

NEITHER KING’S HORSES NOR KING’S MEN: THE PROPOSED
“UNIFORM ALT-CURRENCY ACT” OF 2025

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I. INTRODUCTION: EGG ON THE FLOOR, THE WALL, AND THE FACES OF ALL

A. *The Folly*

*Humpty Dumpty sat on a wall,
Humpty Dumpty had a great fall.
All the king's horses and all the king's men
Couldn't put Humpty together again.*²

So proceeds the rhyme that has outlasted any nursery.³ Interestingly, the famed Humpty Dumpty poem belies its juvenile appearance: competing histories tie the verse to either the failure of the King's forces to ward off the Parliamentary army in 1648⁴ or the famed "*Alice in Wonderland*" children's novel⁵ from two hundred years later. In either tale, the well-heeled fail.

So, too, have fared the disjointed but persistent attempts to rein in the uncharted market for cryptocurrencies.⁶ Almost 21% of Americans dabble in

² *Humpty Dumpty*, ALL NURSERY RHYMES, <https://allnurseryrhymes.com/humpty-dumpty/> [<https://perma.cc/9T5Z-GRGX>] (last visited Sep. 21, 2025).

³ The famed children's poem of 1797 actually perhaps disguised an even much darker political jibe. See E.L. Hamilton, *The Real Humpty Dumpty Story & the Dark Meaning Behind the Iconic Poem*, VINTAGE NEWS (Feb. 28, 2018), <https://www.thevintagenews.com/2018/02/28/humpty-dumpty/> [<https://perma.cc/9YLV-H9DX>].

⁴ *What Is the Real Meaning Behind Humpty Dumpty?*, SPORCLE: BLOG (Nov. 22, 2019), <https://www.sporcle.com/blog/2019/11/what-is-the-real-meaning-behind-humpty-dumpty/> [<https://perma.cc/F9BU-9TT4>].

⁵ Hamilton, *supra* note 3.

⁶ The digital asset "cryptocurrency," as used in this article, denotes open source, public alt-currency that has manifested in literally thousands of digital coins or tokens. Cryptocurrency as a concept belies universal definition; one sturdy description of its synonym "virtual currency" provides as follows:

this novel commerce.⁷ The Securities and Exchange Commission (“SEC”), the Commodity Futures Trading Commission (“CFTC”), and the Department of Justice (“DOJ”) have added colors to the growing canvas, yet the portrait is far from complete. Further, as of mid-2025, the SEC (i.e., the stock market’s chief regulator) has sent mixed messages as to what the future may bring.⁸

Meanwhile, the debate over the proper party to regulate cryptocurrency has continued since at least 2013, the year when the SEC began applying federal securities statutes to cryptocurrency arrangements without express authorization from Congress.⁹ Compounding the legal ambiguities is the undeniable fact that countless such arrangements result in uninformed investments, sizable losses, and/or outright fraud.¹⁰ A cursory review of the facts underlying some of the SEC’s self-touted cryptocurrency actions

[A] digital representation of value that can be digitally traded and functions as: (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is not issued or guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency. Virtual currency is distinguished from fiat currency (a.k.a. “real currency,” “real money,” or “national currency”), which is the coin and paper money of a country that is designated as its legal tender; circulates; and is customarily used and accepted as a medium of exchange in the issuing country. It is distinct from e-money, which is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency.

FATF, VIRTUAL CURRENCIES: KEY DEFINITIONS AND POTENTIAL AML/CFT RISKS 4 (June 2014), <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf.coredownload.pdf> [<https://perma.cc/SY7E-U5EL>] (last visited Sep. 21, 2025).

Cryptocurrency remains an investment phenomenon, belying its original mission of serving as an alternative to fiat currencies. See Gary Gensler, Chair, *Remarks Before the Aspen Forum*, U.S. SEC. & EXCH. COMM’N (Aug. 3, 2021), <https://www.sec.gov/newsroom/speeches-statements/gensler-aspen-security-forum-2021-08-03> [<https://perma.cc/7PY2-XR9V>] (speech by Chair Gary Gensler) (“We also haven’t seen crypto used much as a medium of exchange. To the extent that it is used as such, it’s often to skirt our laws with respect to anti-money laundering, sanctions, and tax collection.”).

In this Article, “cryptocurrency” and “alt-currency” are used interchangeably, as a subset of the broader “digital assets.”

⁷ Anushka Basu, *Largest-ever Crypto Survey Reveals Shocking Number of American Holders*, THE STREET ROUNDTABLE (Apr. 5, 2025, at 12:26 ET), <https://www.thestreet.com/crypto/innovation/55m-americans-hold-crypto-ripple-claims-in-largest-ever-survey> [<https://perma.cc/RR5Y-9UGH>].

⁸ See *SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force*, U.S. SEC. & EXCH. COMM’N (Jan. 21, 2025), <https://www.sec.gov/newsroom/press-releases/2025-30> [<https://perma.cc/U5VJ-WZ4C>].

⁹ See *SEC v. Shavers*, No. 4:13-CV-416, 2013 WL 4028182, at *1–2 (E.D. Tex. 2013), *adhered to on reconsideration*, No. 4:13-CV-416, 2014 WL 12622292 (E.D. Tex. 2014).

¹⁰ See *Cryptocurrency Investment Scams*, CONG. RSCH. SERV. (May 21, 2025), https://www.congress.gov/crs_external_products/IF/PDF/IF13008/IF13008.1.pdf [<https://perma.cc/J52H-KMNS?type=image>].

reveals an alarming, continuing primer on threats to investors from the public sale by issuers of digital assets within the past 10 years.¹¹

Moreover, apart from empirical evidence of fraud, the theoretical reasons for cryptocurrency regulation are numerous. Thanks to mainstream acceptance, the barrier to entry into the market is astonishingly low,¹² while corresponding investor understanding may be even lower.¹³ Additionally, the intertwining of alt-currency arrangements and Ponzi schemes is almost comical.¹⁴ With so much uncertainty, the resulting SEC litigiousness should arguably be applauded.

Conversely, alt-currencies in general (and Bitcoin in particular) have been heralded as both harbingers of progress and the generation's opportunistic investment. The impassioned calls for freedom from any regulation¹⁵ are startling by any standards, as are the well-heeled screeds¹⁶ and worldwide lobbying efforts,¹⁷ which are infamous.

¹¹ See *Enforcement Actions*, U.S. SEC. & EXCH. COMM'N (Apr. 24, 2025), <https://www.sec.gov/about/divisions-offices/division-enforcement/cyber-crypto-assets-emerging-technology/enforcement-actions#crypto> [https://perma.cc/M4L9-S4JC] (relevant SEC enforcement cases).

¹² See Kat Tretina, *How To Buy Bitcoin (BTC)*, FORBES:ADVISOR (May 21, 2024, at 10:29 ET), <https://www.forbes.com/advisor/investing/cryptocurrency/buying-bitcoin/> [https://perma.cc/A2FD-QRW9].

¹³ Michelle Faverio, Wyatt Dawson & Olivia Sidoti, *Majority of Americans Aren't Confident in the Safety and Reliability of Cryptocurrency*, PEW RSCH. CTR.: SHORT READS (Oct. 24, 2024), <https://www.pewresearch.org/short-reads/2024/10/24/majority-of-americans-arent-confident-in-the-safety-and-reliability-of-cryptocurrency/> [https://perma.cc/U3ZX-SSV3].

¹⁴ *Founder Of Cryptocurrency Ponzi Scheme IcomTech Sentenced To 121 Months In Prison*, U.S. ATT'Y'S OFF. S.D.N.Y. (Oct. 4, 2024), <https://www.justice.gov/usao-sdny/pr/founder-cryptocurrency-ponzi-scheme-icomtech-sentenced-121-months-prison> [https://perma.cc/Z2AT-C28N] (detailing a criminal case resulting in a 121-month prison sentence for a promoter promising 100% returns in six months and "financial freedom").

¹⁵ See, e.g., Prateek Ranka, *7 Reasons Why Crypto Should Not Be Regulated*, THE MONEY MONGERS (June 25, 2025), <https://themoneymongers.com/crypto/why-crypto-should-not-be-regulated/> [https://perma.cc/AUP9-N99T]; Lex Sokolin, *Long Take: Policy Recommendations in Crypto, Fintech, and AI for the New Administration*, FINTECH BLUEPRINT (Nov. 8, 2024), <https://lex.substack.com/p/long-take-policy-recommendations> [https://perma.cc/J8DG-GNTL] (calling for "innovation-friendly" regulatory approaches); Gabriel T. Rubin & Dave Michaels, *Silicon Valley Is Into Bitcoin. It Wants to Keep Washington Out*, WALL ST. J.: FINANCIAL REGULATION (Apr. 19, 2018, at 05:30 ET), <https://www.wsj.com/articles/cryptocurrency-firms-investors-seek-exemption-from-sec-oversight-1524130200> [https://perma.cc/553R-S2Q8].

¹⁶ See, e.g., COIN KNOWLEDGE, *The SEC In The US Is Losing Its Powers To Attack Crypto! Find Out How Here*, at 3:01–3:50, (YouTube, July 4, 2024), https://www.youtube.com/watch?v=Qn_fjAkVHjI [https://perma.cc/YDE4-AZBR].

¹⁷ See Julia Shapero, *18 States Sue SEC, Gensler for 'Regulatory Overreach' on Crypto*, HILL (Nov. 14, 2024, at 17:01 ET), <https://thehill.com/policy/technology/4991491-gary-gensler-crypto-enforcement/> [https://perma.cc/K56A-X3TF]. Gary Gensler, a former Professor at MIT, was the SEC Chairman for the most ambitious application of the securities laws to alt-currency arrangements. See Press Release, U.S. Sec. & Exch. Comm'n, SEC Chair Gensler to Depart Agency on January 20 (Nov. 21, 2024), <https://www.sec.gov/newsroom/press-releases/2024-182> [https://perma.cc/B98M-CX95].

In one sense, the debate may be timeless. For better or for worse, a worldwide crisis in 2022 tilted the debate toward tighter market oversight.¹⁸

B. *The Undeniable Near-Demise*

In June 2022, several almost unfathomably large entities playing dubious roles in the alt-currency market met their end.¹⁹ Entities that had taken out Super Bowl commercials failed;²⁰ the young Turk who had headed the largest repository in the alt-currency space was charged with crimes.²¹ While the autopsy of those failures remains unclear, what is undeniable is that the “crypto winter” eradicated two-thirds of the enormous market,²² leading observers and victims alike to question how investments backed by nothing other than investors’ hopes had become so pervasive. In sum, alt-currency issuers, owners, and all parties in between wagered too much on the product’s stability; as happened in the notorious 1920s,²³ popular but unregulated entities had engaged in reckless internecine loans and shallow accounting.²⁴ While the crypto winter amply demonstrated that all digital assets are interrelated,²⁵ that crisis did not end the Leviathan industry, nor the fear of recurrence.

And so, a questionable SEC system of oversight premised upon loud, random discipline has continued. Meanwhile, Congress proposes cryptocurrency bills each year, and the industry still casts sobriquets. In early

¹⁸ See Ken Sweet, *Crypto Firms Acted like Banks, then Collapsed like Dominoes*, AP NEWS (Jan. 24, 2023, at 00:01 ET), <https://apnews.com/article/cryptocurrency-technology-financial-services-bankruptcy-bitcoin-f7d97ff9cc12afc1fd845648b5f13ea7> [<https://perma.cc/42CE-JYBE>].

¹⁹ *Id.*

²⁰ Mallika Mitra, *Why Crypto Ads Won the Super Bowl*, MONEY (Feb. 14, 2022, at 12:06 ET), <https://money.com/super-bowl-crypto-ads-coinbase/> [<https://perma.cc/WM3Z-65KT>]. FTX and crypto.com—trading firms/platforms—entered into bankruptcy. Rohan Goswami & MacKenzie Sigalos, *Crypto.com CEO has History of Red Flags Including Bankruptcy and Quick Exits*, CNBC: TECH (Dec. 11, 2022, at 23:05 ET), <https://www.cnbc.com/2022/12/09/cryptocom-kris-marszalek-involved-bankruptcy-offshore-holdingsclientmoneymonaco.html?msockid=0722cc850f2861d307edd9da0e5a604f> [<https://perma.cc/9FPC-GYEA>].

²¹ *E.g.*, *United States v. Samuel Bankman-Fried, a/k/a “SBF,”* 22 Cr. 673 (LAK), U.S. ATT’Y’S OFF. S.D.N.Y. (Mar. 6, 2024), <https://www.justice.gov/usao-sdny/united-states-v-samuel-bankman-fried-aka-sbf-22-cr-673-lak> [<https://perma.cc/M6PP-D432>].

²² Will Ashworth, *Is the Crypto Winter Over?*, KIPLINGER (Dec. 30, 2023), <https://www.kiplinger.com/investing/cryptocurrency/is-the-crypto-winter-over> [<https://perma.cc/RB4E-NXN4>] (describing the fall of crypto exchange FTX, once valued at \$32 billion).

²³ For a discussion of the dangers of interlocking Wall Street finances in the 1920s, *see generally*, Karol Jan Borowiecki, Michał Dzielniński & Alexander Tepper, *The Great Margin Call: The Role of Leverage in the 1929 Wall Street Crash*, 76 ECON. HIST. REV. 807–826 (2022).

²⁴ *See generally* JOHN KENNETH GALBRAITH, *THE GREAT CRASH* (1954) (providing a celebrated account of how margin loans (i.e., extension of credit to stock purchasers) and other industry operational practices accelerated The Great Depression)).

²⁵ See Joshua Oliver, *Bitcoin Sinks as FTX Crisis Spurs Crypto Contagion Fears*, FIN. TIMES (Nov. 9, 2022), <https://www.ft.com/content/3dadaed2-f959-482e-8897-1a40803de5ae> [<https://perma.cc/Q28W-83SJ>].

2025, President Trump acted quickly to change key regulatory players (while, oddly, adding his own digital asset to the marketplace).²⁶ All of which simply highlights the issue: How could regulation so objectively needed persist without proper underpinning — and in such utter ignominy?

It has literally been a generation since an anonymous party or parties published the White Paper on the Internet, which spawned Bitcoin²⁷ and numerous “blockchains.”²⁸ Since then, the pioneering alt-currency²⁹ has inspired tens of thousands of imitators.

While a handful of countries have formally recognized an alt-coin as equivalent legal tender, most countries overwhelmingly continue to rely upon

²⁶ Drew Harwell & Jeremy B. Merrill, *Small-time Trump Coin Buyers Have Seen Their Investments Collapse*, WASH. POST (May 8, 2025), <https://www.washingtonpost.com/technology/2025/05/08/trump-coin-crypto-investors-wallets/> [<https://perma.cc/4LQB-XBEW>]. A “meme coin” is a cryptocurrency which is tied to a trendy Internet image or other example of online levity. *What is a memecoin?*, COINBASE, <https://www.coinbase.com/learn/crypto-basics/what-is-a-memecoin> [<https://perma.cc/P93T-ZNG4>] (last visited Sep. 22, 2025).

²⁷ See generally Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN, <https://bitcoin.org/bitcoin.pdf> [<https://perma.cc/KN2W-6FMB>] (last visited Sep. 22, 2025) (explaining how bitcoin works).

²⁸ Closely related is the notion of Blockchain, which serves as the digital ledger enabling the creation, trading, and recording of digital transactions. Blockchain may be easier to define: “Blockchain is a shared, immutable digital ledger, enabling the recording of transactions and the tracking of assets within a business network and providing a single source of truth.” Stephanie Susnjara & Ian Smalley, *What Is Blockchain?*, IBM, <https://www.ibm.com/think/topics/blockchain> [<https://perma.cc/RJ85-VGMF>] (last visited Sep. 22, 2025); see also Complaint at 6 n.1, SEC v. Sharma, No. 1:18-cv-02909 (S.D.N.Y. Apr. 2, 2018):

A blockchain is a type of distributed ledger, or peer-to-peer database spread across a network, that records all transactions in the network in theoretically unchangeable, digitally-recorded data packages called blocks. Each block contains a batch of records of transactions, including a timestamp and a reference to the previous block, linking the blocks together in a chain. The system relies on cryptographic techniques for secure recording of transactions. A blockchain can be shared and accessed by anyone with appropriate permissions. Blockchains or distributed ledgers can also record what are called smart contracts, which essentially are computer programs designed to execute the terms of a contract when certain triggering conditions are met.

In the battle between entrepreneur and regulator, a blockchain is neutral; further, as a public record of trading, it can actually enhance regulatory efforts. See, e.g., Complaint at 2, SEC v. Braga, No. 2:22-cv-01563 (W.D. Wash. Nov. 3, 2022). (“Among other evidence, blockchain analysis reveals that, in reality, Trade Coin Club operated in a manner consistent with a Ponzi scheme.”) With a very low barrier to entry, cryptocurrencies currently number over 17,000. Naveen Kumar, *How Many Cryptocurrencies Are There? (2025 Stats)*, DEMANDSAGE (July 30, 2025), <https://www.demandsage.com/number-of-cryptocurrencies/> [<https://perma.cc/U56F-83RS>].

²⁹ As used herein, both cryptocurrency and alt-currency are to be distinguished from “stablecoins,” which are digital assets designed to avoid speculation via linkage to actual, traditional assets. See FATF, *supra* note 6, at 4 (referencing “e-money”); see also Tanaya Macheel, *SEC Clarifies that Most Stablecoins Are Not Securities*, NBC N.Y. (Apr. 4, 2025, at 19:18 ET), <https://www.nbcnewyork.com/news/business/money-report/sec-clarifies-that-most-stablecoins-are-not-securities/6213325/> [<https://perma.cc/UHN5-VMYR?type=image>] (clarifying that most stablecoins are not securities).

fiat currency.³⁰ Rarer still are regulations, which at any time can ensnare an alt-currency issuer, trader, or platform with simple pleading.

