. 275 and 279 (“Should the [custody] rule narrow the definition [of Qualified Custodian] to include only certain banks and savings associations as qualified custodians? . . . For example, should the rule only permit banks or savings associations that are subject to Federal regulation and supervision to act as qualified custodians?”)).
- ⁵⁷ The following are examples of state-registered trust company custodians: Coinbase Custody Trust Company, LLC is a New York trust, Fireblocks Trust Company, LLC is a New York trust, BitGo Trust Company, Inc. is a South Dakota trust, and BitGo New York Trust Company, LLC, is a New York trust. Zero Hash Trust’s application is currently pending with the North Carolina Commissioner of Banks.
- ⁵⁸ See, e.g., *In the Matter of Coinflip, Inc.*, CFTC No. 15-29, [2015-2016 Transfer Binder] Comm. Fut. L. Rep. (CCH) 33,538, at 77,854 (Sept. 17, 2015) (hereinafter “*Coinflip*”).
- ⁵⁹ This function can be compared to gasoline. Gasoline is bought and sold on spot markets globally. Multinational speculators buy gasoline on the spot over the counter market, truck haulers use gasoline and diesel to deliver goods nationally, and every day drivers need the commodity to fuel their vehicles. The function of this commodity makes it impractical to govern within a

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- CFTC-registered framework, but its global significance requires the CFTC's spot market fraud and manipulation mandated backstop. See Press Release No. 8921-24, Commodity Futures Trading Comm'n, *CFTC Orders Trafigura to Pay \$55 Million for Fraud, Manipulation and Impeding Communications with the CFTC* (June 17, 2024) (the CFTC brought an action against Trafigura, a global commodities dealer, for manipulation in spot gasoline markets).
- ⁶⁰ 7 U.S.C. § 1a(9) (emphasis added).
- ⁶¹ See *Coinflip* at 2 n.2 (we borrow heavily from the CFTC's definition of "virtual currency" for our proposal).
- ⁶² 7 U.S.C. § 9(1).
- ⁶³ The Department of Justice has several additional laws at its disposal to prosecute fraud. See e.g., 18 U.S.C. § 1343.
- ⁶⁴ See, e.g., *Id.*; see also, *CFTC v. GelfmanBlueprint, Inc.*, No. 17-7181 (S.D.N.Y. Sept. 21, 2017).
- ⁶⁵ See *supra* note 59.
- ⁶⁶ 31 CFR § 1022.210(a) (2011).
- ⁶⁷ 18 U.S.C. § 1960.
- ⁶⁸ Financial Crimes Enforcement Network, <https://www.fincen.gov/enforcement-actions-failure-register-money-services-business> (last visited Feb. 4, 2025).
- ⁶⁹ Press Release, Dep't of Just., *Multimillion-dollar unlicensed money transmitter convicted* (April 23, 2024); see also Press Release, Dep't of Just., *Prominent Global Cryptocurrency Exchange KuCoin And Two Of Its Founders Criminally Charged With Bank Secrecy Act And Unlicensed Money Transmission Offenses* (March 26, 2024).
- ⁷⁰ Specifically, several states have explicitly stated, through legislation, rulemaking, or regulatory guidance, that certain crypto activities require a money transmission license, including: (i) the transfer of crypto from one party to another; (ii) the storage/custody of crypto on behalf of individuals; (iii) the purchase and sale of crypto using fiat. See, e.g., *supra* note 20; see also 23 New York Comp Codes Rules and Regs §§ 200.2(d), (q).
- ⁷¹ See 31 U.S.C. § 5318(a)(6).
- ⁷² See, e.g., 23 New York Comp Codes Rules and Regs § 200.19(a) (2024).
- ⁷³ This would be similar to the FDIC's depository insurance disclosure requirements informing end-customers of the insured institution. See Federal Deposit Insurance Corporation, <https://www.fdic.gov/deposit-brokers-processing-guide/disclosure-requirements> (last visited Feb. 4, 2025).
- ⁷⁴ 31 CFR § 1020.22.
- ⁷⁵ See, e.g., *Id.*
- ⁷⁶ In addition, we support modernizing Customer Identification Program (CIP) requirements as outlined in FinCEN's March 2024 proposal to collect partial social security numbers and verify using reliable database verification tools. See Notice and Request for Information and Comment, Financial Crimes Enforcement Network, *Request for Information and Comment on Customer Identification Program Rule Taxpayer Identification Number Collection Requirement* (March 20, 2024).
- ⁷⁷ See, e.g., Edward Woodford, *Debanking: My Take*, Medium Blog (Dec. 19, 2024), https://medium.com/@edward_zerohash/debanking-my-take-8673fc4039df
- ⁷⁸ Gabrielle Saulsbery, *FDIC asked for crypto 'pause,' not debanking, unredacted letters show*, Yahoo Finance (Jan. 6, 2025), https://finance.yahoo.com/news/fdic-asked-crypto-pause-not-130428968.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAACUrSKFevykwedCkAewiClx9JZEI8Gdt_Khs-Kwad3LIpp_mbUnBfyypc-yuQ43dxnEijiZcNqDcfBbe3D2X6h45L5FaQ1RK_J2MJtLvbXjHHoP3SiNAKNtHtmWdR1j3DCiGJmwDWqbc11SktjAoHy4GxsOkTPJYu4b08n0Key3gUe
- ⁷⁹ Office of the Comptroller for the Currency, OCC Bull. No. 2014-58, *Banking Money Services Businesses: Statement on Risk Management* (Nov. 19, 2014); See also, Supervisory Guidance from the Federal Deposit Insurance Corporation, *Joint Statement on Crypto-Asset Risks to Banking Organizations* (Jan. 5, 2023) ("Banking organizations are neither prohibited nor discouraged from providing banking services to customers of any specific class or type, as permitted by law or regulation").
- ⁸⁰ *NRA of Am. v. Vullo*, 602 U.S. 175, 196 (2024) (holding that the superintendent of the NYDFS violated the NRA's first amendment rights when the superintendent pressured insurers to cease underwriting firearm-related policies for the NRA's members in exchange for a narrowed enforcement action against those insurers).
- ⁸¹ According to the Security.org. 2025 Cryptocurrency Adoption and Consumer Sentiment Report, approximately 28% of American adults, or about 65 million people, own cryptocurrencies in 2025. Tom Blackstone, *2025 Cryptocurrency Adoption and Consumer Sentiment Report*, Security.org (Jan. 31, 2025), <https://www.security.org/digital-security/cryptocurrency-annual-consumer-report/>.