

THE SEC AND CRYPTO: RISKS OF OVERZEALOUS ENFORCEMENT

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On November 30, 2023, the United States District Court for the District of Utah took the highly unusual step of issuing an order to show cause to the U.S. Securities and Exchange Commission (SEC or Commission), threatening sanctions if it could not justify its attorneys' actions in making "materially false and misleading representations" in a request for an emergency restraining order¹ against an issuer of cryptoassets.² Attorneys for

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¹ Order to Show Cause at 11–12, SEC v. Digit. Licensing Inc., 2023 U.S. Dist. LEXIS 213581 (D. Utah Nov. 30, 2023) (No. 2:23-cv-00482-RJS-DBP) [hereinafter Digital Licensing Order].

² Note that there is no consistency in the labels applied to what this Article calls cryptoassets. For example, the early releases from the SEC talked about crypto as "virtual currencies." See U.S. SEC. & EXCH. COMM'N OFF. OF INV. EDUC. & ADVOC., *Investor Alert: Bitcoin and Other Virtual Currency-Related Investments*, INVESTOR.GOV (May 7, 2014), https://www.sec.gov/oiea/investor-alerts-bulletins/investoralertsia_bitcoin [https://perma.cc/3PVD-WW3S]; see also U.S. SEC. & EXCH. COMM'N OFF. OF INV. EDUC. & ADVOC., *Investor Alert: Ponzi Schemes Using Virtual Currencies*, INVESTOR.GOV (July 23, 2013), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/investor-7> [https://perma.cc/YVJ3-A93Y]. At some point, the SEC apparently switched to using "digital assets." Strategic Hub for Innovation & Financial Technology, *Framework for "Investment Contract" Analysis of Digital Assets*, U.S. SEC. & EXCH. COMM'N (July 5, 2024) <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [https://perma.cc/J3MV-WKWC]. And in a joint staff statement (issued with the Office of General Counsel for FINRA), the SEC referred to covered cryptoassets as "digital asset securities." See Div. of Trading & Mkts., U.S. Sec. & Exch. Comm'n Off. of Gen. Couns., & Fin. Indus. Regul. Auth., *Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities*, U.S. SEC. & EXCH. COMM'N (July 8, 2019),

the SEC in *SEC v. Digital Licensing Inc.*³ had asked for an emergency restraining order to prevent the defendants from continuing to sell unregistered securities.⁴ The SEC claimed the emergency action was necessary after the defendants posted a YouTube video, allegedly admitting a plan to close multiple bank accounts in connection with a planned move of operations overseas for the express purpose of evading enforcement.⁵ Based on these assertions, the court entered an ex parte restraining order against Digital Licensing Inc.⁶

The restraining order was later reversed, and the above-referenced order to show cause was entered when the judge determined that the defendants had not closed the bank accounts themselves and that the comments ascribed to them had been taken out of context in a manner that was misleading at best.⁷ The SEC later acknowledged that the statements had been made in error, but claimed that counsel had not knowingly misrepresented the evidence.⁸ The Commission attorneys did not, however, voluntarily correct the mistakes even after the truth was discovered by them.⁹

As others have noted,¹⁰ and as the SEC itself admits,¹¹ the Commission has a duty to exercise its authority carefully and candidly. Nonetheless, the

<https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities> [https://perma.cc/8A4T-J9H5].

Instead of utilizing these phrases, this Article relies on *cryptoasset* or simply *crypto* to describe the range of assets that exist because of blockchain technology, which is more in line with how public commentators and entrepreneurs tend to speak about these interests. As one commentator noted, “crypto asset is a blanket term [which] isn’t limited to cryptocurrencies.” Aashish Pahwa, *What Is a Cryptoasset? Types of Cryptoassets [Ultimate Guide]*, FEEDOUGH (Oct. 17, 2024), <https://www.feedough.com/what-is-a-cryptoasset-types-of-cryptoassets-ultimate-guide> [https://perma.cc/CAC8-6AXM]. But see Carla L. Reyes, *Emerging Technology’s Language Wars: Cryptocurrency*, 64 WM. & MARY L. REV. 1193, 1249–50 (2023) (suggesting that this label is inherently misleading).

³ Complaint at 2, *SEC v. Digit. Licensing Inc.*, 2023 U.S. Dist. LEXIS 213581 (No. 2:23-cv-00482-RJS-DBP).

⁴ *Id.* at 32–33.

⁵ *Id.* ¶ 6, at 4.

⁶ Digital Licensing Order, *supra* note 1, at 7–10.

⁷ Digital Licensing Order, *supra* note 1, at 15–27.

⁸ SEC Response at 1, *Digit. Licensing Inc.*, 2023 U.S. Dist. LEXIS 213581 (No. 2:23-cv-00482-RJS-DBP) [hereinafter Digital Licensing Response].

⁹ *Id.* (“Commission attorneys failed to correct that statement when they learned of the inaccuracy. Commission counsel also failed to make clear that certain representations were inferences from the facts known to them rather than directly supported factual assertions.”).

¹⁰ See, e.g., Aislinn Keely, *Lawmakers Slam SEC Over Misstatements in Debt Box Case*, LAW360 (Feb. 8, 2024, 10:30 PM), https://www.law360.com/securities/articles/1796003?nl_pk=77302318-1985-4a0e-bd0d-61f44d9e8551&read_main=1&nlsidx=0&nlaidx=6 [https://perma.cc/CZ4R-8ZVR] (citing Letter from JD Vance, Thom Tillis, Bill Hagerty, Cynthia Lummis, & Katie Boyd Britt, U.S. Senators, to Gary Gensler, U.S. Secs. & Exch. Comm’n Chairman (Feb. 7, 2024), <https://www.law360.com/articles/1796003/attachments/0> [https://perma.cc/9NM6-H2BV]) (calling the actions of the SEC in the case “unconscionable”).

¹¹ Digital Licensing Response, *supra* note 8, at 1 (“The Commission must exercise its enforcement authority carefully and be vigilant in fulfilling its duty to be accurate and candid in its representations to the Court. The Commission cannot let its zeal to stop ongoing fraud interfere with its duty to be accurate and candid.”).