Numerous parties with significant credibility have called for the establishment of a federal agency dedicated to the oversight of cryptocurrency.³¹ However, such efforts have stalled, and the time for disciplined oversight at the national level may have simply come and gone. A coterie of state solutions offers timely, active market oversight while allowing for codified rules.³² Such proposed state statutes are thus the focus of this Article.

C. *The Roadmap to the Cure*

Accordingly, this Article progresses as follows:

Part I (“Introduction”) defines key terms and exposes the problem of legislative inertia, both in Congress and at the agency responsible for stock market oversight.

Part II (“Background”) highlights the inefficacy of the extant field of SEC cryptocurrency regulation. While such enthusiastic efforts have enjoyed eye-catching penalties and, on occasion, judicial approbation, the failure to promote the rule of law has plunged the field into, at best, unpredictability and, at worst, political disrepute.

Part III (“Issue”) traces and highlights the successes to date of noteworthy products and services entrusted to state regulation. Primarily, insurance, commercial paper, and even securities matters, such as crowdfunding, have been relegated to non-federal oversight.

Part IV (“Resolution”) explains the five requisite sections of a model statute effectuating a state-based regulation of cryptocurrency. The vaunted SEC and DOJ could be preserved as guardrails for such a novel remedy to a problem entering its third decade.

Finally, Part V (“Conclusion”) provides a recap while chronicling the scorecard of rival solutions, thus auguring well for a nation of States adept at regulation, standing at the vanguard of alt-currency regulation.

³⁰ See *List of currencies of the world*, COUNTRIES-OF-THE-WORLD.COM, <https://www.countries-of-the-world.com/world-currencies.html> [<https://perma.cc/7PDL-EVLH>] (last visited Sep. 22, 2025). “Fiat currency” is most often specifically defined as legal tender endorsed by the sovereign but not backed by a commodity such as gold or silver. James Chen, *Fiat Money Explained: Benefits, Risks, and Global Examples*, INVESTOPEDIA (Aug. 28, 2025), <https://www.investopedia.com/terms/f/fiatmoney.asp> [<https://perma.cc/23HW-7KVB>].

³¹ See, e.g., Joel Seligman, *The Keys To The Kingdom: The Unexpectedly Unsettled Definitions Of Security And Sale And The Overruling Of Chevron*, ILEP 1 (July 19, 2024, at 13:05 ET), <https://www.ilep.org/wps/wp-content/uploads/2024/10/ILEP-2024-Annual-Conference-Joel-Seligman-Draft-Paper-The-Keys-to-the-Kingdom.pdf> [<https://perma.cc/F4XG-SWNC>].

³² See *infra* discussion Part IV.B.

II. BACKGROUND: THE SEC “*HOWEY* PROGRAM”

A. *The Spark from Congress*

The Great Depression prompted federalization of securities regulation in the United States. Under the stewardship of President Franklin Delano Roosevelt (“FDR”), Congress enacted a series of statutes that shifted stock market oversight away from the securities exchanges³³ and state common law.³⁴ The seminal statute was the Securities Act of 1933 (the “33 Act”), a comprehensive measure primarily authored by a law professor that governed the offerings of securities to the public.³⁵ The oft-termed “Truth in Securities Law”³⁶ shifted the burden of providing meaningful disclosure about the investment from the buyer to the seller; the first step in this conversion was the labeling of financial arrangements and instruments subject to the novel federal approach. To that end, the very first definition included in Section 2 of the ’33 Act contained a laundry list of known vehicles for which meaningful disclosure would be required:

(1) The term “security” means 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

³³ Felix Frankfurter, later a Supreme Court Justice, is said to have penned the first federal securities statute at the request of FDR in early 1933. See CHARLES R. GEISST, *WALL STREET: A HISTORY* 228–32 (1997).

³⁴ See generally *id.* (offering a heralded deep dive into the culmination of the first two federal securities statutes). That comprehensive work notes that FDR hoped for stock offerings attended “by full publicity and information.” *Id.* at 228. The rush to litigation at the SEC would become characteristic decades later. *Id.*

³⁵ See *Statutes and Regulations*, U.S. SEC. & EXCH. COMM’N (Oct. 1, 2023), <https://www.sec.gov/rules-regulations/statutes-regulations#secact1933> [<https://perma.cc/WF9F-8EFP>] (providing a lengthier expose on the aims of the ’33 Act).

³⁶ *Id.*

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.³⁷

Noteworthy is that Congress went beyond “stocks” or corporate “shares” offered for sale on a securities exchange. Regulated investments could take the form of any or all terms within a definitional section that deliberately included more than 20 locatable contemporary instruments. Once regulators identified a “security,” Section 5(c) of the ‘33 Act imposed “dual obligations” upon the issuer. These obligations required both registration with the SEC and prospectus delivery to the investor.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.³⁸

Accordingly, the sale of unregistered securities is against federal statutory law. Interestingly, as of 1933, there was no SEC—the world’s most feared market regulator would be legislated into existence the following year via the Securities Exchange Act of 1934.³⁹ The informed observer thus notes that the true “teeth” of the ‘33 Act, at least initially, were displayed by the express causes of action vested in the private citizenry. Specifically, the ‘33 Act Section 11⁴⁰ and Section 12(a)(2)⁴¹ created statutory claims in federal court for purchasers of securities offered by way of a faulty registration

³⁷ 15 U.S.C. § 77b(a)(1) (2025).

³⁸ *Id.* § 77e(c).

³⁹ *See id.* § 78a *et seq.* (“the ‘34 Act”). The SEC was formally created by Section 4 therein. *Id.* § 78d (West, Westlaw through P.L. 119-36).

⁴⁰ 15 U.S.C. § 77k (West, Westlaw through P.L. 119-36).

⁴¹ *Id.* § 77l(a)(2) (West, Westlaw through P.L. 119-36).

statement or prospectus. Meanwhile, Section 12(a)(1) imposed strict liability against the seller of unregistered securities.⁴²

While the private remedies afforded by Sections 11 and 12 ebb and flow in usage,⁴³ the underlying Section 5 violation steadfastly warns against uninformed sales of securities.⁴⁴ The revolutionary private remedies created by the '33 Act function as a deterrent to such inadequately disclosed sales only after a transaction involving a “security” can be identified. Stated most simply, the Section 5 claim remains a vital enforcement tool at the SEC,⁴⁵ and a prerequisite to a plaintiff’s class action.⁴⁶ And that statutory tool has become largely tied to a Supreme Court case that greatly preceded technology and digital assetization.

B. *The Howey Test*

In the 1940s, the SEC employed Section 5 to seek an injunction against the creative enterprise offered by a Florida citrus grove. The case was called *Howey*,⁴⁷ and it may be said to have more juice now than ever.⁴⁸

Specifically, the company “Howey in the Hills” offered tourists ownership of portions of an orange grove. The buyers needed to do nothing other than write a check, although the possibility of entering the land and/or arranging for a separate management company did exist.⁴⁹ In finding the novel business deal to meet the definition of the statutory term “investment contract,” the Court birthed the famed “economic realities” test:

Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise. It

⁴² *Id.* § 771(a)(1) (West, Westlaw through P.L. 119-36). The “law” of unregistered securities can be said to be established via both SEC disciplinary action and decisions resulting from private lawsuits.

⁴³ See John C. Coffee, Jr. & Joshua Mitts, *Can Section 11 Be Saved?: Tracing a Path to Its Survival*, CLS BLUE SKY BLOG (Dec. 6, 2023), <https://clsbluesky.law.columbia.edu/2023/12/06/john-c-coffee-jr-and-joshua-mitts-can-section-11-be-saved-tracing-a-path-to-its-survival/> [<https://perma.cc/NW44-BYA3>].

⁴⁴ Allison Kernisky & Jessica B. Magee, *SEC Enforcement 2024: Year in Review*, HOLLAND & KNIGHT (Dec. 9, 2024), <https://www.hklaw.com/en/insights/publications/2024/12/sec-enforcement-2024-year-in-review> [<https://perma.cc/S4HK-GXYJ>] (noting that over half of the total of monetary sanctions obtained in fiscal year 2024 stemmed from a jury victory over Terraform Labs, a Section 5 case). See *infra* discussion Part III.B. on SEC v. Terraform Labs Pte. Ltd., No. 1:23-CV-01346 (S.D.N.Y. July 31, 2023).

⁴⁵ See *Addendum To Division Of Enforcement Press Release: Fiscal Year 2024*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/files/fy24-enforcement-statistics.pdf> [<https://perma.cc/M3KC-9PTD?type=image>] (last visited Sep. 22, 2025) (noting nearly four times as many “securities offering” cases brought by the SEC in fiscal year 2024 as cases under the next most popular category of claim).

⁴⁶ See Complaint at 1, *Coffey v. Ripple Labs, Inc.*, No. CGC-18-566271 (Cal. Super. Ct. 2018).

⁴⁷ SEC v. W.J. Howey & Co., 328 U.S. 293 (1946).

⁴⁸ *Id.*

⁴⁹ *Id.* at 296–99.

follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed. The investment contracts in this instance take the form of land sales contracts, warranty deeds and service contracts which respondents offer to prospective investors. And respondents' failure to abide by the statutory and administrative rules in making such offerings, even though the failure result from a bona fide mistake as to the law, cannot be sanctioned under the Act.⁵⁰

The resulting (and enduring) “*Howey* Test” for SEC jurisdiction can be phrased in either three⁵¹ or four elements.⁵² In either incarnation, the SEC or private plaintiff must prove the following:

1. An investment of money,
2. in a common enterprise,
3. with the expectation of profits,
4. derived from the efforts of others.⁵³

In the end, *Howey* transformed what was previously thought to be a real estate deal (via the signature of three related customer agreements) into a “security;” legal observers and the public—only years removed from The Great Depression—did not seem to mind.⁵⁴ Further, in the decades since *Howey*, when a Section 5 violation proves to be intentional, even criminal incarceration is a possibility for the issuer, as was evidenced by the *Wolfson* case of 1968.⁵⁵

And so, a notoriously broad statutory definition was broadened even more, and the statutory name attached to the arrangement was subjugated.⁵⁶

⁵⁰ *Id.* at 300.

⁵¹ SEC v. Life Partners, Inc., 986 F. Supp. 644, 646 (D.C. Cir. 1997).

⁵² United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975) (“This test, in shorthand form, embodies the essential attributes that run through all of the Court’s decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.”).

⁵³ See, e.g., *id.*; SEC v. Glenn W. Turner Enters., Inc., 348 F. Supp. 766, 774–76 (D. Or. 1972), *aff’d*, 474 F.2d 476 (9th Cir. 1973); SEC v. Edwards, 540 U.S. 389, 393–94 (2004).

⁵⁴ See generally Miriam R. Albert, *The Howey Test Turns 64: Are the Courts Grading this Test on a Curve?*, 2 WM. & MARY BUS. L. REV. 1–50 (2011) (offering an interesting summary of the far-reaching effects of *Howey*).

⁵⁵ United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968). Wolfson, a corporate raider and racehorse owner, was later vindicated in court; the travail led to his naming his best horse “Affirmed.” That horse won the triple crown in 1978. For an insightful treatment of the bizarre turn of events, see Alan M. Weinberger, *What’s in a Name? The Tale of Louis Wolfson’s Affirmed*, 39 HOFSTRA L. REV. 645 (2011).

⁵⁶ Albert, *supra* note 54 and accompanying text.

A litany of cases in the subsequent years proved the expansion was remarkably elastic in reaching passive investors. The surprising scorecard of unconventional deals thus brought within SEC jurisdiction⁵⁷ reveals a statutory catchall for all types of economic plans, from animal breeding farms⁵⁸ to payphone schemes,⁵⁹ to cryptocurrency investment companies.⁶⁰ The highest court has consistently rejected the predictable argument by promoters accused of unregistered deals that merely a sale of assets occurred.⁶¹ Likewise, the employment of a drafting shield such as the “LLC”⁶² characterization or a “franchise operation” is not dispositive.⁶³

On a more granular level, the *investment of money* element has been broadly construed,⁶⁴ and the *expectation of profits* element has often been combined with the *efforts* element.⁶⁵ Moreover, Ponzi schemes routinely assert coverage by statutes other than the securities laws (with their dire penalties) to no avail.⁶⁶ Further, the intent of the parties to such deals may be deemed wholly irrelevant.⁶⁷

⁵⁷ See, e.g., SEC v. Aqua-Sonic Products Corp., 687 F.2d 577 (2d Cir. 1982) (franchise agreement); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476 (9th Cir. 1973) (Ponzi scheme); SEC v. Edwards, 540 U.S. 389 (2004) (pay phone sale-and-leaseback agreements); and SEC v. SG Ltd., 265 F.3d 42 (1st Cir. 2001) (sustaining Complaint centering on virtual gaming). Private plaintiffs have added considerably to the litany of successful *Howey* applications to unconventional arrangements. See, e.g., Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994) (hotel time share interests); Koch v. Hankins, 928 F.2d 1471 (9th Cir. 1991) (general partnership interest); Marini v. Adamo, 812 F. Supp. 2d 243 (E.D.N.Y. 2011) (rare coins); Landreth Timber Co., v. Landreth, 471 U.S. 681 (1985); Reves v. Ernst & Young, 507 U.S. 170 (1993) (farm cooperative demand notes). Criminal cases have also benefitted from the generous path cut by the *Howey* Test. See, e.g., United States v. Leonard, 529 F.3d 83 (2d Cir. 2008) (LLC interests). But see United States v. Jones, 450 F.2d 523 (5th Cir. 1971) (refusing to define airline voucher arrangements as securities).

⁵⁸ To focus upon the SEC’s traditional *Howey* lens of animal breeding farms (often characterized as tax shelters), see James C. Treadway, Jr., Comm’r, U. S. Sec. & Exch. Comm., Current Developments in the Definition of a Security, Remarks to ALI-ABA Course of Study “Regulation D Offerings of Limited Partnerships and Corporate Capital Raising: At the Commission and in Practice” (Apr. 15, 1983), at 5, <https://www.sec.gov/news/speech/1983/041583treadway.pdf> [https://perma.cc/AJ9Z-JPBF?type=image].

⁵⁹ Edwards, 540 U.S. at 389 (finding a payphone sale-and-leaseback scheme to satisfy the *Howey* test). Perhaps no other *Howey*-based decision commences so artfully: “Opportunity doesn’t always knock . . . sometimes it rings.” *Id.* at 391.

⁶⁰ SEC v. Shavers, No. 4:13-CV-416, 2014 U.S. Dist. LEXIS 130781 (E.D. Tex. Sep. 18, 2014).

⁶¹ Landreth Timber Co., 471 U.S. at 681 (rejecting the “sale of business” exception to security sales because, among other reasons, such defense obligates the court to determine at what extent of share ownership control passes from promoter to investor).

⁶² See, e.g., United States v. Leonard, 529 F.3d at 89.

⁶³ See, e.g., SEC v. Aqua-Sonic Prods. Corp., 687 F.2d 577, 584 (2d Cir. 1982).

⁶⁴ See, e.g., Popovice v. Milides, 11 F. Supp. 2d 638 (E.D. Pa. 1998) (finding an exchange of services for stock to equate to a “sale”).

⁶⁵ See *supra* notes 51 and 52 and accompanying text (discussing the elements of the *Howey* test).

⁶⁶ See, e.g., Leonard, 529 F.3d at 87–88.

⁶⁷ See, e.g., Great Rivers Coop. v. Farmland, Indus., 198 F.3d 685, 699 (8th Cir. 1999) (“Notwithstanding the fact that Farmland registered these instruments as securities, a registration it states was made out of caution, we agree that the characterization of the capital credits as ‘rights to purchase’ stock did not transform the capital credits into securities.”).

Of no small note is the problematic fourth element of the *Howey* Test (i.e., requiring that the promoter provide the dominant efforts in the financial arrangement). This element is very difficult to establish where cryptocurrency is used (as originally designed) as an alternative payment system, or where its rise in value is attributed to factors wholly beyond the seller's control.⁶⁸

C. The SEC “Howey” Program

Beginning around 2013, and undoubtedly spurred by shameless Ponzi schemes, the SEC used *Howey* to reach arrangements involving cryptocurrency.⁶⁹ What commenced as an incidental overlap grew to encompass the issuance of “digital tokens” or “alt-coins”—recall that courts can apply the *Howey* Test and find a security regardless of intent.⁷⁰ The “*Howey* Program” permitted an eager SEC to apply a variety of statutory rules and provisions in an often noble crusade against issuers rushing to obtain investment dollars from strangers.

An abbreviated timeline of case facts highlights the recurring successes of the Program:

2015: A scheme offered shares of a Bitcoin⁷¹ mining operation. 10,000 investors suffered \$19 million in losses.⁷²

2017: \$37 million invested with a company specializing in Bitcoin workspaces; \$4 million diverted to offshore accounts.⁷³

⁶⁸ See J. Scott Colesanti & Veronica Ruiz, NCBA Newsletter, *On Crypto, Death, and Taxes*, 72 NASSAU LAW. 8–9 (Nov. 2022), <https://www.nassaubar.org/nl-archive/Nassau-November-FINAL.pdf> [<https://perma.cc/P93N-LCTA>].

⁶⁹ See generally *SEC Charges Texas Man with Running Bitcoin-Denominated Ponzi Scheme*, U.S. SEC. & EXCH. COMM’N (Oct. 22, 2013) <https://www.sec.gov/newsroom/press-releases/2013-132> [<https://perma.cc/GUH6-9US7>] (discussing charges brought in 2013 by the SEC against a Texas man for defrauding investors in Bitcoin-based Ponzi scheme).

⁷⁰ See *Great Rivers Coop.*, 198 F.3d at 701 (holding that courts apply the *Howey* Test based on the substance of an instrument, not how parties characterize or register it).

⁷¹ Bitcoin remains the most highly visible, oft-traded, and successful alt-currency. See COINMARKETCAP, <https://coinmarketcap.com/currencies/bitcoin/> [<https://perma.cc/R6VJ-SGBV?type=image>] (last visited Sep. 22, 2025). As of May 5, 2025, it could be purchased on countless online venues at a price of approximately \$94,000 a coin. *Crypto Historical Data, Price & Market Cap History*, COINCODEX, <https://coincodex.com/historical-data/crypto/?date=2025-05-05T21:00:00Z> [<https://perma.cc/WN63-TZPR>] (last visited Sep. 22, 2025).

⁷² Complaint at 13, SEC v. Garza, No. 3:15-cv-01760 (D. Conn. 2015).

⁷³ Complaint at 2, 22, SEC v. Haddow, No. 1:17-CV-04950 (S.D.N.Y. 2017).

2018: An unregistered “initial coin offering” (“ICO”) yielded \$32 million to its promoter.⁷⁴

2019: An unregistered ICO yielded \$100 million.⁷⁵

2020: A scheme targeting 150 physician investors raised \$33 million.⁷⁶

2021: Promoters raised \$11 million over five years.⁷⁷

2022: An unregistered offering targeting thousands of investors raised \$124 million.⁷⁸

2023: Promoters obtained \$45 million from “tens of thousands” of investors.⁷⁹

2024: “\$300 million Ponzi scheme targeted more than 40,000 predominantly Latino investors in the U.S. and two other countries.”⁸⁰

On occasion, the aggressive SEC strategy has reached beyond issuers (i.e., crypto brokers⁸¹) and beyond the sale of unregistered securities (i.e., manipulation⁸² and insider trading⁸³). However, the SEC Program does have boundaries: *Howey* has not been used to formally declare Bitcoin a security. The courts have had little trouble finding the pledging of Bitcoin to satisfy the “investment of money” element of the eponymous test.⁸⁴

⁷⁴ Complaint at 1, SEC v. Sharma, No. 1:18-cv-02909 (S.D.N.Y. 2018). The Initial Coin Offering (“ICO”) mimics the initial public offering of securities, which dates in present format from 1933. ICOs may be registered with the SEC (and thus avoid a Section 5 violation) or proceed unregistered (and take their chances).

⁷⁵ Complaint at 1, SEC v. Kik Interactive Inc., No. 1:19-cv-05244 (S.D.N.Y. 2019).

⁷⁶ Complaint at 1, SEC v. Ackerman, No. 1:20-cv-1181 (S.D.N.Y. 2020).

⁷⁷ Jon Southurst, *SEC Charges LBRY Over Token Offering that Raised \$11 Million*, COINGEEK (Mar. 30, 2021), <https://coingeeek.com/sec-charges-lbry-over-token-offering-that-raised-11-million/> [<https://perma.cc/TJ4S-2Y3J>].

⁷⁸ Complaint at 3, SEC v. Barksdale, No. 1:22-cv-01933 (S.D.N.Y. 2022).

⁷⁹ *SEC Charges Creator of CoinDeal Crypto Scheme and Seven Others in Connection with \$45 Million Fraud*, U.S. SEC. & EXCH. COMM’N (Jan. 4, 2023), <https://www.sec.gov/newsroom/press-releases/2023-2> [<https://perma.cc/3HYN-3R5G>].

⁸⁰ Complaint at 1, SEC v. Sanchez, No. 4:24-cv-00939 (S.D. Tex. 2024).

⁸¹ *See, e.g.*, Complaint at 1, SEC v. Consensus Software Inc., No. 1:24-cv-04578 (E.D.N.Y. 2024).

⁸² *See, e.g.*, Complaint at 1, SEC v. Eisenberg, No. 1:23-cv-00503 (S.D.N.Y. 2023).

⁸³ *See, e.g.*, *SEC Charges Former Coinbase Manager, Two Others in Crypto Asset Insider Trading Action*, U.S. SEC. & EXCH. COMM’N (July 21, 2022), <https://www.sec.gov/newsroom/press-releases/2022-127> [<https://perma.cc/XD96-5KFU>].

⁸⁴ Mem. Op. Regarding the Court’s Subject Matter Jurisdiction at 3, SEC v. Shavers, No. 4:13-CV-416, 2014 U.S. Dist. LEXIS 130781 (E.D. Tex. Sep. 18, 2014).

The lone formal decree underscoring the ambitious SEC approach, the DAO Report of 2017, placed crypto issuers on notice that their arrangements would be presumed securities:

Whether or not a particular transaction involves the offer and sale of a security— regardless of the terminology used—will depend on the facts and circumstances, including the economic realities of the transaction. Those who offer and sell securities in the United States must comply with the federal securities laws, including the requirement to register with the Commission or to qualify for an exemption from the registration requirements of the federal securities laws. The registration requirements are designed to provide investors with procedural protections and material information necessary to make informed investment decisions. These requirements apply to those who offer and sell securities in the United States, regardless whether the issuing entity is a traditional company or a decentralized autonomous organization, regardless whether those securities are purchased using U.S. dollars or virtual currencies, and regardless whether they are distributed in certificated form or through distributed ledger technology. In addition, any entity or person engaging in the activities of an exchange, such as bringing together the orders for securities of multiple buyers and sellers using established non-discretionary methods under which such orders interact with each other and buyers and sellers entering such orders agree upon the terms of the trade, must register as a national securities exchange or operate pursuant to an exemption from such registration.⁸⁵

The effect of the release of the DAO Report was dramatic: Although the issuer at the focus was not subjected to an enforcement action,⁸⁶ the entity's actions in bringing to market its digital "tokens" were analyzed in detail and concluded to satisfy the *Howey* Test.⁸⁷ The result was a proliferation of

⁸⁵ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, at 17–18 (July 25, 2017) [hereinafter DAO Report], <https://www.sec.gov/files/litigation/investreport/34-81207.pdf> [<https://perma.cc/UH8G-NHQV?type=image>].

⁸⁶ *Id.* at 1.

⁸⁷ See *generally id.* (deciding not to pursue an enforcement action despite determining the DAO tokens were securities under both the Securities Act of 1933 and the Securities Exchange Act of 1934).

expert commentary on the need for subsequent issuers to document all such offerings. Such proactive compliance could rebut the presumption by the SEC that coin offerings resulted in the creation of securities.⁸⁸

Moreover, examples of SEC leniency are scarce. For example, a 2017 “No Action Letter” simply exonerated an issuer of a digital coin when such was clearly part of a customer rewards program.⁸⁹ Such absolution would reach only a tiny fraction of issuers placing tokens and coins into the stream of commerce.⁹⁰

D. *The Aggravated Response, Internally and Externally*

The case law establishing the boundaries for alt-currency regulation is driven by the SEC. Utilizing the *Howey* Test, the SEC’s Division of Enforcement has brought scores of disciplinary actions.⁹¹ Those litigations are feared within cryptocurrency industries and heavily touted by the SEC in its annual budget justification to Congress.⁹²

Critics of the longstanding SEC activism—including an outspoken SEC Commissioner⁹³—have noted that a great many of the disciplinary actions were resolved by the defendants through consent decrees. Strikingly, that same Commissioner has consistently lobbied against statutes solidifying such

⁸⁸ See, e.g., Joseph A. Hall & Reuben Grinberg, *SEC Confirms That Some Initial Coin Offerings Are Illegal Unregistered Securities Offerings*, HARVARD L. SCH. FORUM ON CORP. GOV. (Aug. 10, 2017), <https://corpgov.law.harvard.edu/2017/08/10/sec-confirms-that-some-initial-coin-offerings-are-illegal-unregistered-securities-offerings/> [https://perma.cc/YU8Z-WQY6]; Kevin Aguirre, *Cryptocurrency ICO Issuers on Notice After SEC Seminal DAO Report*, FORDHAM J. CORP. & FIN. L. (Jan. 25, 2019), <https://news.law.fordham.edu/jcfl/2019/01/25/cryptocurrency-ico-issuers-on-notice-after-sec-seminal-dao-report/> [https://perma.cc/6XCK-FBKG].

⁸⁹ Letter from Jonathan Ingram, Chief Legal Advisor, FinHub, to SEC (Apr. 3, 2019), <https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm> [https://perma.cc/2TYG-UBG6]. The letter opined that the company’s digital coin rewards program did not create securities, as long as certain conditions were met. Chief among those factors was the promise that “The Token is marketed in a manner that emphasizes the functionality of the Token, and not the potential for the increase in the market value of the Token.” *Id.*

⁹⁰ See *id.*

⁹¹ See generally Lee Reiners, *Prepared Statement*, U.S. SEC. & EXCH. COMM’N (Mar. 21, 2025), <https://www.sec.gov/files/ctf-input-reiners-2025-3-18.pdf> [https://perma.cc/ZA4S-G6NN] (discussing enforcement actions brought by the SEC where courts applied the *Howey* test to cryptocurrency).

⁹² See generally U.S. SEC. & EXCH. COMM’N, FISCAL YEAR 2024 CONGRESSIONAL BUDGET JUSTIFICATION ANNUAL PERFORMANCE PLAN, FISCAL YEAR 2022 ANNUAL REPORT (2023), https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf [https://perma.cc/2EPE-45BB] (discussed in detail below).

⁹³ Hester M. Peirce, Speech, *Broken Windows: Remarks Before the 51st Annual Institute on Securities Regulation*, U.S. SEC. & EXCH. COMM’N (NOV. 8, 2019), <https://www.sec.gov/newsroom/speeches-statements/peirce-broken-windows-51st-annual-institute-securities-regulation> [https://perma.cc/EQ3M-ES9X] (“Given my ‘Crypto Mom’ nickname, you had to expect one of my examples to be crypto-related, so here it is. I am concerned about how the SEC has regulated this space, because I believe our lack of a workable regulatory framework has hindered innovation and growth. The only guidance out of the SEC is a parade of enforcement actions...”).

exercises of jurisdiction,⁹⁴ thereby contributing in part to the continuing legislative and regulatory stalemate.

Likewise, the defense bar has often warned that SEC aggression has tenuous legal justification.⁹⁵ Therefore, it is vital that the SEC's *Howey* reliance reach crypto arrangements and be validated by the courts. A trio of cases between 2021 and 2024 served as an indecisive crescendo to the debate.

III. ISSUE: THE BRUTAL TRUTHS AND CONSEQUENCES OF THE *RIPPLE*, *TERRAFORM* AND *COINBASE* CASES

With a confident SEC Chair, the *Howey* Program consistently drew a clear battle line, largely ignoring outspoken members of Congress.⁹⁶ Undeniably, the SEC's pursuit of cryptocurrency jurisdiction—openly eschewing proposed Congressional intervention—had been rewarded via primarily uncontested cases. The trend bucked with one case involving a well-heeled defendant possessing the proceeds of an online offering that garnered over a billion dollars, resulting in protracted litigation for four years.⁹⁷

A. *The Ripple Labs Setback*

In December 2020, the SEC sued the issuer of digital coins and two executives, seeking all the proceeds from an unregistered billion-dollar offering.⁹⁸

⁹⁴ Cheyenne Ligon, *SEC Commissioner Hester Pierce Says Washington Doesn't Need a New Crypto Regulator*, YAHOO! FIN. (Dec. 30, 2021), <https://finance.yahoo.com/news/sec-commissioner-hester-pierce-says-185806149.html> [<https://perma.cc/R7Y7B-9A9M>] (highlighting that the Commission may mistakenly attempt to assert authority over Non-Fungible Tokens).

⁹⁵ See John Deaton, *SEC Crypto Litigation Ventures into Dangerous Legal Territory*, BLOOMBERG L. (May 2, 2023, at 04:00 ET), <https://news.bloomberglaw.com/us-law-week/sec-crypto-litigation-ventures-into-dangerous-legal-territory> [<https://perma.cc/E2N9-X2FD>].

⁹⁶ Compare Chelsea Cox, *Cryptocurrency Firms Need to 'Come into Compliance' with Existing Rules, SEC Chair Gary Gensler Says*, CNBC: POLITICS (Dec. 7, 2022, at 15:09 ET), <https://www.cnbc.com/2022/12/07/sec-chair-gary-gensler-cryptocurrency-firms-need-to-come-into-compliance.html> [<https://perma.cc/6YTR-P9BR>] (quoting former SEC Chair Gary Gensler, who indicated that the SEC had brought over 100 enforcement cases at the time), with Arijit Sarkar, *US Senator Bill Seeks to Cushion Crypto Exchanges from SEC Enforcement Actions*, COINTELEGRAPH (Oct. 1, 2022), <https://cointelegraph.com/news/us-senator-bill-seeks-to-cushion-crypto-exchanges-from-sec-enforcement-actions> [<https://perma.cc/98JF-Y473>] (discussing legislation introduced by United States Senator Bill Hagerty in 2022 to protect cryptocurrency exchanges from SEC enforcement actions).

⁹⁷ See *SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering*, U.S. SEC. & EXCH. COMM'N (Dec. 22, 2020), <https://www.sec.gov/newsroom/press-releases/2020-338> [<https://perma.cc/MVX2-P7Q7>].

⁹⁸ See Complaint at 1, *SEC v. Ripple Labs, Inc.*, No. 1:20-cv-10832 (S.D.N.Y. 2020); *SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering*, *supra* note 97. The *Ripple* case, universally regarded as crucial to the SEC's assertion of broad *Howey* Test application, proceeds on a theory used routinely by the SEC which alleges that unregistered digital coins equated to investment contracts because the offeror pooled proceeds and promised profits based upon the offeror's

The technical, 71-page federal Complaint detailed the sale by Ripple Labs of “XRP” digital coins between 2013 and 2020.⁹⁹ The online sales involved “14.6 billion units of a digital asset security,” alleged to have generated \$1.38 billion in proceeds.¹⁰⁰ Further, Ripple’s CEO and Chairman were alleged to have personally profited \$600 million.¹⁰¹ The Complaint further discussed five unnamed Ripple employees.¹⁰² The accusation of unregistered sales of securities was strengthened by the statement that Ripple (a corporation registered in Delaware, with its chief subsidiary also registered as a money transmitter under federal regulations¹⁰³) had been warned by counsel in 2012 that the XRP coins could be considered “investment contracts” by the SEC.¹⁰⁴

Citing Section 5, the *Howey* Test, and the DAO Report, the SEC faulted Ripple for broadly selling and trading XRP coins:

Ripple’s objectives and its own financial reality thus compelled it to actively seek to offer and sell XRP as widely as possible, while controlling supply and demand in the resale market to manage and control liquidity for an imagined, future “use” case.¹⁰⁵ ...[The CEO] orchestrated the initial stage of Ripple’s Offering of XRP by approving the timing and amount of offers and sales to: (1) purchasers in the open market (“Market Sales”); (2) investment funds, wealthy individuals, or other sophisticated investors (“Institutional Sales”); and (3) others enlisted to assist Ripple’s efforts to develop an XRP market (the “Other XRP Distributions”).¹⁰⁶

The Answer filed by Ripple¹⁰⁷ was mammoth and offered a variety of defenses. Commencing with the assertion that the SEC charges proceeded

efforts. See also Complaint, SEC v. LBRY, Inc., No. 1:21-cv-00260 (D.N.H. 2021); Ekta Mourya, *SEC v. Ripple Lawsuit Update: Remittance Network Ripple Scores Another Small Win in Court*, FXSTREET (Dec. 22, 2022, at 07:22 GMT), <https://www.fxstreet.com/cryptocurrencies/news/sec-v-ripple-lawsuit-update-remittance-network-ripple-scores-another-small-win-in-court-case-202212220628> [<https://perma.cc/L6TM-4JY7?type=image>].

⁹⁹ Complaint at 1, SEC v. Ripple Labs, Inc., No. 1:20-cv-10832 (S.D.N.Y. 2020).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 5.

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.* at 2 & 9–10.

¹⁰⁵ Complaint at 13, SEC v. Ripple Labs, Inc., No. 1:20-cv-10832 (S.D.N.Y. 2020).

¹⁰⁶ *Id.*

¹⁰⁷ Answer of Defendant Ripple Labs, Inc. to Plaintiff’s Complaint, SEC v. Ripple Labs, Inc., No. 1:20-cv-10832 (S.D.N.Y. 2020).

“with neither statutory mandate nor congressional authorization,”¹⁰⁸ the Answer continued by declaring:

The SEC’s theory in the Complaint would read the word “contract” out of “investment contract,” and stretch beyond all sensible recognition the Supreme Court’s test for determining investment contracts in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946). As a matter of economic substance, XRP categorically differs from the various instruments and business arrangements that Congress authorized the SEC to regulate — all of which, unlike Ripple, involve “schemes devised by those who seek the use of the money of others on the promise of profits.” *Howey*, 328 U.S. at 299. Every other case in which courts have ruled that transactions involving a digital asset were investment contracts involved an issuer’s ICO or other promise of future tokens to raise money to develop a digital-asset product, as well as a contractual relationship between the issuer and asset purchasers. Ripple never held an ICO, never offered future tokens to raise money, and has no contracts with the vast majority of XRP holders. . . .¹⁰⁹

Overall, the Ripple defendants claimed that privity between investor and issuer was lacking, that various parties used the XRP coins for various reasons, and that other government agencies were aware of the company’s dealings. Concurrently, Ripple asserted seven legal defenses, including the absence of a security, a lack of regulatory notice, and the statute of limitations.¹¹⁰

The litigation was largely resolved via rulings on competing motions for summary judgment.¹¹¹ In a reasoned Order, Judge Torres of the Southern District of New York left both sides unsatisfied. Two of the arrangements detailed by the SEC were found to be securities per the *Howey* Test.¹¹² Both sides claimed victory. Followers of the litigation observed that, ironically, the arrangements found to be securities involved sales to hedge funds (i.e., sophisticated investors not needing the protection of the securities laws), while the arrangements not found to be securities (known as “programmatic

¹⁰⁸ *Id.* at 1.