Commission suggested that, while it “deeply regrets the[] errors,”¹² nonetheless sanctions were not warranted because “the circumstances” did not involve misconduct such as bad faith that Rule 11¹³ was designed to reach.¹⁴

On March 18, 2024, the court disagreed with the SEC,¹⁵ expressly finding that the “mischaracterizations cannot be plausibly excused as innocent.”¹⁶ In fact, the court concluded that “[e]ach piece of support the Commission offered in seeking the TRO—and then later reiterated in defending the TRO—proved to be some combination of false, mischaracterized, and misleading.”¹⁷ Adding insult to injury, in attempting to defend against the Order to Show Cause, the SEC had failed to cite case law which the court characterized as “binding Tenth Circuit precedent,” amounting to what the court concluded was “likely . . . another breach of their duty of candor to the court.”¹⁸ As a result, the court concluded that the SEC’s conduct constituted “a gross abuse of the power entrusted to it by Congress,”¹⁹ amounting to “subjective bad faith” justifying the imposition of sanctions.²⁰

I. WHY WOULD THE SEC GO TO SUCH EXTREMES TO OPPOSE CRYPTO?

In trying to understand why the SEC attorneys acted as they did, one possible explanation is that pervasive anti-crypto views and rhetoric may have so permeated the Commission under the leadership of Chairman Gary Gensler that the neutrality one expects of public authorities was

¹² *Id.*

¹³ FED. R. CIV. P. 11(b)–(c). Rule 11 of the Federal Rules of Civil Procedure provides, among other things, for sanctions in the event that an attorney presents written documents to the court that any evidence presented is warranted based on reasonable inquiry.

¹⁴ Digital Licensing Response, *supra* note 8, at 1.

¹⁵ Memorandum Decision and Order at 2, SEC v. Digit. Licensing Inc., 2023 U.S. Dist. LEXIS 213581 (No. 2:23-cv-00482-RJS-DBP D. Utah Mar. 18, 2024), <https://storage.courtlistener.com/recap/gov.uscourts.utd.141167/gov.uscourts.utd.141167.275.0.pdf> [<https://perma.cc/ZYP4-C2KX>].

¹⁶ *Id.* at 61.

¹⁷ *Id.* at 63.

¹⁸ *Id.* at 71–72.

¹⁹ *Id.* at 73.

²⁰ *Id.* at 74; see Matthew Bultman, *SEC Must Pay \$1.8 Million in Fees After Crypto Case Sanctions*, BL (May 28, 2024, 6:05 PM), <https://news.bloomberglaw.com/securities-law/sec-must-pay-1-8-million-in-fees-after-crypto-case-sanctions> [<https://perma.cc/K5XH-ZY4G>].

compromised.²¹ While not all SEC commissioners expressed such opinions,²² the chairman and others in important positions within the agency often appeared to take such a stance.

There are, of course, other possible explanations for the agency's aggressive response. Noted professors Stephen Choi and A.C. Pritchard have posited that bounded rationality might also explain some of the SEC's biases.²³ Given the vast array of information flooding the agency, these scholars suggest that it is not surprising that the agency develops tunnel vision—bound by the limits of the staff and commissioners and becoming reactive—focusing on headlines about scandals and recent developments in their responses.²⁴

Professor Langevoort has suggested that the SEC has its own “culture of compliance,” with a focus on enforcement and regulatory supervision.²⁵ Drawing on a vast array of literature and research about decision-making in corporate settings, he suggests that the interest of members in furthering the objectives of their community (in this case, the SEC) may result in motivated reasoning that pushes members to act in ways that might otherwise be considered unethical.²⁶ The fact that this happens in groups can create mutual reinforcement for such biases.²⁷

Regardless of the reasons, however, one can easily see the results. The SEC became increasingly hostile towards cryptoassets. One of the most vivid early condemnations of crypto entrepreneurs from the SEC came from Steve Peiken, then the Co-Director of the SEC's Enforcement Division, who in 2017 publicly referred to persons seeking the profits associated with initial

²¹ Note that an honest and good-faith belief on the part of individuals within the agency that cryptoassets are fundamentally flawed or a poor choice for rational investors is not a legitimate basis for agency responses. The SEC oversees a disclosure regime that is not designed to proscribe the choices available to investors except to see that adequate information is provided to them. “The philosophy underpinning federal securities regulation in the United States is one of disclosure. . . . [T]he concept of merit regulation is indeed largely alien to the scheme of U.S. federal securities regulation.” Ronald J. Colombo, *Merit Regulation via the Suitability Rules*, 12 J. INT'L BUS. & L. 1, 1 (2013).

²² SEC Commissioner Hester Peirce, sometimes called “crypto mom” because of her support of crypto businesses, has been outspoken in her belief that the nascent industry should not be over-regulated. See Daniel Kuhn, *‘What Are We Waiting for’? SEC Commissioner Hester Peirce Discusses Moving Crypto Regulation Forward*, COINDESK, https://finance.yahoo.com/news/waiting-sec-commissioner-hester-peirce-152112153.html?fr=yhssrp_catchall (Apr. 11, 2024) [<https://perma.cc/G2RZ-4N4A>]. Her opinions in this regard, however, did not convince most of her colleagues. As noted elsewhere, “Peirce has been unsuccessful in convincing her colleagues in the SEC to abandon the pattern of fractured regulation by enforcement action and to instead consider creating comprehensive, clear regulations for cryptocurrencies that benefit consumers and investors.” Sarah Milby, *Hester Peirce, “Crypto Mom”*, U. OF CHI.: WOMAN IS A RATIONAL ANIMAL (Feb. 12, 2021), <https://womanisrational.uchicago.edu/2021/02/12/hester-peirce-crypto-mom-on-responsible-regulation-and-innovation/> [<https://perma.cc/7NND-3LQJ>].

²³ Stephen J. Choi & Adam C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 21–25 (2003).

²⁴ *Id.* at 25.

²⁵ Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 943 (2017).

²⁶ *Id.* at 951.

²⁷ *Id.* at 952.

coin offerings as “roaches.”²⁸ This statement followed the release of the agency’s first report, concluding that cryptoassets were securities under the *Howey* investment contract test.²⁹ It is particularly notable because it was unusually hostile for the time, but intensely negative criticisms of cryptoassets and entrepreneurs who work in the space gradually became much more common.³⁰

SEC Chairman Gary Gensler asserted many times that crypto operates in the “wild west,”³¹ being “highly speculative” and “non-compliant.”³² He frequently declared that crypto is “rife with fraud and manipulation,”³³ and repeatedly expressed concerns that the crypto industry had more than its share of fraud and bankruptcies, at least in part because, in his opinion, crypto is generally built “around noncompliance with the law.”³⁴

²⁸ Rachel-Rose O’Leary, ‘Roaches’: SEC Chief Speaks Out Against Malicious ICOs, COINDESK, <https://www.coindesk.com/markets/2017/09/06/roaches-sec-chief-speaks-out-against-malicious-icos/> (Sept. 13, 2021, 2:53 AM) [<https://perma.cc/4T3L-FCW2>] (discussing Peiken’s statement).

²⁹ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 34-81207 (July 25, 2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf> [<https://perma.cc/7JTY-Z5RU>] [hereinafter DAO Report]. In order to determine whether crypto should be a security, this report relied on the test for when assets would be investment contracts under SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

³⁰ Anna Saggu et al., *Uncertain Regulations, Definite Impacts: The Impacts of the U.S. Securities and Exchange Commission’s Regulatory Interventions on Crypto Assets*, 72 FIN. RSCH. LETTERS, Feb. 2025, at 1, 1-2.