¹⁰⁹ *Id.* at 6–7.

¹¹⁰ *Id.* at pages 90–92.

¹¹¹ *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308 (S.D.N.Y. 2023).

¹¹² *Id.* at 324–33.

sales” to the public via a platform/exchange) involved less sophisticated buyers.¹¹³

The written decision perhaps served foremost to highlight the unpredictability of the key factors: The Judge gave heavy weight to the marketing materials distributed by Ripple, while discounting the nature of retail investors. Judge Torres flatly rejected the arguments that the “essential ingredients test” had added requirements to the *Howey* Test insofar as digital assets were concerned.¹¹⁴ However, the standard itself was perhaps set back by the Judge’s conclusions, which appeared narrowly focused upon privity and written promises to investors (or lack thereof):

The SEC alleges that Ripple engaged in three categories of unregistered XRP offers and sales: (1) Institutional Sales under written contracts for which it received \$728 million; (2) Programmatic Sales on digital asset exchanges for which it received \$757 million; and (3) Other Distributions under written contracts for which it recorded \$609 million in “consideration other than cash.”¹¹⁵ . . . Based on the totality of circumstances, the Court finds that reasonable investors, situated in the position of the Institutional Buyers, would have purchased XRP with the expectation that they would derive profits from Ripple’s efforts.¹¹⁶ . . . Whereas the Institutional Buyers reasonably expected that Ripple would use the capital it received from its sales to improve the XRP ecosystem and thereby increase the price of XRP, . . . Programmatic Buyers could not reasonably expect the same. . . . Therefore, having considered the economic reality and totality of circumstances, the Court concludes that Ripple’s Other Distributions did not constitute the offer and sale of investment contracts.¹¹⁷

The zealous cadre of technology supporters claimed triumph, echoed by the mainstream press,¹¹⁸ while the more sedate defense bar noted continuing

¹¹³ *When Howey Met Gary (Gensler): Ripple or Tsunami?*, DAVISPOLK: CLIENT UPDATE (July 17, 2023), <https://www.davispolk.com/insights/client-update/when-howey-met-gary-gensler-ripple-or-tsunami> [<https://perma.cc/EAA2-V95G>].

¹¹⁴ *Ripple Labs, Inc.*, 682 F. Supp. 3d at 322.

¹¹⁵ *Id.* at 324.

¹¹⁶ *Id.* at 326.

¹¹⁷ *Id.* at 328.

¹¹⁸ *E.g.*, David Yaffe-Bellany, *Crypto Industry Secures Early Victory in Legal Battle With Regulators*, N.Y. TIMES (July 13, 2023), <https://www.nytimes.com/2023/07/13/business/crypto-ripple-ruling.html> (on file with U. of Louisville L. Rev.).

questions likely to affect the SEC's will to pursue other, pending litigations.¹¹⁹ The SEC appealed the partial victory.

In 2024, Judge Torres imposed a penalty against Ripple of \$125 million based upon the earlier finding of Section 5 violations.¹²⁰ However, the wound to the SEC Program was clear: Where the SEC had seen danger to retail investors, the Court had found none—at least not in sufficient quantity to use the ubiquitous *Howey* Test for broad protections.¹²¹

In 2025, after a torrent of political statements and changes (discussed below), the SEC and Ripple settled for \$50 million.¹²² In the interim, a separate Southern District of New York jurist saw *Howey* as more concerned with protecting against the dangers of unregistered offerings of alt-currencies.¹²³

B. The Terraform Response

A follow-up to the *Ripple* decision emerged quickly. Weeks after the decision by Judge Torres, fellow Southern District of New York Judge Rakoff issued his decision in *Terraform*, another *Howey* Program case.

The facts of the *Terraform* case¹²⁴ are both more extensive and more haunting. Do Hyeong Kwon (“Kwon”) was CEO and majority shareholder of Terraform Labs, a Singapore company with its General Counsel and other employees working in the United States.¹²⁵ While at times overtly technical, the *Terraform* case was anything but boring: The matter involved an amended complaint, a whistleblower, a detailed list of everyday victims, and an eventual extradition.

¹¹⁹ See, e.g., Alex Drylewski, Daniel Michael, & Spurthi Jonnalagadda, *Ripple Effects: Developments Following Groundbreaking Decision in SEC v. Ripple Labs*, REUTERS: LEGAL NEWS (Dec. 5, 2023), <https://www.skadden.com/-/media/files/publications/2023/12/rippleeffectsdevelopmentsfollowinggroundbreakingdecisioninsecvripplelabs.pdf> [https://perma.cc/PW34-9MJP].

¹²⁰ Michael Juanico, *Ripple Ordered to Pay \$125 Million Fine for Securities Violations*, BLOCKNEWS: CRYPTO (Aug. 7, 2024), <https://blocknews.com/ripple-ordered-to-pay-125-million-fine-for-securities-violations/> [https://perma.cc/GPS5-QHCZ].

¹²¹ *When Howey Met Gary (Gensler): Ripple or Tsunami?*, supra note 113.

¹²² Cheyenne Ligon, *SEC, Ripple Ink \$50M Settlement Agreement, Ask NY Judge for Green Light*, COINDESK: POLICY (May 9, 2025, at 09:55 ET), <https://www.coindesk.com/policy/2025/05/08/sec-ripple-ink-usd50m-settlement-agreement-ask-ny-judge-for-green-light> [https://perma.cc/99TN-6EH2].

¹²³ Opinion and Order at 43-44, *SEC v. Terraform Labs Pte. Ltd.*, No. 1:23-cv-01346 (S.D.N.Y. 2023); See generally *SEC v. Terraform Labs Pte. Ltd.*: SDNY Judge Rakoff Denies Defendants' Motion to Dismiss SEC's Claims, Rejects the Ripple Court's Interpretation of Howey Test, MORRISON FOERSTER: CLIENT ALERT (Aug. 4, 2023), <https://www.mofo.com/resources/insights/230803-sec-v-terraform-labs-pte-ltd-sdny-judge-rakoff> [https://perma.cc/U72G-XGMV] (discussing Judge Rakoff's opinion which held that Terraform's crypto-assets qualified as securities under the Howey Test).

¹²⁴ *SEC Charges Terraform and CEO Do Kwon with Defrauding Investors in Crypto Schemes*, U.S. SEC. & EXCH. COMM'N (Feb. 16, 2023), <https://www.sec.gov/newsroom/press-releases/2023-32> [https://perma.cc/6UWR-TS47].

¹²⁵ Complaint at 5, *SEC v. Terraform Labs Pte. Ltd.*, 684 F. Supp. 3d 170 (S.D.N.Y. 2023) (No. 1:23-cv-01346).

Legally, in addition to the Section 5 charge, the SEC accused Kwon of violating the anti-fraud provisions of the securities statutes.¹²⁶ As alleged in the SEC complaint, between 2018 and 2022, Terraform sold four groups of alt-currency securities without registration. Some offers were completed via programmatic sales, while others progressed through private contracts. An overarching Terraform ecosystem was touted on Twitter and elsewhere; all incarnations of the deals were alleged by the SEC to be *Howey* securities.¹²⁷ Notably, Kwon expressly touted an ultimate secondary market in some digital coins—a fact often expediting satisfaction of the promoter’s “efforts” for purposes of the final element of *Howey*.¹²⁸

The complaint made creative use of Kwon’s text messages encouraging “cross trading” between Terraform products. Further, retail victims were described as unsophisticated investors (e.g., “a musician in Venice [California]”; “a painter in... Vermont”¹²⁹). Overall, the SEC relied upon both the *Howey* Test and the DAO Report in blaming Kwon and Terraform for misleading both the public at large and individual purchasers in particular.¹³⁰

In his December 2023 decision following oral argument on cross-motions for summary judgment,¹³¹ Judge Rakoff granted summary judgment for the SEC on the Section 5 claim. After hearing from numerous expert witnesses, Judge Rakoff readily concluded that “the *Howey* Test remains a binding statement of the law, not dicta.”¹³² Further, Judge Rakoff rejected pleas for considerations more suited for administrative law textbooks and newer lines of reasoning when he concluded, “In any event, neither the Supreme Court nor the Second Circuit has ever suggested that *Howey* rests on a shaky foundation.”¹³³ Accordingly, all four of the alt-currency arrangements described by the SEC were found to be securities. However, the court declined to grant summary judgment on the fraud allegations.¹³⁴

Comparatively, both *Ripple Labs* and *Terraform* delivered partial verdicts, both employing the *Howey* Test. Additionally, both cases credited direct communications with institutional investors. However, the *Terraform* case placed an emphasis upon a) retail victims, b) misleading statements by the issuer (e.g., pegging the price of certain coins to \$1.00 while also encouraging the trading of these for other assets on a Terraform blockchain), and c) the distinction in sophistication when it is known that sold digital

¹²⁶ *Id.*

¹²⁷ Complaint, SEC v. Terraform, No. 1:23-cv-01346, *passim*.

¹²⁸ *Cf.* SEC v. Life Partners, 102 F.3d 587 (D.C. Cir. 1996) (finding such secondary markets efforts lacking).

¹²⁹ Complaint at 25, SEC v. Terraform, No. 1:23-cv-01346.

¹³⁰ *Id.* at 35–38.

¹³¹ Opinion and Order at 2, SEC v. Terraform, No. 23-cv-01346 (S.D.N.Y. 2023).

¹³² *Id.* at 37.

¹³³ *Id.* at n.9.

¹³⁴ *Id.* at 50–54.

assets will be resold.¹³⁵ It is also noteworthy that Kwon was awaiting extradition to the United States on an unrelated criminal charge at the time of the *Terraform* hearing.¹³⁶

After *Ripple Labs* and *Terraform*, there remained a legitimate question about the dispositive role, if any, of programmatic sales in *Howey* Program cases. A third case from recent years (again in the Southern District of New York) might have clarified the singular importance of cryptocurrency sales on an “exchange.” However, the policy underlying the *Howey* Program seemed to matter above all else.

C. The Coinbase Fiasco

Since at least 2019, Coinbase has been the largest national trading platform for cryptocurrency.¹³⁷ It has served over 100 million customers, who are able to buy, sell, and trade “listed” alt-currencies.¹³⁸

Coinbase had played the role of a good corporate citizen when dutifully registering¹³⁹ with the SEC in 2021.¹⁴⁰ The disclosure document filed with the SEC revealed compliance commitments.¹⁴¹ However, the SEC’s charges against Coinbase in June 2023¹⁴² may have been the last straw.

As background, Coinbase is largely known as a cryptocurrency trading platform. However, the SEC charges described the company as serving many roles, including a cryptocurrency broker.¹⁴³ As in *Ripple Labs*, the SEC faulted Coinbase for conscious avoidance of its registration obligations:

Since at least 2016, Coinbase has understood that the Supreme Court’s decision in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) and its progeny set forth the relevant

¹³⁵ *Id.* at 46 (“The natural problem for defendants is that ‘securities do not come to rest with investors who intend a further distribution.’”).

¹³⁶ *Id.* at 68.

¹³⁷ *SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency*, U.S. SEC. & EXCH. COMM’N (June 6, 2023), <https://www.sec.gov/newsroom/press-releases/2023-102> [<https://perma.cc/6AH6-FX6M>].

¹³⁸ *Guide to DeFi tokens and altcoins*, COINBASE, <https://www.coinbase.com/learn/crypto-basics/defi-tokens-and-altcoins> [<https://perma.cc/F4W6-KNZS>] (last visited Sep. 23, 2025) (noting “listed” in this context means approved for sale on the platform in the same manner that stocks are listed on a securities exchange).

¹³⁹ *SEC Filings Details*, COINBASE, <https://investor.coinbase.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=100115667541> [<https://perma.cc/AT9M-6T7H>] (last visited Sep. 23, 2025).

¹⁴⁰ Coinbase Global, Inc., Post-Effective Amendment No.1 to Form S-1: Registration Statement Under the Securities Act of 1993 (Form S-1) (July 1, 2021), <https://www.sec.gov/Archives/edgar/data/1679788/000162828021013355/coinbase-possx1.htm> [<https://perma.cc/4L5X-F332>].

¹⁴¹ See DAO Report, *supra* note 85.

¹⁴² See Complaint at 1, *SEC v. Coinbase, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. 2023) [hereinafter “Coinbase Complaint”].

¹⁴³ *Id.* at 1.

test for determining whether a crypto asset is part of an investment contract that is subject to regulation under the securities laws. And, as part of its public marketing campaign to position itself as a “compliant” actor in the crypto asset space, Coinbase has for years touted its efforts to analyze crypto assets under the standards set forth in *Howey* before making them available for trading. But while paying lip service to its desire to comply with applicable laws, Coinbase has for years made available for trading crypto assets that are investment contracts under the *Howey* test and well-established principles of the federal securities laws...¹⁴⁴

The SEC’s five charges—under both the ’33 Act and the ’34 Act—went beyond alleging the sale of unregistered securities. Coinbase, which reportedly earns billions of dollars in annual revenue from the sale and trading of thousands of cryptocurrencies, was accused of violating Section 6 of the ’34 Act¹⁴⁵ by failing to register with the SEC as a national securities exchange and Section 15 of the same statute by failing to register as a broker-dealer.¹⁴⁶ Further, the “staking” program¹⁴⁷ offered by Coinbase to customers was alleged to be a separate Section 5 violation,¹⁴⁸ apart from the 13 specific digital coins alleged to be unregistered “Crypto Asset Securities.”¹⁴⁹

In support of the allegations, the SEC cited the ’33 Act, the ’34 Act, the *Howey* Test, and the DAO Report. Significantly, the SEC complaint repeated Coinbase’s annual corporate disclosure, which laments the lack of certainty in the field:

A particular crypto asset’s status as a “security” in any relevant jurisdiction is subject to a high degree of uncertainty and if we are unable to properly characterize a crypto asset, we may be subject to regulatory scrutiny, investigations, fines, and other penalties, which may adversely affect our business, operating results, and

¹⁴⁴ *Id.* at 3.

¹⁴⁵ 15 U.S.C.S. § 78f.

¹⁴⁶ *Id.* § 78o.

¹⁴⁷ See, e.g., *What Is Crypto Staking and How Does it Work?*, KRAKEN, (June 2, 2025), <https://www.kraken.com/learn/what-is-crypto-staking> [<https://perma.cc/5F8R-YKRP>] (describing staking as a process where platforms hold cryptocurrency for profit while paying fees to nominal owners, portrayed as creating passive income by “locking up” digital assets on a blockchain).

¹⁴⁸ Coinbase Complaint, *supra* note 142, at 22–23 & 93.

¹⁴⁹ *Id.* at 33.

financial condition. The SEC and its staff have taken the position that certain crypto assets fall within the definition of a “security” under the U.S. federal securities laws. The legal test for determining whether any given crypto asset is a security is a highly complex, fact-driven analysis that evolves over time, and the outcome is difficult to predict. The SEC generally does not provide advance guidance or confirmation on the status of any particular crypto asset as a security. Furthermore, the SEC’s views in this area have evolved over time and it is difficult to predict the direction or timing of any continuing evolution.¹⁵⁰

In response, the lengthy Coinbase Answer, *inter alia*, denied all wrongdoing while highlighting the transparent nature of Coinbase’s business. The Answer early on emphasized its bold stance: “The only change is in the SEC’s position regarding its powers.”¹⁵¹ The CEO of Coinbase spoke loudly and quickly about the unfounded position of the SEC, as well as the company’s strict review prior to going public in 2021.¹⁵²

Separately, in July 2022, Coinbase petitioned the SEC for formal rulemaking on cryptocurrency per SEC regulations.¹⁵³ Subsequently, in 2025, a federal court granted in part Coinbase’s petition for SEC rulemaking.¹⁵⁴ That decision faulted the SEC for its cavalier attitude in issuing a perfunctory denial of Coinbase’s request.

Behind the scenes of the Coinbase case, President Trump often promised supporters during his 2024 campaign that the SEC Chair would be replaced,

¹⁵⁰ *Id.* at 32.

¹⁵¹ Coinbase Answer at 2–3, SEC v. Coinbase, Inc., No. 1:23-cv-04738 (S.D.N.Y. 2023).

¹⁵² See Tom Blackstone, *Coinbase CEO Responds to SEC Suit, Says Team Is ‘Confident’ in Facts and Law*, COINTELEGRAPH (June 6, 2023), <https://cointelegraph.com/news/coinbase-ceo-responds-to-sec-suit-says-team-is-confident-in-facts-and-law> [<https://perma.cc/KF2Q-5AJF>].

¹⁵³ Petition for Rulemaking – Digital Asset Securities Regulation 1 (U.S. Sec. & Exch. Comm’n July 21, 2022) <https://www.sec.gov/files/rules/petitions/2022/petn4-789.pdf> [<https://perma.cc/2ZVA-PESE?type=image>]. The SEC responded, tersely, in December 2023. See Coinbase Global, Inc., SEC Response to Petition for Rulemaking, No. 4-789 (Dec. 15, 2023), <https://www.sec.gov/files/rules/petitions/2023/4-789-letter-secretary-grewal-121523.pdf> [<https://perma.cc/3YCA-J7HT?type=image>].