³¹ See, e.g., Paul Kiernan, *Crypto ‘Wild West’ Needs Stronger Investor Protection, SEC Chief Says*, WALL ST. J., <https://www.wsj.com/articles/sec-will-police-cryptocurrencies-to-maximum-possible-extent-chair-gary-gensler-says-11628007567> (Aug. 3, 2021, 6:21 PM) [<https://perma.cc/445B-2KJU>] (noting that in his remarks to the Aspen Security forum, Chair Gensler also called “the asset class rife with ‘fraud, scams and abuse’”); Pippa Stevens & Jordan Smith, *SEC chair Gary Gensler wants to crack down on the ‘wild west’ of crypto: CNBC After Hours*, CNBC AFTER HOURS (Sept. 14, 2021, 6:29 PM), <https://www.cnbc.com/2021/09/14/sec-chair-gary-gensler-wants-to-crack-down-on-the-wild-west-of-crypto.html> [<https://perma.cc/DN3Q-GSCV>] (headline referencing August 31, 2021 comments to the Senate Banking Committee); Emily Tonelli, *SEC Chair Gensler Calls Crypto ‘Wild West’ While Asking for More Money*, CRYPTO BRIEFING (July 20, 2023), <https://cryptobriefing.com/sec-chair-gensler-calls-crypto-wild-west/> [<https://perma.cc/KU6K-78S4>] (referencing a July 19, 2023 speech to the U.S. Senate Appropriations Committee).

³² Jesse Coghlan, *Gary Gensler finds new audience for his crypto skepticism: the US Army*, COINTELEGRAPH (Jan. 12, 2023), <https://cointelegraph.com/news/gary-gensler-finds-new-audience-for-his-crypto-skepticism-the-us-army> (referring to January 11, 2023, investment advice offered to U.S. Army service members).

³³ CNBC Television, *SEC Chair Gensler: Crypto is a Field ‘That’s Been Rife with Fraud and Manipulation’*, YOUTUBE (Feb. 14, 2024), https://www.youtube.com/watch?v=lm6rjg_mgB0 [<https://perma.cc/A9Q8-CXPD>] (commenting on fraud and manipulation in crypto from 3:26–3:31).

³⁴ Nikhilesh De, *SEC Chair Gary Gensler: ‘Far Too Many Frauds and Bankruptcies’*, COINDESK, <https://www.coindesk.com/policy/2023/12/22/sec-chair-gary-gensler-far-too-many-frauds-and-bankruptcies/> (Mar. 8, 2024, 2:06 PM) [<https://perma.cc/XUX9-VKV7>].

Gensler also publicly stated that he does not see much value in crypto,³⁵ a view that seems to have been shared by at least some others at the SEC.³⁶ For example, on April 6, 2023, the SEC's Investor Advisory Committee sent Chairman Gary Gensler a letter urging him to intensify the Commission's enforcement efforts targeting the unregistered sale of crypto securities.³⁷ After complaining about "notable levels of fraud and abuse," the letter asserted that "virtually all, if not all, crypto tokens are securities and that they, as well as the platforms and custodians dealing with them, are subject to regulation under the federal securities laws to protect investors."³⁸

It is important to recognize that, unlike the affirmative misrepresentations in the *Digital Licensing* case,³⁹ there is no evidence that these assertions are being made in bad faith. Rather, it appears that the driving force behind these complaints has been the involvement of some bad actors in the crypto space.⁴⁰ SEC Chair Gensler repeatedly and explicitly pointed to a concern for investors,⁴¹ who may stand to lose their entire investment if they trust persons

³⁵ Gensler is quoted as having questioned whether there is a value proposition to cryptoassets. *Id.* "Many of these projects are just 'speculative investment contracts,' he said." *Id.*

³⁶ See, e.g., Declan Harty, *SEC's Gensler Turns Tide Against Crypto in Court*, POLITICO (May 5, 2024, 7:00 AM), <https://www.politico.com/news/2024/05/05/gary-gensler-sec-crypto-00154769> [https://perma.cc/MH4C-5HTT] (discussing that many federal officials are highly suspicious of the crypto industry).

³⁷ Letter from Christopher Mirabile, Comm. Chair & Leslie Van Buskirk, Comm. Vice Chair, Inv. Advisory Comm., to Gary Gensler, U.S. Secs. & Exch. Comm'n Chairman (Apr. 6, 2023) (accessible at <https://www.sec.gov/files/20230406-iac-letter-cryptocurrency.pdf>) [https://perma.cc/96EZ-5R9W].

³⁸ *Id.*; Jean-Pierre Bado, *The SEC's Aggressive Tack on the Cryptocurrency Industry*, FRIDMAN FELS & SOTO PLLC (Dec. 12, 2023), <https://ffslawfirm.com/the-secs-aggressive-tack-on-the-cryptocurrency-industry/> [https://perma.cc/S469-39XW].

³⁹ See *supra* text accompanying notes 1–20.

⁴⁰ It is beyond question that such bad actors are active in the crypto space. For an explanation of that, alongside a recognition that the presence of some bad actors does not mean the entire industry is corrupt, see Brian Whitehurst & Omid Malekan, *Politicians and Regulators Keep Shouting that Crypto is Synonymous with Fraud. Here's Why They're Wrong*, FORTUNE (Dec. 12, 2023, 6:00 AM), <https://fortune.com/crypto/2023/12/12/cryptocurrencies-fraud-politicians-regulators-critics-bad-actors/> [https://perma.cc/9KLV-K26Q].

⁴¹ For example, in early 2024, Gensler warned of "fraudsters' continuing to exploit crypto investors into scams," noting that crypto investments "can be exceptionally risky [and] are often volatile." Joshua Ramos, *SEC Chair Gary Gensler: 'Fraudsters' Continue Exploiting Crypto*, WATCHER.GURU (Jan. 8, 2024), <https://watcher.guru/news/sec-chair-gary-gensler-fraudsters-continue-exploiting-crypto> [https://perma.cc/PUQ6-95WG]. In November 2023, Gensler spoke at the annual D.C. Fintech Week conference, reminding listeners that the SEC's "mission is to 'protect investors' . . . '[W]here we see fraud, we're going to pursue that, and we really have an eye on protecting the public.'" Maydeen Merino, *SEC Will Investigate Crypto Fraud With Insider-Trading Fervor, Gensler Says*, NAT'L L. J. (Nov. 8, 2023, 5:33 PM), <https://www.law.com/nationallawjournal/2023/11/08/sec-will-investigate-crypto-fraud-with-insider-trading-fervor-gensler-says/?slreturn=2025031241018> [https://perma.cc/7FPN-798L]. This was another instance in which the Chairman spoke about his belief that "crypto is rife with fraud and manipulation." *Id.* See also Bill Alpert, *SEC's Gensler Vows Strong Enforcement Against Crypto Wrongdoers*, BARRON'S (Oct. 25, 2023, 4:13 PM), <https://www.barrons.com/articles/secs-gensler-vows-strong-enforcement-against-crypto-wrongdoers-37b40277> [https://perma.cc/C8HZ-A6N3] (quoting Gensler as having repeated his claim that crypto "is a field rife with fraud, scams, bankruptcies, and money laundering").