¹⁵⁴ *Coinbase, Inc. v. SEC*, 126 F.4th 175 (3d Cir. 2025); see also Melissa C. Bender et al., *Third Circuit Coinbase Decision Pressures SEC on Crypto Rulemaking*, ROPES & GRAY: INSIGHTS (Jan. 16, 2025), <https://www.ropesgray.com/en/insights/alerts/2025/01/third-circuit-coinbase-decision-pressures-sec-on-crypto-rulemaking> [<https://perma.cc/62GS-4FS3>].

and the agency would head in a different direction regarding alt-currency.¹⁵⁵ In January 2025, Chairman Gensler stepped down.¹⁵⁶

In February 2025, the SEC dropped its case against Coinbase.¹⁵⁷ In its press release, the SEC referenced its “ongoing efforts to reform and renew its regulatory approach.”¹⁵⁸ As a result, the bold assertions lodged by the SEC did not receive a juridical decision. Further, specific queries, such as whether a platform can be faulted for listing digital coins previously drawing regulatory ire, remained unanswered. However, the cryptocurrency industry celebrated what it viewed as a shift toward lighter regulatory oversight.

The trio of *Howey* Program cases from 2021 to 2024 provided instructive lessons about the current state of cryptocurrency regulation. Most significantly, courts demonstrated that the precise verbiage of the *Howey* Test will be relied upon primarily in contested matters, with alternative standards grounded in administrative law or defense bar creativity likely to be discounted.¹⁵⁹ Moreover, the policy underlying the *Howey* Test plays little role in judicial analysis. As a result, sophisticated buyers seemingly receive more protections than do retail investors—an ironic outcome, given the securities laws’ protective purpose. Additionally, courts are quick to note the lack of legal justification for the *Howey* Program, specifically the absence of any mandate from Congress or dedicated agency rulemaking.¹⁶⁰ Consequently, jurists have shown reluctance to impose individual liability in *Howey* Program cases, at least at the summary judgment phase, leaving the regulatory landscape in continued uncertainty.

In 2024, crypto players more aggressively opposed the SEC’s longstanding program. Beyond Coinbase’s request for rulemaking, there appeared to be preemptive lawsuits seeking to stave off the application of federal securities laws. As stated in one such lawsuit (which named all five SEC Commissioners as defendants):

Someone who purchases limited-run Nike sneakers
intending to resell them, for example, may well expect to

¹⁵⁵ Tonya M. Evans, *Can Trump Bypass Legal Hurdles To Fire Gensler? The Risks for Crypto*, FORBES: DIGITAL ASSETS (Nov. 26, 2024, at 23:29 ET), <https://www.forbes.com/sites/tonyaevans/2024/11/14/can-trump-bypass-legal-hurdles-to-fire-gensler-the-risks-for-crypto/> [<https://perma.cc/52TZ-35YF>].

¹⁵⁶ *SEC Chair Gensler To Depart Agency on January 20*, U.S. SEC. & EXCH. COMM’N (Nov. 21, 2024), <https://www.sec.gov/newsroom/press-releases/2024-182> [<https://perma.cc/54ZU-7Z47>].

¹⁵⁷ *SEC Announces Dismissal of Civil Enforcement Action Against Coinbase*, U.S. SEC. & EXCH. COMM’N (Feb. 27, 2025), <https://www.sec.gov/newsroom/press-releases/2025-47> [<https://perma.cc/R3MC-RK2Q>].

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* discussion Parts III.A–C.

¹⁶⁰ See *SEC v. Payward, Inc.*, 763 F. Supp. 3d 901, 911 (N.D. Cal. 2025) (ruling “The SEC would have to show that any ordinary entity in Kraken’s position would understand that the *Howey* test, as applied to the secondary market transactions on Kraken’s platform, establishes that those transactions are investment contracts”).

turn a profit based on Nike's managerial and promotional efforts to create demand for and otherwise increase the value of those desirable shoes. Under the SEC's newly minted view of its regulatory reach, that would apparently be enough to turn those sneakers into securities, their purchase into a securities transaction regulated by the SEC, and any auction house or consignment store that facilitates such purchases into an unregistered securities exchange. That sweeping claim of agency dominion reaches far beyond anything Congress authorized in any statute, and certainly reaches far beyond anything Congress authorized with the clarity that would be necessary to grant such extraordinary regulatory power.¹⁶¹

Finally, a primary challenge in overlaying federal securities law lies in the tendency for attendant regulations to turn a blind eye to sophisticated buyers. Indeed, whole bodies of precedent have grown around exemptions from securities regulation intended to keep the securities laws focused upon vulnerable victims (as opposed to the well-heeled).¹⁶²

Over time, a protocol that centered on fraud yielded an appreciable number of precedents for *Howey* being used to identify those digital assets that qualified as investment contracts. As one federal court has stated:

The SEC brought its first enforcement actions involving digital assets in the early 2010s. These were typically fraud actions that incidentally involved bitcoin. *See, e.g., SEC v. Shavers*, No. 4:13-cv-416, 2014 WL 12622292 (E.D. Tex. Aug. 26, 2014). Not until 2017 did the SEC start to train its attention on whether digital assets themselves are securities. In July of that year, the SEC issued its Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934

...¹⁶³

Separately, the chief commodities regulator, the "CFTC," may facially present a solid fit for alt-currency oversight. Noteworthy here is the 2015 *Cabbage Tech* decision, in which a federal judge declared Bitcoin to be a

¹⁶¹ Complaint at 3, *Lejilex v. SEC*, No. 4:24-cv-00168-O (N.D. Tex. 2024).

¹⁶² *E.g.*, Regulation D, SEC Rule 501, 17 C.F.R. § 230.501(a)(2025) (defining "accredited investors" – primarily based upon assets for the purpose of exempting securities issuers from the obligation to deliver written information on an offering of securities); *id.* § 230.506(c).

¹⁶³ *Coinbase, Inc. v. SEC*, 126 F.4th 175, 183 (3rd Cir. 2025).

commodity (and thus squarely within the jurisdictional reach of the CFTC).¹⁶⁴ However, that agency proved more often than not amenable to the “let the technology prosper” side of regulating digital assets.¹⁶⁵ The commodities regulator has adopted a “wait and see” emphasis on information gathering that has allied itself with states and entrepreneurs rather than regulators and victims.¹⁶⁶

More pointedly, the CFTC has come under fire for its cozy relationship with a notorious failed crypto leader, casting doubt upon its independence.¹⁶⁷ Namely, after the FTX debacle of 2022, critics openly questioned whether the agency was a bit too willing to be lobbied by the crypto industry and to be advised by its players.¹⁶⁸

Legally, it is noteworthy that the CFTC enabling statute expressly states that the CFTC’s reach must not “supersede or limit” SEC jurisdiction.¹⁶⁹ Therefore, the CFTC may need the SEC to engage in rulemaking first. Consequently, while occasional CFTC headlines trumpet fraud cases against Bitcoin titans, the agency appears to have carved out an identity focused upon avoiding paternalism for the modern “investor”¹⁷⁰—such a distinction would leave unprotected the countless cryptocurrency dilettantes over-populating the industry.

¹⁶⁴ See *CFTC v. McDonnell*, 332 F. Supp. 3d 641 (E.D.N.Y. 2018).

¹⁶⁵ See CFTC, www.cftc.gov [https://perma.cc/B5XC-WPXC] (last visited Sep. 24, 2025). see also Evelyn Cheng, *Staten Island-Based ‘CabbageTech’ Charged with Bitcoin-Related Fraud After Promising 300% Returns in a Week*, CNBC (Jan. 19, 2018, at 13:20 ET), <https://www.cnbc.com/2018/01/19/us-regulator-charges-cabbagetechn-with-bitcoin-related-fraud.html> [https://perma.cc/YX24-H9HH] (discussing CFTC enforcement action that established Bitcoin as a commodity under agency jurisdiction).

¹⁶⁶ See, e.g., Caroline D. Pham, Comm’r, CFTC, Keynote Address at the 18th Nasdaq Technology of the Future Conference—Reimagining Tomorrow’s Markets (June 28, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opapham3> [https://perma.cc/8BFV-RDLY] (“Some foresee the Metaverse, Web3, crypto assets, non-fungible tokens (NFTs), and portable digital identity and ownership enabling a seamless convergence of our physical and digital lives—creating unified, virtual communities where people can work, play, relax, transact, and socialize.”)

¹⁶⁷ “*To Be Governed...*”, CATO INSTITUTE, <https://www.cato.org/sites/cato.org/files/2023-02/cpr-v45n1-11.pdf> [(quoting Tory Newmyer & Peter Whoriskey, *Inside Sam Bankman-Fried’s courtship of a Washington Regulator*, WASH. POST (Nov. 28, 2022), <https://www.washingtonpost.com/business/2022/11/28/sam-bankman-fried-ftx-cftc/>) (“...the capital is looking anew at [Bankman-Fried’s] courtship of Washington and why he sought to build ties with [CFTC Chairman] Benham and the agency he leads...”); Chelsea Cox, *Former FTX CEO Bankman-Fried Met with Top Officials at the CFTC More Than 10 Times Over the Past 14 Months, Says Chairman Rostin Benham*, CNBC (Dec. 1, 2022, at 15:00 ET), <https://www.cnbc.com/2022/12/01/former-ftx-ceo-sam-bankman-fried-met-multiple-times-with-cftc-.html> [https://perma.cc/V6UU-BQ5P]; Gamza Khanzadavaev, *Ripple Rival Stellar becomes CFTC’s Blockchain and Digital Assets Advisor*, U.TODAY; NEWS, (Jan. 20, 2023, at 13:18 ET), <https://u.today/ripple-rival-stellar-becomes-cftcs-blockchain-and-digital-assets-advisor> [https://perma.cc/X9Z6-T5PZ].

¹⁶⁸ Tory Newmyer & Peter Whoriskey, *FTX Implosion Focuses Scrutiny on SEC Chief*, WASH. POST (Dec. 14, 2022), <https://www.washingtonpost.com/technology/2022/12/14/sec-gensler-crypto-ftx/> [https://perma.cc/CZU5-3GS6].

¹⁶⁹ 7 U.S.C. § 2(a)(1)(A) (2022).

¹⁷⁰ Alys Key, *CFTC Commissioner Wants Two-Tier Crypto Rules for Retail Investors and Millionaires*, DECRYPT (Dec. 1, 2022), <https://decrypt.co/116141/cftc-commissioner-wants-two-tier-crypto-rules-retail-investors-millionaires> [https://perma.cc/W399-VYEN].

Concomitantly, the SEC has always openly embraced the case-by-case approach. One 2022 speech by a Commissioner touted the existence of concrete guidance, despite a regulatory agenda not tied to a statute or rule.¹⁷¹ Moreover, the long-term plan of the SEC has been truly unremarkable: The SEC's most recent strategic plan referenced only bland outcomes regarding newer digital assets.¹⁷²

D. *The Outlook, Moving Forward*

The current President of the United States has commenced an unprecedented reshaping of agency independence.¹⁷³ In particular, the SEC has been the subject of direct White House intervention. More specifically, the President acted quickly to remove the Chairman behind the DAO Report and publicly celebrate a more user-friendly approach to cryptocurrency regulation.¹⁷⁴ Not surprisingly, the SEC disbanded one internal cryptocurrency task force only to create a new one weeks later.¹⁷⁵

What is surprising is that—despite all the repositioning, formal and otherwise—the SEC Program continues. One need only review the April 2025 complaint filed against PGI Global. That jurisdictional nexus merely duplicated the hook relied upon countless times before:

PGI Global's membership packages were investment contracts and thus constituted securities within the meaning of Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. As investment contracts, PGI Global's membership packages involved:

¹⁷¹ Jaime Lizárraga, Comm'r, U. S. SEC. & EXCH. COMM'N, Keynote Address at the Brooklyn Law School, *Digital Assets: Putting Investors First* (Nov. 16, 2022), <https://www.sec.gov/newsroom/speeches-statements/lizarraga-brooklyn-law-school-20221116> [<https://perma.cc/8JVA-QG74>] (“Some have suggested that the SEC has not provided guidance to the industry. The reality is that there’s an abundance of guidance, from the DAO Report, to the SEC FinHub Framework for “Investment Contract” Analysis of Digital Assets, and multiple no-action letters issued by the staff of the Division of Corporation Finance.”).

¹⁷² See U.S. SEC. & EXCH. COMM'N, STRATEGIC PLAN: FISCAL YEARS 2022–2026 11 (2022), https://www.sec.gov/files/sec_strategic_plan_fy22-fy26.pdf [<https://perma.cc/JN35-E33M>] (“Future market volatility driven by market or external events such as the pandemic, the evolution of markets without subsequent strengthening of agency authorities, and the rapid growth in crypto assets all represent evolutionary risks.”).

¹⁷³ *Fact Sheet: President Donald J. Trump Reins in Independent Agencies to Restore a Government that Answers to the American People*, WHITE HOUSE (Feb. 18, 2025) [hereinafter WHITE HOUSE], <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-reins-in-independent-agencies-to-restore-a-government-that-answers-to-the-american-people/> [<https://perma.cc/5AQ6-J5NV>].

¹⁷⁴ See *SEC Chair Gensler To Depart Agency on January 20*, *supra* note 156.

¹⁷⁵ Christopher J. Bosch & Maxwell Earp-Thomas, *SEC Withdraws from Prominent Crypto Enforcement Amid Regulatory Shift*, NAT'L L. REV. (Feb. 27, 2025), <https://natlawreview.com/article/sec-withdraws-prominent-crypto-enforcement-amid-regulatory-shift> [<https://perma.cc/SNT6-W4QL>].

(1) the investment of money; (2) in a common enterprise; (3) with a reasonable expectation of profits to be derived from the efforts of others. *See SEC v. W.J. Howey Co.*, 328 U.S. 298-99 (1946).¹⁷⁶

The case was widely commented upon;¹⁷⁷ further, its connection to regulatory responses to “Ponzi scheme” frauds was undeniable.¹⁷⁸

The net result from contested cases reveals a regulatory landscape marked by fundamental contradictions and institutional drift. Most fundamentally, no statute, SEC, or CFTC rule presently outlines cryptocurrency regulation, leaving the field governed by ad hoc enforcement actions rather than a coherent legal framework. During the years 2020-2024, particularized SEC cases and enforcement tools vested a tremendous and growing amount of regulatory discretion in the SEC, effectively allowing the agency to expand its jurisdiction through litigation rather than rulemaking.¹⁷⁹ While judicial intervention has been colorful and closely watched, it has produced mixed results that have failed to clarify the underlying legal standards. Most tellingly, the SEC Program—applying the *Howey* test to crypto arrangements on an as-needed basis—remains undeterred by dramatic political events,¹⁸⁰ suggesting that neither legislative pressure nor executive intervention has succeeded in establishing predictable regulatory boundaries.¹⁸¹

Accordingly, periods of both high-profile litigation and political opposition have failed to crystallize a federal regulatory program tied to anything beyond a Supreme Court case that is over 79 years old.¹⁸²

¹⁷⁶ Complaint at 17, *SEC v. Ramil Ventura Palafox*, 1:25-cv-00681 (E.D.Va. 2025),

<https://www.sec.gov/files/litigation/complaints/2025/comp-pr2025-69.pdf> [<https://perma.cc/9GB3-SGET>].

¹⁷⁷ Even the loud voices for unfettered cryptocurrency deals confessed that the cases under the new SEC Chairman resembled fraud cases against crypto charlatans prosecuted under the old Chairman. *See Vismaya V, SEC Sues Crypto Executive Over Alleged \$198 Million Scheme*, DECRYPT: NEWS: LAW AND ORDER (Apr. 23, 2025), <https://decrypt.co/315879/sec-sues-crypto-executive-198-million-scheme> [<https://perma.cc/F2SN-R96S>] (quoting an SEC official as stating “[The defendant’s] false claims of crypto industry expertise and a supposed AI-powered auto-trading platform were just masking an international securities fraud”); *see also SEC Charges Founder & Associates With Fraud for Allegedly Running a Nearly \$200M Ponzi-like Crypto Investment Scheme*, JDSUPRA (Apr. 30, 2025) [hereinafter JDSUPRA], <https://www.jdsupra.com/legalnews/sec-charges-founder-associates-with-3907217/> [<https://perma.cc/K5JR-GFA7>] (“Firms and individuals should not assume that the SEC will not remain active simply because it has changed course.”).

¹⁷⁸ JDSUPRA, *supra* note 177.

¹⁷⁹ *See supra* discussion Parts III.A–C.

¹⁸⁰ *See* WHITE HOUSE, *supra* note 173.

¹⁸¹ *See* Roslyn Layton, Opinion, *A Pivotal Case Shaping Cryptocurrency Regulation*, REGUL. REV. (June 17, 2025), <https://www.theregreview.org/2025/06/17/layton-a-pivotal-case-shaping-cryptocurrency-regulation/> [<https://perma.cc/VWQ7-L8F3>] (“From 2021 to 2025, under Chair Gary Gensler, the SEC pursued an enforcement-driven approach to cryptocurrency regulation, filing lawsuits against multiple firms, including Ripple, Coinbase, and Kraken. Gensler’s tenure saw more than 30 crypto-related actions, with the SEC often targeting firms for alleged securities violations absent explicit regulations”).

¹⁸² *SEC v. Howey*, 328 U.S. 298 (1946) (cited over 14,000 times in Westlaw as of May 2025).

The sheer absence of a knowledgeable regulatory approach was succinctly stated in March 2025 by a federal bankruptcy judge. In confirming a debtor's plan placing cryptocurrency back in the hands of parties who pushed the crypto platform/brokerage Voyager into bankruptcy, the candid jurist wrote as follows:

I also am aware that Voyager operated, and Binance. US currently operates, in a regulatory environment that at best can be described as highly uncertain. There are firms that operate as cryptocurrency brokers or exchanges, and have done so for several years, without being subject to clear and well-defined regulatory requirements. Regulators themselves cannot seem to agree as to whether cryptocurrencies are commodities that may be subject to regulation by the CFTC, or whether they are securities that are subject to securities laws, or neither, or even on what criteria should be applied in making the decision. This uncertainty has persisted despite the fact that cryptocurrency exchanges have been around for a number of years.