who are not acting in good faith.⁴² The result of this perspective, which can certainly be attributed to good faith desires to protect market participants,⁴³ was an expansive and aggressive approach to enforcement⁴⁴ that some characterized as being overtly hostile to the crypto industry.⁴⁵

While it is undoubtedly true that there are fraudsters in the crypto space, other observers have pointed to extensive analytics data suggesting crypto crime, as a percent of all crypto transactions, has been decreasing,⁴⁶ and that

⁴² This point of view is not limited to SEC officials. Senator Elizabeth Warren (D-Mass.), for example, is one of the individuals who have expressed agreement with this mindset. *See, e.g., Allison Morrow, Elizabeth Warren: Crypto Giants are 'Collapsing Under the Weight of Their Own Fraud'*, CNN BUSINESS (Jan. 25, 2023, 2:48 PM), <https://www.cnn.com/2023/01/25/investing/crypto-elizabeth-warren-ftx/index.html> [<https://perma.cc/YV69-AQL8>] (quoting Senator Warren complaining about “fraud, deceit and gross mismanagement” in the crypto industry); Elizabeth Warren, *Regulate Crypto or It'll Take Down the Economy*, WALL ST. J. (Nov. 22, 2022, 11:57 AM), <https://www.wsj.com/articles/regulate-crypto-or-itll-take-down-the-economy-fraud-reporting-know-your-customer-loop-hole-energy-disclosure-ftx-bankman-fried-ftx-11669123750> [<https://perma.cc/2VGG-WHQH>] (comparing crypto to past “financial schemes promoted by criminals and charlatans”); Ted Knutson, *Elizabeth Warren Lays Into Crypto*, FORBES (Oct. 11, 2018, 12:18 PM), <https://www.forbes.com/sites/tedknutson/2018/10/11/elizabeth-warren-cryptocurrency-is-easy-to-steal/?sh=3d560f221249> [<https://perma.cc/KDG6-MM2E>] (stating “[c]rypto is easy to steal and a lot of small investors are being scammed”); *see also* Press Release, U.S. Sen. Elizabeth Warren, ICYMI: At Hearing, Experts Agree with Warren that Stablecoins and Crypto Pose Threats to American Consumers, (Feb. 2, 2024) (accessible at <https://www.warren.senate.gov/newsroom/press-releases/icymi-at-hearing-experts-agree-with-warren-that-stablecoins-and-crypto-pose-threats-to-american-consumers> [<https://perma.cc/2F7Q-PHRP>]) (“[T]he lack of safeguards around crypto . . . makes it a prime tool for criminals and foreign countries to scam Americans with.”).

⁴³ Clearly, the SEC’s mission calls for it to protect investors. *See* U.S. Sec. & Exch. Comm’n, *The Role of the SEC*, INVESTOR.GOV (Aug. 9, 2023), <https://www.investor.gov/introduction-investing/investing-basics/role-sec#:~:text=The%20U.%20S.%20Securities%20and%20Exchange,Facilitate%20capital%20formation> [<https://perma.cc/GH7M-8QJR>].

⁴⁴ “[T]he U.S. Securities and Exchange Commission (“SEC”) has pursued an increasingly aggressive enforcement policy in the cryptocurrency space . . .” Benjamin M. Bathgate et al., *Cryptocurrency ‘Regulation by Enforcement’ as Hot as Ever: What’s to Come From Securities Regulators in 2024?*, WEIRFOULDS LLP (Feb. 5, 2024), <https://www.weirfoulds.com/cryptocurrency-regulation-by-enforcement-as-hot-as-ever-whats-to-come-from-securities-regulators-in-2024> [<https://perma.cc/4TMF-VGKV>].

⁴⁵ Ripple CEO Brad Garlinghouse, for one, labeled the SEC a “very hostile regulator.” Arjun Kharpal, *Crypto Firm Ripple Explored IPO Outside of U.S. Because of ‘Hostile’ SEC, Won’t Go Public Soon*, MONEY REPORT, CNBC (Jan. 16, 2024), <https://www.nbcnewyork.com/news/business/money-report/crypto-firm-ripple-explored-ipo-outside-of-u-s-because-of-hostile-sec-wont-go-public-soon/5045763/> [<https://perma.cc/MXT8-RZK2>].

⁴⁶ Chainalysis, a premier data analytics firm specializing in digital assets, prepares annual reports assessing illicit transactions. The 2023 Chainalysis annual report, which analyzed and reported on data from 2022, concluded that “illicit transaction volume rose for the second consecutive year, hitting an all-time high of \$20.6 billion.” *The 2023 Crypto Crime Report*, CHAINALYSIS 1, 5 (Feb. 2023), <https://www.chainalysis.com/blog/2023-crypto-crime-report-introduction/> (available for download via link under “The 2023 Crypto Crime Report”) [<https://perma.cc/5VR5-55XH>]. Most of that total, however, involved transfers to entities sanctioned by the Office of Foreign Assets Control, including a number of Russian-based businesses. *Id.*

Notably, while those transactions violated U.S. sanctions policies, they did not immediately take money from consumers. After a year of tracking down additional data, the total was increased to \$39.6

most crypto entrepreneurs are not criminals. It appears the public agrees, at least if one looks at the increasing market capitalization for cryptoassets.⁴⁷

Many legitimate crypto businesses have said that they are in favor of reasonable regulations, so long as the rules are clear and compliance is not impossibly burdensome.⁴⁸ The U.S. is therefore in a situation where there are some bad actors in the crypto space, there are increasing numbers of purchasers who stand to be hurt by these fraudsters, and there is widespread agreement that some regulation is a good idea.⁴⁹ It would therefore seem

billion, again mostly to addresses hosted by sanctioned services or to sanctioned jurisdictions, and \$8.7 billion in creditor claims against FTX. *See 2024 Crypto Crime Trends: Illicit Activity Down as Scamming and Stolen Funds Fall, But Ransomware and Darknet Markets See Growth*, CHAINALYSIS (Jan. 18, 2024), <https://www.chainalysis.com/blog/2024-crypto-crime-report-introduction/> [<https://perma.cc/9XHGP9>].