If the current regulatory environment can be characterized as uncertain, the future regulatory environment can only be characterized, in my mind, as virtually unknowable. There have been differing proposals in Congress to adopt different types of regulatory regimes for cryptocurrency trading. Meanwhile, the SEC has filed some actions against particular firms with regard to particular cryptocurrencies, and those actions suggest that a wider regulatory assault may be forthcoming. The CFTC seems to have taken some positions that are at odds with the SEC's views. Just how this will all sort itself out, how the pending actions relating to cryptocurrencies will be decided, and just what issues might be raised in future regulatory actions, and how they will affect individual firms or the industry as a whole, is unknown.¹⁸³

Tellingly, the jurist author of this critique, Honorable Michael E. Wiles,¹⁸⁴ can be said to have opined kindly by simply highlighting the lack

¹⁸³ *In re Voyager Digital Holdings*, 649 B.R. 111, 119 (Bankr. S.D.N.Y. 2023).

¹⁸⁴ *Id.* at 111.

of guidance: The debtor, Voyager, engaged in actions at times reflecting a “bank”¹⁸⁵ and called itself a “broker.”¹⁸⁶ Voyager’s departure from the class of solvent entities thus became inevitable when the crypto winter of July 2022 revealed \$350 million in lost customer assets and debts,¹⁸⁷ a situation that state regulators quickly publicized.¹⁸⁸

On May 9, 2025, Congressional Democrats united to defeat a bill that would have established a government stance on stablecoins.¹⁸⁹ It perhaps does not need reiteration that Congress will not act; even more troubling, any proposed action appears poised to benefit federal officials.

It has thus become urgent that states act to ensure that all alt-currency creators, traders, users, and platforms are advised of and subject to a discernible regulatory approach.

III. PROPOSED SOLUTION: THE UNIFORM ALT-CURRENCY ACT OF 2025

Congress, through lack of final action, has remained silent. And the SEC has consciously avoided rulemaking. The logical choice, it would seem, is a new genre of federalism whereby the states adopt an approach best suited for their aims and potential corporate citizenry. Rather than waiting for litigation to unpredictably hammer out competing requirements and boundaries, it is respectfully submitted that the adoption of a concise model, “Uniform Alt-currency Act,” would provide more certainty for regulators and the regulated alike. Such direct action would surely not be unprecedented.

A. *Models of State Regulation: The UCC, USA, and Insurance Law*

¹⁸⁵ Danny Nelson & David Z. Morris, *Behind Voyager’s Fall: Crypto Banker Acted like a Bank, Went Bankrupt*, COINDESK (May 11, 2023, at 13:22 ET), <https://www.coindesk.com/layer2/2022/07/12/behind-voyagers-fall-crypto-broker-acted-like-a-bank-went-bankrupt> [<https://perma.cc/34VQ-5NB2>].

¹⁸⁶ Andrew Asmakov, *Bankrupt Crypto Broker Voyager Cleared to Repay \$1.3B to Creditors*, DECRYPT: NEWS: BUSINESS (May 18, 2023), <https://decrypt.co/140547/bankrupt-crypto-broker-voyager-cleared-repay-creditors> [<https://perma.cc/TWE6-3FQC>].

¹⁸⁷ Nina Bambysheva, *Crypto Broker Voyager Digital Files For Chapter 11 Bankruptcy*, FORBES: DIGITAL ASSETS (July 8, 2022, at 16:45 ET), <https://www.forbes.com/sites/ninabambysheva/2022/07/06/crypto-broker-voyager-digital-files-for-chapter-11-bankruptcy/> [<https://perma.cc/N4UC-YW2P>].

¹⁸⁸ Nelson & Morris, *supra* note 185.

¹⁸⁹ Steven T. Dennis, *Crypto-Backed Stablecoin Bill Blocked Amid Trump Ventures Furor*, BLOOMBERG L. (May 8, 2025, at 15:45 ET), https://www.bloomberglaw.com/bloomberglawnews/banking-law/X8ROLFQC000000?bna_news_filter=banking-law#cite [<https://perma.cc/RZ7S-AEMT>]. The article noted that Senator Elizabeth Warren of Massachusetts urged her party members to filibuster unless a rider were added to prevent high officials from profiting from the creation of “meme coins” and related digital assets.

The Uniform Commercial Code (“UCC”) is in place in some version in all 50 states.¹⁹⁰ Drafted beginning in 1945 but released in 1952, the UCC provides the touchstone for the sale of products, resolution of attendant disputes, and a variety of law school classes.¹⁹¹

It was first enacted by Pennsylvania in 1953,¹⁹² with Massachusetts following suit in 1957;¹⁹³ universal acceptance (in the majority part) among the states was attained in the 1990s.¹⁹⁴

What is striking about UCC history is the number of predecessor codes and statutes.¹⁹⁵ The final Code was first created by private entities seeking to provide guidance to merchants, wherever located. As described by the Uniform Law Commission:

The Uniform Commercial Code (UCC) is a comprehensive set of laws governing all commercial transactions in the United States. It is not a federal law, but a uniformly adopted state law. Uniformity of law is essential in this area for the interstate transaction of business. Because the UCC has been universally adopted, businesses can enter into contracts with confidence that the terms will be enforced in the same way by the courts of every American jurisdiction. The resulting certainty of business relationships allows businesses to grow and the American economy to thrive. For this reason, the UCC has been called “the backbone of American commerce.”¹⁹⁶

More impressive still is the list of the UCC framers, which includes the Uniform Law Commission. That august body, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”), is recognized for, among other things, its continuous existence since 1892.¹⁹⁷

¹⁹⁰ Daniel Liberto, *What Is the Uniform Commercial Code (UCC)? Key Articles and Purpose*, INVESTOPEDIA (Aug. 27, 2025), <https://www.investopedia.com/terms/u/uniform-commercial-code.asp> [<https://perma.cc/TDW2-PJJ4>].

¹⁹¹ Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 800 (1958).

¹⁹² *Id.* at 799.

¹⁹³ *Id.*

¹⁹⁴ *See generally States Adopting the UCC*, USLEGAL, <https://uniformcommercialcode.uslegal.com/states-adopting-the-ucc/> [<https://perma.cc/9QVH-MGU6>] (last visited Sep. 24, 2025).

¹⁹⁵ Braucher, *supra* note 191, at 799 (specifically, seven “uniform” commercial statutes were enacted prior to the adoption of the UCC between 1896 and 1933).

¹⁹⁶ *Uniform Commercial Code*, UNIFORM L. COMM’N, <https://www.uniformlaws.org/acts/ucc> [<https://perma.cc/7D48-PWAS>] (last visited August 27, 2025).

¹⁹⁷ *About Us*, UNIFORM L. COMM’N, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/GUV8-LR76>] (last visited August 27, 2025).

Further, the UCC enjoys active and loyal defense: decades after its creation, scholars loudly proclaim its success in unifying a contentious area of law.¹⁹⁸

Practically speaking, the UCC¹⁹⁹ is organized around nine primary articles that comprehensively address commercial transactions. These include: Article 1, on general definitions and utilities; Article 2, covering the sale of goods; Article 3, addressing checks and negotiable instruments; Article 4, governing bank deposits; Article 5, covering bank letters of credit; Article 6, addressing auctions and liquidations *inter alia*; Article 7, covering instruments of title; Article 8, governing investment securities held by intermediaries;²⁰⁰ and Article 9, addressing secured transactions of personal property, including promissory notes.²⁰¹

While malleable to state needs, the UCC has remained impressively intact, and updates have remained functional. In 2022, Article 12 of the UCC added guidance for digital assets.²⁰² Primarily, Article 12 expanded the definition of cryptocurrency to include all digital assets under a newly created category of “controllable electronic records” (“CERs”).²⁰³ However, only approximately half the states have enacted the new Article. More significantly, the CER designation speaks primarily to the perfecting of security interests in such intangibles (i.e., not to the regulatory issues permeating this Article).²⁰⁴ In fact, broader definitions used herein are actually hampered by the new UCC section, which, at subsection 105, arguably excludes certain alt-currencies by referencing “virtual currency”.²⁰⁵

¹⁹⁸ See, e.g., Norman I. Silber, *Why the UCC Should Not Subordinate Itself to Federal Authority: Improper Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. PITT. L. REV. 441 (1994).

¹⁹⁹ See *Uniform Commercial Code*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/ucc> [<https://perma.cc/9KGG-T99G>] (last visited August 27, 2025) (providing exhaustive listing of UCC Articles by version most popular among the states).

²⁰⁰ U.C.C. § 8-103(a) (“A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.”); See, e.g., Joel Seligman, *The Keys to the Kingdom: The Unexpectedly Settled Definitions of Security and Sale and the Overruling of Chevron*, BERKELEY BUS. L. J., <https://lawcat.berkeley.edu/record/1317758/files/Seligman%20Final%205.pdf> [<https://perma.cc/Q64V-79FE>] (noting that UCC Article 8 normally applies only to conventional corporate securities, leading securities experts to avoid UCC references when exploring digital asset regulation).

²⁰¹ *Reves v. Ernst & Young*, 494 U.S. 56 (1990). Promissory notes can, under certain arrangements, qualify as “securities” for purposes of the U.S. securities laws. Such judicial determination may rely on the Supreme Court case of *Reves*.

²⁰² See Adam C. Wolk & Barbara M. Goodstein, *Choice-of-law Issues as 2022 Amendments Come into Effect*, MAYER BROWN (Feb. 5, 2025), <https://www.mayerbrown.com/en/pdf/insights/publications/2025/02/choice-of-law-issues-as-the-ucc-2022-amendments-come-into-effect> [<https://perma.cc/A8YK-3M85>].

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Cindy J. Chernuchin, *UCC Article 12: Controllable Electronic Records*, WILLKIE FARR & GALLAGHER LLP (Aug. 5, 2024), <https://www.willkie.com/-/media/files/publications/2024/08/ucc-article-12-controllable-electronic-records.pdf> [<https://perma.cc/2LRD-XGJ3>].

Nonetheless, the UCC serves as the model state code that admirably survived traversing the country. As commentators have noted, it exemplifies the “quest for efficiency.”²⁰⁶

Separately, the Uniform Securities Act (“USA”) was created in 1956, also by the NCCUSL.²⁰⁷ The USA was revised in 1985 and 2002.²⁰⁸ Despite being preceded by state “Blue Sky” statutes²⁰⁹ by approximately 40 years, 12 states presently follow a version of the USA.²¹⁰

The USA contains seven articles that systematically address securities regulation at the state level. These include: Article 1, providing general provisions; Article 2, listing exemptions from registration for securities; Article 3, requiring registration of securities; Article 4, covering broker-dealers and investment advisors; Article 5, addressing fraud and liabilities; Article 6, governing administrative and judicial review; and Article 7, covering transition.²¹¹

The key provision is numbered first among the substantive areas: Exemptions from registration.²¹² Recall that Section 5 of the ‘33 Act requires registration of all securities²¹³ (the legal requirement serving as both carrot and stick in the offering market). Yet the ‘33 Act provides very little guidance on the terms of registration exemptions.²¹⁴ The exemption can be met, among various means, by satisfying SEC Regulation D.²¹⁵

However, Regulation D by its own terms refers the issuer to state law.²¹⁶ Accordingly, the exemptions provision of the USA is a necessity for full

²⁰⁶ Robert E. Scott, *The Uniform Commercial Code and the Ongoing Quest for an Efficient and Fair Commercial Law* 273–92 (Columbia L. School Working Paper No. 661 2022).

²⁰⁷ *A Brief History of Securities Regulation*, WIS. DEP’T. FIN. INSTS., <https://dfi.wi.gov/Pages/Securities/Filings/SecuritiesRegulationHistory.aspx> [<https://perma.cc/9VPH-WYBP>] (last visited Sep. 24, 2025).

²⁰⁸ *Uniform Securities Acts*, NASAA: INDUSTRY RESOURCES, <https://www.nasaa.org/industry-resources/uniform-securities-acts/> [<https://perma.cc/BQY5-BYZ3>] (last visited Sep. 25, 2025).

²⁰⁹ State “Blue Sky” statutes are first traced to Kansas in 1911, where a judge famously remarked that a fraudster had seemingly attempted to sell a piece of the “great blue sky.” Troy Segal, *Blue Sky Laws: Definition, Purpose, How They’re Regulated*, INVESTOPEDIA (Sep. 25, 2025), <https://www.investopedia.com/terms/b/blueskylaws.asp> [<https://perma.cc/R6X6-T9WT>].

²¹⁰ *Uniform Securities Act*, NAT’L CONF. COMM’RS UNIF. ST. LAWS (Feb. 10, 2023), <https://www.nasaa.org/wp-content/uploads/2021/09/2002-Uniform-Securities-Act.pdf> [<https://perma.cc/XRN4-WKJD>]; see also *Securities Regulation and the Uniform Securities Act of 2002*, FAEGRE DRINKER (July 1, 2007), <https://www.faegredrinker.com/en/insights/publications/2007/7/securities-regulation-and-the-uniform-securities-act-of-2002> [<https://perma.cc/JA2X-PFYQ>] (discussing that only 12 states have adopted “Blue Sky” statutes).

²¹¹ *Id.*

²¹² *Id.* at 38.

²¹³ 15 U.S.C. § 77eee (1990).

²¹⁴ For example, the entirety of the “private offering exemption” reads as follows: “. . . transactions by an issuer not involving any public offering.” 15 U.S.C.S. § 77d(a)(2).

²¹⁵ 17 C.F.R. § 230.500 *et seq.* (2025).

²¹⁶ *Id.* § 230.500(b) (“Nothing in Regulation D obviates the need to comply with any applicable state law relating to the offer and sale of securities.”).

compliance with the federal provision; stated otherwise, the USA completes the federal protocol. And that USA provision both expands upon the definition of “security” and broadens the range of exemptions provided by federal statute.²¹⁷

The contents of the USA, however, are far less interesting than its sponsorship. Extending beyond securities officials, the members of the aforementioned NCCUSL include lawyers, judges, legislators, and professors.²¹⁸ Further, the private legislative body meets continuously on a variety of topics. The NCCUSL could thus ideally take up a new topic, such as baseline cryptocurrency legislation, an occurrence growing more necessary with each passing week of 2025. Moreover, a dedicated body of state securities regulators²¹⁹ consistently follows and supports the adoption of the USA. Overall, both the UCC and USA are noted for resilience and utility.²²⁰

Of course, the greatest success of financial regulation by the states lies in the example of domestic insurance company oversight. Expressly delegated to the states by the McCarran-Ferguson Act of 1945,²²¹ that independence is fiercely protected by a renowned association of state insurance commissioners called the National Association of Insurance Commissioners (“NAIC”).²²² NAIC has been so successful that it can repeatedly boast in granular detail about the economic solvency of insurance companies in each state.²²³ It is thus axiomatic that federal banking regulators and securities regulators defer to state overseers in this field. Further, Congress expressly exempted insurance products from federal registration requirements in the seminal Securities Act of 1933.²²⁴

B. General Goals to be Met in Alt-Currency Regulation

²¹⁷ *Uniform Securities Acts*, *supra* note 210, at 42–57.

²¹⁸ *Understanding Uniform Law Commissioners: Their Role in Legal Standardization*, USLEGAL, <https://legal-resources.uslegalforms.com/u/uniform-law-commissioners> [https://perma.cc/9LBP-88CL] (last visited Sep. 26, 2025).

²¹⁹ About: *Welcome to NASAA*, NASAA, <https://www.nasaa.org/about/> [https://perma.cc/AU9H-HUBF] (last visited Sep. 26, 2025).

²²⁰ See Joel Seligman, *The New Uniform Securities Act*, 81 Wash. U. L.Q. 243, 299 (2003) (describing the Act’s goal of modernizing and unifying state securities regulation while retaining flexibility for future developments); see also Steven L. Schwarcz, *Rethinking Commercial Law’s Uncertain Boundaries*, 14 Harv. Bus. L. Rev. 1, 242 (2024) (noting the UCC’s enduring centrality to commercial law and its capacity to adapt to evolving business practices).

²²¹ McCarran-Ferguson Act, ch. 20, § 1, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. § 1011 (1945)).

²²² NAIC, <https://content.naic.org/>, [https://perma.cc/L9WX-HA4F] (last visited Sep. 24, 2025). “NAIC” stands for National Association of Insurance Commissioners, and the organization represents all 50 States.

²²³ NAIC, REPORT IN PROFITABILITY BY LINE BY STATE IN 2023 1 (Apr. 2025), <https://content.naic.org/sites/default/files/publication-pbl-pb-profitability-line-state.pdf> [https://perma.cc/GE44-ZR4G].

²²⁴ 15 U.S.C. § 77c(a)(8) (2012).

Various states have attempted meaningful crypto regulation. A current state survey defies analysis; a relevant survey from 2022 reveals a hodgepodge of solutions varying between registration of products and services and tax benefits for fledgling enterprises.²²⁵

New York is at the forefront of this crusade. Its approach has taken at least three forms since 2020. First, the state's Department of Financial Services ("DFS") created a "Bitlicense" requiring sellers located anywhere to register whenever engaging in virtual currency business activity with New York or a New York resident.²²⁶ The attendant compliance protocol is costly and invasive, perhaps accounting for the relatively low number of companies that have purchased the license.²²⁷ Additionally, the purchase of the license opens the door to substantial penalties, as Robinhood learned in 2022.²²⁸

Second, New York has proposed legislation that would go further than any protocol to date in defining, reaching, and punishing crypto players. The New York CRYPTO Act²²⁹ asserts the most comprehensive of these approaches.²³⁰ The measure, proposed in 2023, considerably expands upon the existing expansive federal protocol for "digital assets." In addition to enabling digital payments, the ambitious bill amends three existing New York statutes and provides for penalties of up to \$10,000 per violation.²³¹ New categories of subject individuals, such as "digital asset influencer," "digital asset broker," and "digital asset investment adviser," would be created.²³² Its proponents thus advertised the measure as "Nation-Leading Regulations on the Cryptocurrency Industry."²³³

²²⁵ See *Cryptocurrency Laws and Regulations by State*, BLOOMBERG L. (Jan. 18, 2022), <https://pro.bloomberglaw.com/insights/technology/cryptocurrency-laws-and-regulations-by-state/> [<https://perma.cc/FB8Y-EQPB>].