This means that, as a share of transaction volume, illicit transactions in 2022 accounted for only 0.42%, as compared to 1.29% in 2019. *Id.*

Early data from 2023 suggests that there was a significant drop in value received by illicit cryptocurrency addresses, as compared to 2022, standing at a preliminary total of \$24.2 billion or 0.34% of all transactions by volume. *Id.* Other data analytics firms concur that as a percent of all transactions, crypto crime is relatively rare. *See, e.g.,* Jim Richards, *Crypto vs Fiat: Is One or The Other More Of A Haven For Illicit Finance?*, REGTECH CONSULTING (Nov. 12, 2021), <https://regtechconsulting.net/cryptoblockchain/crypto-vs-fiat-is-one-or-the-other-more-of-a-haven-for-illicit-financing/> [<https://perma.cc/L9A4-PKWT>] (stating that the notion “that ‘crypto is increasingly being used for criminal activity’ is false if you believe (and there is no reason not to) the work of such solid firms as Elliptic, Chainalysis, and CipherTrace”).

In addition, according to the U.S. Treasury Department, fiat appears to continue to be the preferred medium for financial crime, not crypto. Paulina Okunytė, *Fiat vs. Crypto: Which Is More Popular for Criminal Activities?*, DAILYCOIN (Mar. 26, 2022, 12:00 PM), <https://dailycoin.com/fiat-vs-crypto-which-is-more-popular-for-criminal-activities/> [<https://perma.cc/EE33-YNZJ>].

Other sources agree. According to a 2020 report from the Society for Worldwide Interbank Financial Telecommunication, “‘cases of laundering through cryptocurrencies remain relatively small compared to the volumes of cash laundered through traditional methods’” Hailey Lennon, *The False Narrative Of Bitcoin’s Role In Illicit Activity*, FORBES (Jan. 19, 2021, 9:37 PM), <https://www.forbes.com/sites/haileylennon/2021/01/19/the-false-narrative-of-bitcoins-role-in-illicit-activity/?sh=5fd607db3432> [<https://perma.cc/KDW4-NEN4>].

⁴⁷ Total market capitalization in the crypto markets on April 2, 2024, stood at \$2.48 trillion dollars. *Crypto Historical Data, Price & Market Cap History*, COINCODEX, <https://coincodex.com/historical-data/crypto/?date=2024-04-02T21:00:00Z> [<https://perma.cc/H92C-BCRW>].

⁴⁸ *See* Harsh Notariya, *Regulatory Rift: Crypto Industry Demands Clear Guidelines in Face-Off with SEC*, BE(IN) CRYPTO (Mar. 20, 2024, 2:55 PM), <https://beincrypto.com/why-crypto-firms-demand-clear-regulations/> [<https://perma.cc/9AVW-XXVT>]. One major industry group, the Blockchain Association, has explained that its goal is to “build a commonsense regulatory framework” for crypto. Hannah Lang, *US Crypto Industry Lobby Spending on Track for New Record in 2023*, REUTERS (Dec. 5, 2023, 3:50 PM), <https://www.reuters.com/business/finance/us-crypto-industry-lobby-spending-track-new-record-2023-12-05/> [<https://perma.cc/D36G-6KGY>]. Major companies such as Coinbase and Foris DAX, which operates Crypto.com, have spent millions of dollars lobbying to see that goal achieved through legislation. *Id.* *See also*, Zachary Warmbrodt, *Crypto CEOs to Congress: We Want Regulation, Our Way*, POLITICO (Dec. 8, 2021, 2:38 PM), <https://www.politico.com/news/2021/12/08/cryptocurrency-ceos-congress-regulation-523950> [<https://perma.cc/3LQD-8AKD>].

⁴⁹ Connor Donevan & Patrick Jarenwattananon, *There’s a new plan to regulate cryptocurrencies. Here’s what you need to know*, NPR (Jun. 13, 2022, 5:00 AM), <https://www.npr.org/2022/06/14/1104303982/crypto-bitcoin-stablecoin-regulation-senate> [<https://perma.cc/3FJC-R49X>] (“Nearly everyone believes the crypto industry needs some sort of regulation.”).

logical that putting an effective and balanced regulatory structure into place would be the highest priority for those concerned with crypto markets. Logically, with its substantial expertise in financial market regulation, its expansive budget and sizeable employee base,⁵⁰ the SEC might be the obvious choice as the appropriate regulator. Unfortunately, as of the end of 2024, the SEC had not been successful in its efforts to assume control over crypto,⁵¹ and part of the problem may be that the SEC had lost its impartiality with regard to its enforcement efforts involving crypto businesses.

II. IMPACT OF ANTI-CRYPTO FEARS

As an indication that the SEC had failed to follow its obligations of neutrality, consider how the agency responded to other crypto ventures. While perhaps not as egregious as the misrepresentations made in *Digital Licensing*,⁵² the SEC's actions (and inactions) in other situations suggest a longstanding and pervasive distrust of crypto that hampered the ability of the agency to deal impartially and effectively with the new and growing asset class. There are a number of examples that support this hypothesis.

A. Long-standing Opposition to Bitcoin ETFs

Conventionally, an ETF, or exchange-traded fund, allows investors to buy into a fund that holds a bundle of assets, and interests in that fund are traded on a regulated exchange, similar to how a mutual fund allows investors to buy

⁵⁰ As described on the SEC webpage, “[t]he Division of Trading and Markets establishes and maintains standards for fair, orderly, and efficient markets. The Division regulates the major securities market participants, including broker-dealers, self-regulatory organizations (such as stock exchanges, FINRA, and clearing agencies), and transfer agents.” *Trading and Markets*, U.S. SEC. & EXCH. COMM’N <https://www.sec.gov/divisions/trading-markets> [<https://perma.cc/QWX3-TGQG>]. For fiscal year 2024 the SEC submitted a budget request of \$2.436 billion, which would allow staffing for 5,475 positions. U.S. SEC. & EXCH. COMM’N, FISCAL YEAR 2024 CONGRESSIONAL BUDGET JUSTIFICATION ANNUAL PERFORMANCE PLAN 3 (2024), https://www.sec.gov/files/fy-2024-congressional-budget-justification_final-3-10.pdf [<https://perma.cc/VU7U-BC7Z>].

⁵¹ SEC Chairman Gensler acknowledged and complained that the crypto industry had not complied with SEC requirements. Hope C, *Gensler Slams Crypto’s “Wide-Ranging Non-Compliance” Ahead of Hearing on SEC’s Oversight*, YAHOO FINANCE (Sep. 12, 2023), https://finance.yahoo.com/news/gensler-slams-crypto-wide-ranging-045608352.html?fr=yhssrp_catchall [<https://perma.cc/5Z9F-739H>]. From the point of view of crypto industry participants, this reflects a belief that it is not reasonably possible to comply with, or even understand, existing regulatory requirements. See Brady Dale, *The Few Crypto Firms That Have Registered with the SEC*, AXIOS (Mar. 6, 2023), <https://www.axios.com/2023/03/06/crypto-register-sec-securities-exchange-commission> [<https://perma.cc/F849-2N9Z>] (noting that very few businesses have been able to register and that the SEC needs to improve the system or more companies may choose to avoid the U.S.).

⁵² See *supra* text accompanying notes 1–20, for a description of that incident.

a share in a pool of various stocks.⁵³ An ETF can be beneficial to investors because it allows convenient ownership of diversified assets (some of which might be difficult to acquire individually), with high liquidity and price transparency,⁵⁴ but it has to be granted an affirmative exemption from the SEC in order to be traded on a securities exchange.

The first request to approve a bitcoin ETF came from the Winklevoss twins, two early bitcoin adopters and co-founders of the Gemini crypto exchange,⁵⁵ in 2013.⁵⁶ The Winklevoss application was denied by the SEC in 2017,⁵⁷ a result that was reaffirmed in 2018.⁵⁸ Over the next several years, the SEC continued to deny spot bitcoin ETF requests from the Winklevoss twins and several others, typically on the grounds that the market for bitcoin was too subject to manipulation.⁵⁹

Not every country (or every SEC Commissioner, for that matter⁶⁰) agreed that bitcoin ETFs were unsuitable for trading. Several other countries allowed

⁵³ For a more complete description of ETFs, see Devanshu L. Modi, *ETFs-The Good, The Bad and The Ugly*, N.J. LAW. at 54 (Dec. 2015).

⁵⁴ William A. Birdthistle, *The Fortunes and Foibles of Exchange-Traded Funds: A Positive Market Response to the Problems of Mutual Funds*, 33 DEL. J. CORP. L. 69, 75–76 (2008) (noting potential risks, as well).

⁵⁵ Max DeNike, *Everything You Need to Know About the Winklevoss Twins*, WORK+MONEY (Jan. 1, 2025), <https://www.workandmoney.com/s/winklevoss-twins-bio-bc28c09ffb074639> [https://perma.cc/UX22-6FWE].

⁵⁶ Kingsley Alo, *First Application was 9 Years Ago Today, but a Spot BTC ETF is Nowhere in Sight*, TOKENIST (Jul. 1, 2022, 1:43 PM), <https://tokenist.com/first-application-spot-btc-etf-9-years-ago-approval-nowhere-in-sight/> [https://perma.cc/78Y3-HKSA].

⁵⁷ Bats BZX Exch., Inc., Exchange Act Release No. 34-83723, 83 Fed. Reg. 37579 (July 26, 2018).

⁵⁸ *Id.*

⁵⁹ See, e.g., NYSE Arca, Inc., Exchange Release No. 34-88284, 85 Fed. Reg. 12595 (Mar. 3, 2020) (disapproving ETF that would include bitcoin and long-term treasury obligations in light of the potential for manipulating bitcoin); Grayscale Invs., LLC v. SEC, 82 F.4th 1239, 1242 (D.C. Cir. 2023); Jamie Crawley, *SEC Rejects Ark21Shares Spot Bitcoin ETF for Second Time*, YAHOO FINANCE (Jan. 26, 2023), https://finance.yahoo.com/news/sec-rejects-ark-21shares-spot-171152333.html?fr=yhssrp_catchall [https://perma.cc/5VWL-YQK8]; Allyson Versprille, *Skybridge's Bitcoin EFT Proposal is Latest Shot Down by the SEC*, BL (Jan. 20, 2022, 11:16 AM), <https://news.bloomberglaw.com/securities-law/skybridges-bitcoin-etf-proposal-is-latest-shot-down-by-the-sec> [https://perma.cc/7FV2-K6CW] (insufficient safeguards to prevent fraud and manipulation); Vildana Harjic & Katie Greifield, *SEC Rejects VenEck's Bitcoin ETF in Latest Spot-Listing Snub*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2021-11-12/sec-rejects-vaneck-s-bitcoin-etf-application-to-trade-on-cboe> (Nov. 12, 2021, 3:54 PM) [https://perma.cc/KS8M-PGNM]; Marion A. Brown, *Cryptocurrency and Financial Regulation: The SEC's Rejection of Bitcoin-Based ETFs*, 23 N.C. BANKING INST. 139, 146 (2019); David Sheer, *SEC Quashes More Bitcoin ETF Pitches in Another Blow to Crypto*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2018-08-23/sec-quashes-more-bitcoin-etf-pitches-in-another-blow-to-crypto> (Aug. 23, 2018, 7:46 AM) [https://perma.cc/B8W7-DF4X]. See also THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION 276 –81 (Thomson West, 8th ed. 2023).

⁶⁰ Commissioner Hester Peirce dissented from several orders denying approval of bitcoin ETFs. See Marie Huillet, *US SEC Commissioner Dissents From Agency's Rejection of Winklevoss Bitcoin ETF*, COINTELEGRAPH (Jul. 27, 2018), <https://cointelegraph.com/news/us-sec-commissioner-dissents-from-agency-s-rejection-of-winklevoss-bitcoin-etf> [https://perma.cc/G4PE-PYVG]; Susan Light et al., *Commissioner Peirce Dissents from SEC's Rejection of Bitcoin-Based ETF*, NAT'L L. REV. (Feb. 28, 2020),

such funds to be traded, including Canada,⁶¹ countries in the European Union, Brazil, and elsewhere.⁶²

Further complicating the situation in the U.S., the Commodity Futures Trading Commission (CFTC) began approving bitcoin futures for trading on exchanges registered with it in 2018.⁶³ Since bitcoin futures were already trading on CFTC-regulated U.S. markets, in order to allow securities exchanges to compete, in October 2021, the SEC allowed bitcoin futures ETFs⁶⁴ to begin trading on the New York Stock Exchange.⁶⁵ In addition, in April and May 2022, the SEC approved several applications for additional bitcoin futures products to trade on securities exchanges.⁶⁶ Notwithstanding these developments, the SEC continued its refusal to approve bitcoin spot ETFs.

<https://www.natlawreview.com/article/commissioner-peirce-dissents-sec-s-rejection-bitcoin-based-etf> [https://perma.cc/F5SC-SZ9M]; Jake Simmons, *Commissioner Peirce Reveals SEC Dispute Post Bitcoin ETF Approval*, BITCOINIST (Jan. 2024), <https://bitcoinist.com/sec-commissioner-peirce-dispute-bitcoin-etf/> [https://perma.cc/9J46-UMGK].

⁶¹ Bridget Casey, *Canada Approves the First Bitcoin ETF*, MONEY.CA (Feb. 28, 2025), <https://money.ca/investing/cryptocurrency/canada-approves-first-bitcoin-etf> [https://perma.cc/DUU9-8KEL] (“Shares became available for trading on Thursday, February 18, 2021.”).

⁶² See generally Edward Oosterbaan & George Kaloudis, *Bitcoin ETFs Aren’t New. Here’s How They’ve Fared Outside the US*, COINDESK, <https://www.coindesk.com/markets/2021/10/20/bitcoin-etfs-arent-new-heres-how-theyve-fared-outside-the-us/> (Mar. 8, 2024, 4:35 PM) [https://perma.cc/T9PG-H9TN].