²²⁶ 23 CRR-NY 200.2 (2023); See *Virtual Currency Business Licensing*, N.Y. STATE: DEPT. OF FIN. SERVS., https://www.dfs.ny.gov/virtual_currency_businesses [<https://perma.cc/D7QN-WQCJ>] (last visited Sep. 24, 2025).

²²⁷ See, e.g., Nikhilesh De et al., *BitLicense Recipients*, COINDESK (Dec. 12, 2022, at 07:49 ET), <https://www.coindesk.com/policy/2020/06/24/bitlicense-recipients> [<https://perma.cc/7P3X-25E6>].

²²⁸ *DFS Superintendent Harris Announces \$30 Million Penalty on Robinhood Crypto for Significant Anti-Money Laundering, Cybersecurity & Consumer Protection Violations*, N.Y. STATE: DEPT. OF FIN. SERVS. (Aug. 2, 2022), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202208021 [<https://perma.cc/Z7FC-SDDF>] (noting the \$30 million fine imposed by DFS for flawed "consumer protection" systems).

²²⁹ See *Attorney General James Proposes Nation-Leading Regulations on Cryptocurrency Industry*, N.Y. STATE ATT'Y GEN. (May 5, 2023), [<https://perma.cc/V422-PZAU>]. The legislative acronym stands for "Crypto, Regulation, Protection, Transparency and Oversight."

²³⁰ S. 4728A, §§ 6–7, 136th Gen. Assem., Reg. Sess. (N.Y. 2025). (proposed CRPTO Act).

²³¹ *Id.* § 359-r.

²³² *Id.* § 359-n.

²³³ *Attorney General James Proposes Nation-Leading Regulations on Cryptocurrency Industry*, *supra* note 229.

Third, New York has actively applied its existing Blue Sky statute, the Martin Act, garnering eye-catching cash settlements in the process.²³⁴

Overall, the New York approach to both welcoming registration and combating alt-currency fraud is so broad as to undermine itself. The resulting lessons appear to be twofold: First, excessive penalties slow compliance by entities questioning jurisdiction or need; second, over-regulation may ward off entrepreneurs.²³⁵

Pursuing differing ends, in late 2023, California became the third state to enact a licensing requirement when it adopted the Digital Financial Assets Law (“DFAL”).²³⁶ The statute, which becomes effective in mid-2025,²³⁷ is far less ambitious than the proposed New York statute. However, DFAL does stand out for its requirements, albeit exempting 17 categories of individuals and only applying to entities that formally “list” a cryptocurrency on a platform or digital exchange.²³⁸ Like many state measures,²³⁹ DFAL repeats money-transmitter requirements implemented by FinCEN.

Given these extremes abounding, the UAA would seek middle ground by instilling in all jurisdictions the need for a compass. The state could be “crypto-friendly,” or alternatively, devoted to investor protection. However, in either regard, authority would be traced to statute, rather than common law.

A state solution—once adequately developed and adopted—would be best centered on five aims. First, establishing a finite list of applicable definitions to provide clarity and consistency across jurisdictions.²⁴⁰ Second, clearly demarcating cryptocurrency products and dealers subject to state jurisdiction, with an additional pathway for federal referral where necessary.²⁴¹ Third, providing a rational outline of powers accorded to governing state authorities, both in terms of audit and the imposition of any

²³⁴ See Attorney General James Recovers \$50 Million from Crypto Firm Gemini for Defrauded Investors, N.Y. STATE ATT’Y GEN. (June 14, 2024), <https://ag.ny.gov/press-release/2024/attorney-general-james-recovers-50-million-crypto-firm-gemini-defrauded> [<https://perma.cc/5BK7-UVAG>].

²³⁵ See, e.g., *The Exodus has Already Started, Crypto Companies are Leaving the U.S.*, WALLETinVESTOR (June 8, 2023), <https://walletinvestor.com/magazine/the-exodus-has-already-started-crypto-companies-are-leaving-the-u-s> [<https://perma.cc/JC8Y-MTZB>] (describing how lack of U.S. regulatory clarity contrasts with Europe’s efforts to establish cryptocurrency standards).

²³⁶ See Erin E. Martin & Christina W. Włodarczyk, *California Becomes Latest State to Regulate Digital Assets*, MORGAN LEWIS (Nov. 2, 2023), <https://www.morganlewis.com/pubs/2023/11/california-becomes-latest-state-to-regulate-digital-assets> [<https://perma.cc/83AL-BPX5>].

²³⁷ *Id.*

²³⁸ See California Digital Financial Assets Law, 2023 Cal. Legis. Serv. Ch. 792 (A.B. 39) (codified at Cal. Fin. Code §§ 3201-41).

²³⁹ The Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, § 6001, 134 Stat. 3388, 4547 (2021) (enhancing federal penalties for money laundering, prompting state legislative opportunities).

²⁴⁰ See *supra* notes 6, 29 and accompanying text.

²⁴¹ A suitable model for referral to the DOJ has existed for decades in the 33 Act where that statute states “The [SEC] may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter . . .”. 15 U.S.C.A. § 77t(b).

resulting discipline.²⁴² Fourth, emphasizing disclosure to investors and consumers of risks associated with cryptocurrency transactions.²⁴³ Finally, including a choice of law clause that enables state sovereignty while providing express means of reliance upon a single state statute. Notably absent from this modest list of universal aims are excessive or creative definitions, private causes of action, and implied long-arm jurisdiction—elements that have complicated other regulatory attempts.

In view of all of the foregoing, it is respectfully submitted that the Uniform Securities Act of 2002 (i.e., a highly successful “traveling statute”) should also be used as a guide.²⁴⁴

C. *The Proposed Uniform Alt-currency Act of 2025*

The proposed Uniform Alt-currency Act (“UAA”) establishes a comprehensive regulatory framework through five key provisions. The UAA’s structure addresses the current regulatory void while providing states with flexible implementation options.

Section 1: Definitions

²⁴² It is noted that in New York, within clear dividing line, both the Department of Financial Services and the Attorney General’s Office may discipline digital asset transgressions, perhaps providing for duplication of resources. *Compare DFS Superintendent Harris Announces \$30 Million Penalty on Robinhood Crypto for Significant Anti-Money Laundering, Cybersecurity & Consumer Protection Violations*, *supra* note 228 (detailing the first such action by the DFS), with *See Attorney General James Recovers \$50 Million from Crypto Firm Gemini for Defrauded Investors*, *supra* note 234 (detailing action taken by the Attorney General’s Office).

²⁴³ Missouri may be at the frontier of this approach. In a 2015 action by Missouri’s Secretary of State, a novel form of crypto supervision was created when the defendants were cited for not disclosing the following to their investors:

“...that there were risks associated with using a virtual currency to transact business including, but not limited to, the following:

- i. virtual currencies are not backed by a central bank and are not insured;
- ii. virtual currencies can be hacked or stolen with little or no recourse;
- iii. there is no way to reverse a virtual currency transaction;
- iv. virtual currencies are highly volatile;
- v. this volatility may greatly reduce the funds raised in a securities offering tied to these currencies and make financial projections difficult;
- vi. securities offerings that are tied to virtual currencies may be highly dependent upon the growth and acceptance of the virtual currency market; and/or
- vii. that the liquidity of virtual currencies may be highly dependent upon the growth and acceptance of the virtual currency market.”

In re Virtual Mining, Corp., Case No. AP-14-09, at 8 (Mo. Sec’y of State, 2014).

²⁴⁴ *See generally Uniform Securities Act*, *supra* note 210 (providing model statute for state securities regulation including definitions, exemptions, registration requirements, and enforcement provisions).

The UAA includes two foundational definitions. First, “cryptocurrency” and “alt-currency” are defined as “a digital or virtual currency secured by cryptography and recorded on a ledger enforced by a disparate network of computers. Such assets have no value other than that attributed by the market.”²⁴⁵ This definition encompasses the broad universe of digital assets while emphasizing their speculative nature.

Second, “Governing Authority” refers to “the branch of state government enjoying licensing authority for securities dealers and products.”²⁴⁶ This approach leverages existing regulatory infrastructure and avoids creating duplicative oversight mechanisms.

These passages above provide for flexibility in precise verbiage in accordance with the product most often offered in the particular state. Further, the designation of a Governing Authority prevents the undesirable avoidance of residency attempted by Coinbase: As noted in the SEC Complaint, Coinbase was headquartered in Delaware but attempted to establish a novel category of Web 3.0 detachment by labeling itself a “remote-first company” not nominally doing business in any one state.²⁴⁷

Other related but less consequential terms, such as “blockchain,” are left wholly to state drafters.²⁴⁸ Such terms are not pivotal (i.e., one would be hard-pressed to find conflicts or disputes based on the type of ledger upon which alt-currencies are recorded).

“Governing Authority” is the more controversial of the two proposed terms. By expressly tying it to existing authority, the hope is that infighting at the state level could be minimized. Of course, as a traveling statute, the UAA could be amended as a particular state sees fit.

Section 2: Jurisdictional Scope

The UAA establishes clear jurisdictional boundaries by rejecting the expansive New York “effects test” approach.²⁴⁹ Instead, the Act provides

²⁴⁵ This definition borrows largely from common online definitions. See, e.g., *Cryptocurrency Explained with Pros and Cons for Investment*, INVESTOPEDIA (Aug. 28, 2025), <https://www.investopedia.com/terms/c/cryptocurrency.asp> [<https://perma.cc/W3Y8-3YMG>].

²⁴⁶ *Id.*

²⁴⁷ Coinbase Complaint, *supra* note 142, at 5.

²⁴⁸ See, e.g., New York’s recent “Crypto Fraud Act” Bill (introduced in March 2025): “Blockchain” shall mean a cryptographically secured digital ledger or database that:

(a) functions as a mathematically verifiable, consensus-based mechanism for maintaining a single version of a digital record across multiple computers or nodes; and

(b) uses a distributed ledger technology, or other similar technology, that is maintained by a decentralized network or participants who validate and record transactions through a predetermined consensus mechanism. . . .

N.Y. Leg. Assemb. A-6515. Reg. Sess. 2025-2026 (2025).

²⁴⁹ Cf. Attorney General James Proposes Nation-Leading Regulations on Cryptocurrency Industry, *supra* note 229.

entrepreneurs with predictable notice through three specific jurisdictional triggers.

Jurisdiction extends to entities that are: (a) registered in the state, (b) resident in the state while effecting cryptocurrency sales to other residents, or (c) otherwise consenting to state registration and oversight. This limited approach avoids the broader, untested jurisdictional reach that characterizes many securities statutes while ensuring adequate regulatory coverage.

Therefore, the UAA would avoid the broader, untested “effects test” jurisdictional reach that characterizes state securities statutes.²⁵⁰ The purpose of the UAA here—and, indeed, in many instances—is to provide guidance where parties have not otherwise acquiesced to jurisdiction. Expressed more directly, an entity registering in the state as a bank, broker-dealer, investment adviser, or trust company has accepted the applicability of all relevant state statutes and regulations. However, where such acquiescence is not manifest, then the UAA (like the UCC) 251 would fill a crucial gap.

Section 3: Disclosure Requirements

The UAA mandates comprehensive investor warnings modeled on Missouri’s approach²⁵² to cryptocurrency disclosure. The Act requires a standardized disclosure statement addressing six critical risk factors that investors must understand before engaging in cryptocurrency transactions.

The mandatory disclosure includes warnings that: (a) alt-currency purchases represent novel, decentralized digital assets, (b) cryptocurrency is not tied to any commodity such as gold or silver, (c) trading occurs on platforms that may be registered as trusts but not as national securities exchanges, (d) the market involves innumerable platforms with highly volatile prices, (e) no guarantee exists for resale of digital assets, and (f) promoters may have received undisclosed compensation. This framework

²⁵⁰ See 15 U.S.C.A. § 77v (Section 22 of the Securities Act of 1933).

²⁵¹ See the Uniform Law Commission’s explanation of the nature of the UCC most recently reiterated in 2023:

The UCC consists mainly of “default” rules that the parties to any particular transaction can override by agreeing to different terms in a contract, so long as the rights of third parties are not affected. If there is no contractual agreement, or if the contract does not cover a particular subject, the UCC rules apply by default. Because the UCC exists in nearly identical form in every state, commerce in the United States is predictable.

Statement on Central Bank Digital Currency and the 2022 UCC Amendments, UNIF. L. COMM’N (Apr. 12, 2023), https://higherlogicdownload.s3.amazonaws.com/UNIFORMLAWS/b7c515db-1895-4387-bb2d-ee99e58c0066/UploadedImages/Documents/ULC_Statement_on_the_UCC_and_CBDCs.pdf [<https://perma.cc/UE68-GUJR>].

²⁵² *In re Virtual Mining, Corp.*, Case No. AP-14-09, at 8 (Mo. Sec’y of State, 2014)

ensures informed investor decision-making while establishing uniform disclosure standards across jurisdictions.

Indeed, such dire warnings already exist at the federal level. Specifically, the “Margin Disclosure” document required by FINRA Rule 2264 in tone and substance mirrors the language proposed herein.²⁵³ Moreover, the express communication of the threat of digital jargon repeats conclusions that have been uttered in court pleadings and decisions for years.²⁵⁴ Equally threatening are casual references to “exchanges” when the federal securities laws govern only “securities exchanges.”²⁵⁵ Such delineation misleads the naïve investor and lures the uninitiated. The proposed language would alleviate that problem.

Section 4: Enforcement and Penalties

The UAA deliberately excludes criminal sanctions from its enforcement mechanism. The rule of lenity requires that legal ambiguities favor the accused, and until states achieve consensus on equitable remedies, imposing severe fines or incarceration would prove counterproductive.²⁵⁶ This approach prioritizes regulatory compliance over punitive measures while maintaining effective oversight authority.

Section 5: Choice of Law

²⁵³ See 2264. *Margin Disclosure Statement*, FINRA: 2260 DISCLOSURES, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/2264> [<https://perma.cc/V265-HTXV>] (last visited Aug. 28, 2025). The full list of FINRA bullets reads as follows:

- You can lose more funds than you deposit in the margin account...
- The firm can force the sale of securities or other assets in your account(s)...
- The firm can sell your securities or other assets without contacting you...
- You are not entitled to choose which securities or other assets in your account(s) are liquidated or sold to meet a margin call...
- The firm can increase its "house" maintenance margin requirements at any time and is not required to provide you advance written notice...
- You are not entitled to an extension of time on a margin call...

²⁵⁴ See, e.g., *Brooklyn Businessman Pleads Guilty to Defrauding Investors through Two Initial Coin Offerings*, U.S. ATT’Y’S OFF. E. DIST. N.Y. (Nov. 15, 2018), <https://www.justice.gov/usao-edny/pr/brooklyn-businessman-pleads-guilty-defrauding-investors-through-two-initial-coin> [<https://perma.cc/H465-8RFT>] (quoting the federal judge as stating “[the defendant] and his associates cloaked old-fashioned criminal schemes in the language of new currency in order to take advantage of investors”).

²⁵⁵ 15 U.S.C.A. § 78f (requiring registration with the SEC of all “national securities exchanges”).

²⁵⁶ See 23 CRR-NY 200.2 (New York’s BitLicense regulation); see also *DFS Superintendent Harris Announces \$30 Million Penalty on Robinhood Crypto for Significant Anti-Money Laundering, Cybersecurity & Consumer Protection Violations*, *supra* note 228 and accompanying text (discussing Robinhood \$30 million fine and low BitLicense registration rates).

The UAA adopts a simplified choice of law framework rather than following the complex approach of the 2022 UCC amendments.²⁵⁷ While the UCC's digital changes permit alternative forum selection when controllable electronic records are unavailable—potentially defaulting to Washington, D.C., under certain circumstances²⁵⁸—such complexity has likely contributed to delayed state adoption. The UAA instead establishes straightforward jurisdictional rules that promote uniform implementation across states.

Separately, the Uniform Securities Act expressly exempts certain products from the definition of “securities” wherever “regulated in respect to its rates and charges by the United States or a State or . . . regulated in respect to the issuance or guarantee of the security by the United States, a State, Canada, or a Canadian province or territory . . .”²⁵⁹

Accordingly, a simplified, direct choice of law clause could read as follows: “Alt-currency purchases, sales, and all related arrangements shall remain subject at all times to the law of the jurisdiction with primary registration authority for securities registration, unless contracted otherwise by written agreement preceding the transaction.”

Indeed, such deferential observance is codified elsewhere in the UCC.²⁶⁰

While far from perfect, a directly stated Uniform Alt-currency Act would, at the very least, prod movement at the state level. Further, the argument for less prosecution by the SEC and DOJ would take form, as business decisions and guidance would be tied to the rule of law, rather than disciplinary actions.

D. Disposition of Counter-Analyses

One could argue that a state-centric solution would indubitably draw the opposition of sponsors of pending bills in Congress. Indeed, such proposed measures have been steadfastly introduced since at least 2018.²⁶¹

However, such worthy federal legislative adversaries need not be countered or defeated: The history of the UCC notes proudly that proponents

²⁵⁷ See Wolk & Goodstein, *supra* note 202 (discussing obstacles to universal acceptance of UCC digital asset amendments).