⁶³ “In 2018, [the CFTC Chairman] did the unthinkable and approved bitcoin futures trading. More specifically, he allowed CME Group and Cboe Global Markets to ‘self-certify’ these products.” Daniel Kuhn, *The CFTC Was Proved Right on Bitcoin Futures. What’s Next for the Agency?*, COINDESK, <https://www.coindesk.com/policy/2021/10/19/the-cftc-was-proved-right-on-bitcoin-futures-whats-next-for-the-agency/> (May 11, 2023, 4:25 PM) [https://perma.cc/9NNN-ZUSN].

⁶⁴ A bitcoin futures ETF invests in bitcoin futures, which in essence are contracts that speculate on what the price of the underlying asset will be on a specific future date. For more information about bitcoin futures, see Wayne Duggan & Michael Adams, *What Are Bitcoin Futures? How Do They Work?*, FORBES, <https://www.forbes.com/advisor/investing/cryptocurrency/what-are-bitcoin-futures/#:~:text=What%20Are%20Bitcoin%20Futures%3F%20Futures%20are%20a%20type,contracts%2C%20they%20are%20speculating%20about%20BTC%E2%80%99s%20future%20price> (Apr. 10, 2024, 5:49 PM) [https://perma.cc/8EG5-SYTS]; A bitcoin spot ETF refers to a fund that has acquired bitcoin in the spot, or actual trading market. Jacob Wade & Michael Adams, *Spot Bitcoin ETFs: What Are They, And How Do They Work?*, FORBES, <https://www.forbes.com/advisor/investing/cryptocurrency/spot-bitcoin-etfs/> (May 13, 2024, 2:17 PM) [https://perma.cc/46RK-BXSZ].

⁶⁵ Nikhilesh De & Danny Nelson, *SEC Approves Bitcoin Futures ETF, Opening Crypto to Wider Investor Base*, COINDESK, <https://www.coindesk.com/policy/2021/10/15/sec-approves-bitcoin-etf-opening-crypto-to-wider-investor-base/> (May 11, 2023, 5:18 PM) [https://perma.cc/ZWA4-C8ZD].

⁶⁶ Owen Pinkerton et al., *Grayscale’s Successful Challenge of SEC Denial and its Potential Implications*, FUTURES & DERIVATIVES L. REP., Nov. 2023, at 4 and accompanying text (citing Teucrum Order, Exchange Act Release No. 34-94620, 87 Fed. Reg. 21676 (Apr. 12, 2022); Valkyrie Order, Exchange Act Release No. 34-94853, 87 Fed. Reg. 28848 (May 11, 2022)).

Eventually, Grayscale took the SEC to court⁶⁷ after the SEC again rejected the company's request to approve a bitcoin spot ETF in June of 2022.⁶⁸ Grayscale's argument was that the agency's refusal to approve the application violated the federal Administrative Procedure Act, which sets aside an action as "arbitrary [and] capricious" unless it is "reasonable and reasonably explained."⁶⁹ The court agreed, finding that the SEC's "denial of Grayscale's proposal was arbitrary and capricious because the Commission failed to explain its different treatment of similar products."⁷⁰ The court therefore vacated the SEC's order, requiring the agency to reconsider the request.⁷¹

Following this defeat in court, the SEC capitulated and approved multiple bitcoin ETF proposals (including one from Grayscale) on January 10, 2024.⁷² In the SEC Chairman's statement on the decision, the court order is explicitly pointed to as part of the changed circumstances justifying approval of the ETFs notwithstanding years of denying essential identical applications.⁷³ The statement is also significant for pointing out that the SEC remained critical of the crypto industry as a whole.⁷⁴

B. Allegations Not Supported by the Facts

The most vivid example of this kind of behavior comes from the *Digital Licensing* case discussed at the outset of this Article,⁷⁵ primarily because of the fact that the court called out the misconduct and imposed sizable penalties on the agency.⁷⁶ However, this case is not the only example of the SEC overstating the facts.⁷⁷

⁶⁷ See *Grayscale Invs., LLC v. SEC*, 82 F. 4th 1239 (D.C. Cir. 2023).

⁶⁸ Hannah Lang, *US Court Questions SEC's Rejection of Grayscale's Bitcoin Fund Proposal*, REUTERS (Mar. 7, 2023, 12:28 PM), <https://www.reuters.com/legal/court-set-hear-arguments-grayscale-lawsuit-against-sec-over-bitcoin-fund-2023-03-07/> [<https://perma.cc/D8YH-8673>].

⁶⁹ *Grayscale Invs., LLC*, 82 F. 4th at 1244–45 (quoting Administrative Procedure Act, 5 U.S.C. § 706(2) (1966); *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

⁷⁰ *Id.* at 1242.

⁷¹ *Id.* at 1252.

⁷² Chairman Gary Gensler, *Statement on the Approval of Spot Bitcoin Exchange-Traded Products*, U.S. SEC. & EXCH. COMM'N (Jan. 10, 2024), <https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023> [<https://perma.cc/5UK6-D8FH>].

⁷³ *Id.*

⁷⁴ After claiming that the SEC is "merit neutral," Chairman Gensler's statement also called out "the current state of non-compliance of certain crypto asset market participants with the federal securities laws," and concludes that "without prejudging any one crypto asset, the vast majority of crypto assets are investment contracts and thus subject to the federal securities laws." *Id.*

⁷⁵ See *supra* text accompanying notes 1–20.

⁷⁶ See Bultman, *supra* note 20.

⁷⁷ See Jennifer J. Schulp, *SEC Overreach: Examining the Need for Reform*, CATO INST. (Mar. 20, 2024), <https://www.cato.org/testimony/sec-overreach-examining-need-reform> [<https://perma.cc/Q5HK-M9FD>] (testimony of Jennifer Schulp before the Subcommittee on Capital Markets of the House Committee on Financial Services of the 118th Congress).

In June 2019, the SEC initiated an enforcement action against Kik Interactive, Inc., referred to in the complaint and here as Kik,⁷⁸ a social media company that had launched a cryptoasset known as the KIN token two years previously. The complaint paints a picture of a company in dire financial straits, willing to cut corners and promise anything in a desperate attempt to acquire financing for a floundering company.⁷⁹

For example, near the start of the complaint, the SEC alleged that “[d]espite Kik Messenger’s initial success and the company’s receipt of venture capital funding, Kik’s costs have always far outpaced its revenues, and the company has never been profitable.”⁸⁰ The SEC characterized this as “a crisis. Fewer and fewer people were using Kik Messenger.”⁸¹ According to the SEC complaint, this led the company to turn to crypto in desperation: “Faced with a shrinking financial ‘runway,’ Kik decided to ‘pivot’ to an entirely different kind business and attempt what a board member called a ‘hail Mary pass’: Kik would offer and sell one trillion digital tokens in return for cash to fund company operations and a speculative new venture.”⁸²

In support of its general argument that Kik was desperate and willing to do and say anything to attract investors, the SEC claimed that the company was warned it would be violating the securities but decided to move ahead anyway.⁸³ The SEC also quoted Kik’s CEO as having promised that the company would “guarantee we are all in on” raising the price or value of Kin tokens.⁸⁴

Normally, an answer to a complaint looks at the specific allegations and admits or denies each of them in turn,⁸⁵ but in this case, Kik found so many of the allegations to be inaccurate that it did not do this.⁸⁶ Instead, it took the

⁷⁸ Complaint, SEC v. Kik Interactive Inc., 492 F. Supp. 3d 169 (S.D.N.Y. Sept. 30, 2020) (No. 1:19-cv-05244).