²⁵⁸ See Chris Daniel *et al.*, *UCC Article 12: How States Are Regulating Digital Asset Transactions*, PAUL HASTINGS (Jan. 17, 2025), <https://www.paulhastings.com/insights/crypto-policy-tracker/ucc-article-12-how-states-are-regulating-digital-asset-transactions> [<https://perma.cc/A7H8-UHFJ>].

²⁵⁹ *Uniform Securities Act*, *supra* note 210, at 38–42 (Section 201—Exempt Securities, 5A and 5B).

²⁶⁰ U.C.C. § 1-301 (c) (2022) (“If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified . . .”).

²⁶¹ See *infra* discussion Part V.A (discussing Congressional cryptocurrency bills).

of the Federal Sales Act were convinced to abandon reform through concessions and compromise.²⁶²

Similarly, opponents could point to the time necessitated for the task. As detailed earlier, the march towards a ubiquitous UCC took eight years.²⁶³ However, the UCC needed to outpace earlier omnibus proposals dating back over 40 years. Similarly, the USA needed eight years to gain ratification across the country.²⁶⁴

Yet, such measures needed to replace a long list of existing federal and state pronouncements. Currently, one would be hard-pressed to locate more than a dozen solutions rivaling the pointed language proposed herein. And the UCC itself has been updated to reflect the sale of digital assets in the most obvious and basic ways. Simply put, the “choice of law” problem that delayed widespread adoption of the UCC does not threaten the proposed UAA, which, in many instances, may well provide legislators and other officials with the opportunity to boast of progressive reform in lockstep with other states.²⁶⁵

Perhaps most importantly, a state statute modeled on the proposed UAA could wholly eliminate the unpredictability created by varying judicial interpretations of the critical “efforts” prong of the *Howey* Test. Such express isolation of the UAA analysis could be stated as follows:

In determining whether a financial arrangement qualifies as a “security”, the State shall rely upon the operative investment conduct provision found in the State securities statute. Additional considerations shall be dependent upon the following list of critical factors:

²⁶² See Braucher, *supra* note 191, *passim*.

²⁶³ *Id.* at 800.

²⁶⁴ See *Uniform Securities Acts*, NASAA: INDUSTRY RESOURCES, <https://www.nasaa.org/industry-resources/uniform-securities-acts/> [<https://perma.cc/V6YN-76KS>] (last visited Sep. 9, 2025) (providing text of USA and noting NASAA has warned investors about cryptocurrency fraud since 2018 while encouraging state uniformity with local variations for investor protection); see also *NASAA Reminds Investors to Approach Cryptocurrencies, Initial Coin Offerings, and Cryptocurrency-Related Investment Products with Caution*, NASAA: INVESTOR EDUCATION (Jan. 4, 2018), <https://www.nasaa.org/44073/nasaa-reminds-investors-approach-cryptocurrencies-initial-coin-offerings-cryptocurrency-related-investment-products-caution/?qoid=newsroom> [<https://perma.cc/8G7P-BW7Y>] (NASAA has long encouraged State adherence to the twin goals of uniform statutes and local variations); *State Securities Regulators Endorse Uniform Securities Act (2002)*, NASAA (Jan. 6, 2003), <https://www.nasaa.org/8015/state-securities-regulators-endorse-uniform-securities-act-2002/?qoid=newsroom> [<https://perma.cc/983G-36ED>] (“[NASAA] encourage[s] its members to seek uniformity of state securities laws but with an acknowledgement that its members ‘may have local provisions important to investor protection in their jurisdictions.’”).

²⁶⁵ E.g., Anna Baydakova, *Wyoming Regulatory Clarity and Crypto-Friendly Banks Fuel Blockchain Revolution*, COINDESK (June 27, 2023, at 08:03 ET), <https://www.coindesk.com/consensus-magazine/2023/06/27/wyoming-regulatory-clarity-and-crypto-friendly-banks-fuel-blockchain-revolution> [<https://perma.cc/HX5Y-WCA6>] (describing Wyoming’s distinction as the nation’s “most crypto friendly state”).

- a. The nature of the issuer and its existing obligation to follow a regulatory protocol,
- b. The size of the offering, and/or
- c. The voluntary registration of the security by the issuer.

Example:

An online trading platform named “Ex T Tensis” publicly offers approximately 30 digital coins for purchase, sale, and trading. Ex T Tensis advertises online and draws customers from around the world. None of the digital coins are registered as securities; however, Ex T Tensis is registered as a chartered trust company in New York State. After the digital coins consistently underperform, customer complaints arise as to the adequacy of disclosures attending the trading in the coins.

Analysis:

Under the proposed UAA, the coins would not need to be declared securities. Ex T Tensis, as a regulated New York entity, is subject to oversight by the New York State Attorney General. Accordingly, per the New York Blue Sky statute, any misleading disclosures are already actionable, and New York victims remain protected.²⁶⁶

While such an approach might not reach all of the arrangements subject to the *Howey* Test, it is submitted that entities on the cusp of coverage have largely been targeted because of nefarious activities.²⁶⁷ And such prosecution—directly tied to the 1921 Martin Act’s broad language of “fraud or misrepresentation”²⁶⁸—reveals both legislative authority and discretion exercised by an elected official subject to the will of the voting public (i.e., the New York Attorney General).

Finally, if a state required a more definite or expansive definition of “security,” a cross-reference to the Uniform Bankruptcy Code (“UBC”) could be made. Section 49 of the UBC displays time-honored guidance and includes examples ranging from “bond[s]” to “investment contract[s]” to instruments that have, over time, acquired the characteristics of “stock.”²⁶⁹

²⁶⁶ Such resolution was actually reached in a similar case. *See, e.g.*, Complaint at 2, *People v. Gemini Trust Co., LLC*, No. 452784, Slip Op 31269(U) (Sup. Ct. N.Y., Apr. 9, 2025) (charging the trading platform Genesis for “two distinct fraudulent schemes” resulting in customer losses per New York’s Martin Act); *see generally* Frank C. Razzano, *The Martin Act: An Overview*, 1 J. BUS. & TECH. L. 125 (2006) (surveying New York’s famed, longstanding Martin Act).

²⁶⁷ *See, e.g.*, SEC Charges Texas Man with Running Bitcoin-Denominated Ponzi Scheme, U.S. SEC. & EXCH. COMM’N (Oct. 23, 2013), <https://www.sec.gov/newsroom/press-releases/2013-132> [<https://perma.cc/LKA4-7C9J>] (describing SEC enforcement action where investor funds were diverted to rent, car expenses, utilities, retail purchases, casinos, and meals).

²⁶⁸ *See generally* *The Martin Act: New York State’s Most Notorious Business Law*, ENERGYINDEPTH (Oct. 18, 2019), <https://eidclimate.org/the-martin-act-explained/> [<https://perma.cc/M7UQ-KNBR>] (explaining the Martin Act in detail).

²⁶⁹ 11 U.S.C.A. § 101(49) (2025).

Such observance might quell even the harshest critics of the status quo—one of whom, ironically, is a federal bankruptcy judge.²⁷⁰

V. CONCLUSION: GOVERNMENT FAILS AND COMMERCE

A. *The Present*

In May 1933, President Franklin Delano Roosevelt presented to the United States Congress the first federal securities regulation statute.²⁷¹ In doing so, the 32nd President ostensibly usurped oversight from both the existing 48 states²⁷² and the stock exchanges themselves.

Such a dramatic decrease in the role of local market regulators was occasioned by economic indicators no less harrowing than those faced 90 years later. Specifically, armed with data revealing thousands of bank failures and 25% unemployment, FDR's federal solution was the overwhelmingly popular remedy of choice, as it was with bank deposit²⁷³ and unemployment insurance.²⁷⁴

Yet, in 2025, the argument for federalized regulation has actually inverted. Contributing factors are the unprecedented growth of the alt-currency market and the competing needs for investor participation and protection.

This Article's analysis reveals the urgency of state-based solutions to the cryptocurrency regulatory crisis. Part I introduced the fundamental problem: a mammoth crypto market, foisted upon the uninitiated, remains persistently unstable and consistently dotted with fraud.²⁷⁵ Part II elaborated on the troubling truth that over 15 years of regulatory experience has failed to produce even one relevant federal regulation.²⁷⁶ Conversely, Part III detailed the successes of the state regulation of financial instruments, even given this nation's tremendous bias toward federal solutions to market instability.²⁷⁷ Accordingly, Part IV posited individual state solutions guided by those who had successfully implemented such localized solutions in the past.²⁷⁸ While

²⁷⁰ See *In re Voyager Digital Holdings, Inc.*, 649 B.R. 111, 119 (Judge Wiles criticizing regulatory uncertainty in cryptocurrency industry).

²⁷¹ See Securities Act of 1933, ch. 38, 48 Stat. 88 (codified as amended at 15 U.S.C.A. §§ 77a-77aa).

²⁷² Total Number of US States*, at the End of Each Year, Since the Declaration of Independence in 1776, STATISTA, <https://www.statista.com/statistics/1043617/number-us-states-by-year/> [<https://perma.cc/JHJ9-R989>] (last visited Sep. 25, 2025).

²⁷³ See generally Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.) (establishing FDIC and federal deposit insurance).

²⁷⁴ See generally the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C.A. §§ 301-1397mm) (establishing federal unemployment insurance and social welfare programs).

²⁷⁵ See *supra* discussion Part I.

²⁷⁶ See *supra* discussion Part II.

²⁷⁷ See *supra* discussion Part III.

²⁷⁸ See *supra* discussion Part IV.

numerous states have commenced or adopted crypto legislation,²⁷⁹ the widely varying nature of these measures demands informed guidance. This Part V therefore underscores the unsavory nature of the regulatory status quo and the corresponding imperative for coordinated state action.

Significantly, over two dozen standalone alt-currency bills persist in Congress. These widely varied and largely ill-fated measures promise, *inter alia*, protection from foreign interference in domestic alt-currency regulation,²⁸⁰ protection of financial innovation,²⁸¹ regulation of emissions stemming from cryptocurrency “mining,”²⁸² creation of online “memes,”²⁸³ and protection of “stablecoins.”²⁸⁴

Notably, Congress has seemingly embraced the SEC as the primary overseer of “digital assets.”²⁸⁵ Meanwhile, experts continue to question the legality of the SEC Program.²⁸⁶

B. The Future

Neither the SEC nor the CFTC has alt-currency regulations in the works. The void is somewhat startling, given that in the past five years, presidents from rival sides of the aisle have signed executive orders prodding either regulatory action or profiting in this regard.²⁸⁷

²⁷⁹ See Joseph Jasperse, *50-State Review of Cryptocurrency and Blockchain Regulation*, WHARTON SCH. OF UNIV. OF PA: STEVENS CTR. FOR INNOVATION IN FIN. (Feb. 2023), <https://stevenscenter.wharton.upenn.edu/publications-50-state-review/> [<https://perma.cc/JF33-X38B>] (detailing the approximately 25 States that have adopted some form of crypto statute); see also Collins J. Okoth, *27 U.S. States Push for Bitcoin and Digital Asset Legislation*, CRYPTOPOLITAN (Feb. 10, 2025, at 20:55 UTC), <https://www.cryptopolitan.com/27-u-s-states-push-for-bitcoin-legislation/> [<https://perma.cc/J8GF-NCAV>] (tallying “Bitcoin reserve” proposals).

²⁸⁰ Prohibiting Foreign Adversary Interference in Cryptocurrency Markets Act, S.1223, 119th Cong. (2025).

²⁸¹ David W. Perkins, *Financial Innovation: “Cryptocurrencies,”* CONG. RSCH. SERV. (Feb. 7, 2018), <https://crsreports.congress.gov/product/pdf/IF/IF10824> [<https://perma.cc/Q5FQ-NZXR>].

²⁸² Clean Cloud Act of 2025, S. 1475, 119th Cong. (2025).

²⁸³ MEME Act, H.R. 1712, 119th Cong. (2025); see generally *What Is Bitcoin?*, COINBASE, <https://www.coinbase.com/learn/crypto-basics/plp-what-is-bitcoin?> [<https://perma.cc/4XCT-BQ7C>] (last visited Sep. 25, 2025) (explaining the process of bitcoin mining).

²⁸⁴ GENIUS Act of 2025, S. 919, 119th Cong. (2025).

²⁸⁵ Eva Su, CONG. RSCH. SERV., R48521, CAPITAL MARKETS AND SECURITIES REGULATION: OVERVIEW AND POLICY ISSUES I (2025).

²⁸⁶ See generally Frank Emmert, *The Long Arm of the SEC in the Regulation of Digital Currencies*, 33 IND. INT’L & COMPAR. L. REV. (2023) (questioning the basis of the SEC’s authority in regulating digital currencies).

²⁸⁷ Nikhilesh De, *Biden Issues Long-Awaited US Executive Order on Crypto*, COINDESK (May 11, 2023, at 11:42 ET), <https://www.coindesk.com/policy/2022/03/09/biden-issues-long-awaited-executive-order-on-crypto> [<https://perma.cc/XL54-SZFM>] (discussing President Biden’s 2022 Executive Order urging regulatory cooperation among federal agencies); see also Alan Suderman, *Trump Signs Executive Order to Establish Government Bitcoin Reserve*, AP: Politics (Mar. 6, 2025, at 20:30 ET), <https://apnews.com/article/bitcoin-reserve-trump-crypto-sacks-5c91a1ab3dab9a8c86d4bc42b8db3f8f> [<https://perma.cc/6TBB-UC2W>] (discussing President Trump’s Executive Order to establish a “Bitcoin reserve” funded by the alt-currency seized in federal criminal actions to date).

Against this backdrop of cacophony lingers the specter of another crypto winter, or perhaps worse, agency demise.²⁸⁸ Simply put, an unscripted and disjointed approach to the world's fastest-growing investment market presently seems poised more for complete eradication than fine-tuning. Ample precedent and resources exist for delegating the duty that has evaded codification to states better poised to appreciate local needs. The UAA proposed herein is not a power grab; it is a necessity. The codification of cryptocurrency law need not be slow. And the resulting state statutes might just have more in common than not. This approach will definitely mark a new, long-awaited era of predictable oversight, as well as certainty in everyday commerce.

And even if the states were to uniformly commence alt-currency regulation only to later be preempted, the landscape would improve dramatically. One is reminded of the example of crowdfunding. Excesses and questionable "donations" via that phenomenon²⁸⁹ led Massachusetts to finalize controls first in this area.²⁹⁰ Later, the SEC implemented its overarching "Regulation CF."²⁹¹ And even the formal SEC guidance on the regulation acknowledges the utility of crowdfunding issuers complying with both the federal and state regimes.²⁹² Simply put, even the mighty SEC sometimes refers investors to state protocols.

Alas, sometimes the most direct solution comes from the mouths of babes. To edit the famed childish refrain of the 16th century, "All the king's

²⁸⁸ See *Fact Sheet: President Donald J. Trump Empowers Parents, States, and Communities to Improve Education Outcomes*, WHITE HOUSE (Mar. 20, 2025), <https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-empowers-parents-states-and-communities-to-improve-education-outcomes/> [<https://perma.cc/Z8BU-PB72>] (announcing the eradication of the Department of Education). To same end, The North American Securities Administrators Association sent a letter to Congress in October 2025 requesting that the federal legislature do nothing to alter the famed Howey Test in its application to cryptocurrency arrangements. Letter from Leslie M. Van Buskirk, President, NASAA, to Senator Tim Scott, Senator John Boozman, Senator Elizabeth Warren, and Senator Amy Klobuchar (Sep. 5, 2025) <https://www.nasaa.org/wp-content/uploads/2025/09/US-NASAA-Member-Letter-to-Congress-Regarding-Market-Structure-Legislation-9.5.25.pdf> [<https://perma.cc/B6E4-8S96>].

²⁸⁹ See, e.g., April Siese, *Only in the Age of Crowdfunding: \$40K Potato Salad*, DAILY BEAST (July 10, 2014, at 05:45 ET), <https://www.thedailybeast.com/only-in-the-age-of-crowdfunding-dollar40k-potato-salad/> [<https://perma.cc/T97G-6MEN>]; see also Matt Murray, *Man Raises More than \$35,000 on Kickstarter to Make Potato Salad*, TODAY (July 8, 2014, at 09:24 ET), <https://www.today.com/food/man-raises-more-35-000-make-potato-salad-1D79899203> [<https://perma.cc/8MBZ-MQVR>] (detailing the notorious fundraising efforts of Zach "Danger" Brown, who successfully solicited over \$30,000 in donations in minutes).

²⁹⁰ *Massachusetts Adopts Emergency Crowdfunding Exemption*, HAMILTON & ASSOCIATES LAW GROUP, P.A., <https://www.securitieslawyer101.com/2015/massachusetts-emergency-crowdfunding/> [<https://perma.cc/54B2-XC7B>].

²⁹¹ 17 C.F.R. § 227.100.

²⁹² *Frequently Asked Questions About Exempt Offerings*, U.S. SEC. & EXCH. COMM'N (June 29, 2024), https://www.sec.gov/resources-small-businesses/exempt-offerings/frequently-asked-questions-about-exempt-offerings?auHash=rh5WfJ9h3wRzP6X2anOmgYLdhPHNuo-3Vw0YNZyR_M#faq3 [<https://perma.cc/S3XX-BPKE>] ("If a company is selling securities, it must comply with both federal regulations and state securities laws and regulations in the states where securities are offered and sold typically, the states where offerees and investors are based.")

horses and all the king's men have no plan to put the egg back together again.”²⁹³

When it comes to cryptocurrency, it is respectfully submitted that federal regulators have had their shot. Let the state solutions begin.

²⁹³ See *Humpty Dumpty*, *supra* note 2.