⁷⁹ *Id.* ¶ 6-7.

⁸⁰ *Id.* ¶ 5.

⁸¹ *Id.* ¶ 6.

⁸² *Id.* ¶ 7.

⁸³ *Id.* ¶ 17 (claiming that “Kik had been informed by one of its consultants that the Kin offering was, potentially, an offering of securities that needed to be registered with the SEC and that ‘unregistered public securities offerings are not legal in the U.S.’”).

⁸⁴ *Id.* ¶ 116.

⁸⁵ For example, simple online instructions on how to answer a civil complaint suggest that “[y]ou should respond to each paragraph in the complaint using the exact number used in the complaint.” *Instructions to Answer a Complaint*, LEGAL AID OF N.C., <https://www.lawhelpnc.org/files/CF76DC62-D528-7183-3117-39472C017826/attachments/7B3ADFA8-5301-4312-B697-E6D2F9401206/consumer-instructions-to-answer-a-complaint.pdf> [<https://perma.cc/752P-D55T>] (emphasis in original).

⁸⁶ The Kik Answer is 131-pages in length, and there is a three-page introduction that sets the tone of much of the company’s response. *See* Answer at 1–3, SEC v. Kik Interactive Inc., 492 F. Supp. 3d 169 (S.D.N.Y. Aug. 6, 2019) (No. 1:19-cv-5244) [hereinafter *Kik Answer*].

unusual step of beginning its answer with a narrative outlining some of what it called “a highly selective and misleading depiction of the record.”⁸⁷

The Answer first takes issue with the allegation that a Kik consultant had warned the company that it would be violating U.S. securities laws.⁸⁸ While agreeing that its consultant had said “[U]nregistered public securities offerings are not legal in the U.S.,” Kik’s answer pointed out that the full quote would have continued: “In the case of a community currency, there is a good basis to argue that this is not a security. You’re just selling units of property that you created that are used for a particular purpose in your app.”⁸⁹ As Kik concludes, this was in fact “the opposite of what the Commission claims he said in its Complaint.”⁹⁰

The Answer then challenged the SEC “claims that Kik promised to increase Kin’s price through its efforts.”⁹¹ Again, Kik includes the full quote to make clear that the SEC has mischaracterized the statements from Kik’s CEO:

So we can not guarantee value with Kin. I think once you create a cryptocurrency it sits on exchanges and the price of it is set by the market based on supply and demand. So you know supply is fixed and demand goes down the price is going to go down. But I think what we can guarantee is we’re all in on this.⁹²

In framing its reaction to the SEC’s complaint, Kik contended that the SEC’s strategy from the outset had been to “twist the facts.”⁹³

Unlike the *Digital Licensing* case,⁹⁴ *SEC v. Kik* did not result in any penalty being imposed upon the SEC or any finding by the court that the agency had acted improperly.⁹⁵ However, the final order makes no reference to the SEC’s characterization of Kik as having been in desperate financial straits, or having guaranteed efforts to produce a profit for purchasers.⁹⁶ Those allegations appear to have vanished at some point during the proceedings.⁹⁷

Obviously, nothing in the *Kik* case led to sanctions being imposed against the SEC, but the allegations made in the SEC’s complaint and rebutted in

⁸⁷ *Id.* at 3.

⁸⁸ *Id.* at 2.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Kik Answer*, *supra* note 86, at 2.

⁹² *Id.* at 2–3.

⁹³ *Id.* at 3.

⁹⁴ See *supra* text accompanying notes 1–20, for a description of *SEC v. Digit. Licensing*.

⁹⁵ See Opinion and Order on Motions for Summary Judgment, 492 F. Supp. 3d 169 (2020).

⁹⁶ See *id.* at 12.

⁹⁷ The order does note some statements that were reported by the SEC, such as references to the potential of Kin tokens to increase in value. See *id.* This is a far cry, however, from the suggestion that profits were guaranteed by Kik.

Kik's answer do illustrate the reality that the agency has been willing to twist the facts or take things out of context in an effort to make its case against crypto businesses.

C. Interactions Between Coinbase and the SEC

Compounding the problems of an agency willing to overstate or misstate the facts was growing evidence of an agency unwilling to fully explain its actions or positions or to clarify what the rules it is following actually mean.

Coinbase, the largest U.S.-based crypto exchange,⁹⁸ has had a long and sometimes contentious relationship with the SEC. In June 2021, Coinbase announced a plan to create a crypto lending product that would have enabled customers to deposit cryptoassets with Coinbase and earn interest at predetermined rates considerably higher than were then available for deposits at legacy financial institutions.⁹⁹ Following a warning from the SEC that they had tentatively concluded the proposed plan would violate the securities laws, Coinbase abandoned its plans¹⁰⁰ while expressing confusion and exasperation with the Commission's refusal to explain its conclusions.¹⁰¹

Coinbase was particularly concerned about the persistent failure of the SEC to communicate with the company, not just about its lending product but also about clarifying which of the assets it lists should be classified as securities.¹⁰² Finally, in July 2022, Coinbase formally asked the SEC to adopt

⁹⁸ See generally Daniel Kuhn, *Coinbase Grew Quickly by Working With U.S. Regulators. Will It Expand Even More by Disregarding the SEC?*, COINDESK (May 2, 2023, 9:46 PM), <https://www.coindesk.com/consensus-magazine/2023/05/02/coinbase-grew-quickly-by-working-with-us-regulators-will-it-expand-even-more-by-disregarding-the-sec/> [https://perma.cc/V5EV-4HM5] (describing the company's origins and growth).

⁹⁹ The Coinbase Blog announced the planned Coinbase Lend program on June 29, 2021, suggesting that customers could pre-enroll to earn interest "with rates more than 50x the national average of a traditional savings account." *Update as of 5pm ET, Friday, September 17th: We Are Not Launching the USDC APY Program Announced Below*, COINBASE (June 29, 2021), <https://blog.coinbase.com/sign-up-to-earn-4-apy-on-usd-coin-with-coinbase-cdad79e5f5eb> [https://perma.cc/3H95-LZ8A]. The Coinbase webpage on the Lend program now redirects viewers, but it still accessible at *Earn 4% APY on USDC*, WAYBACK MACHINE (Sept. 9, 2021), <https://web.archive.org/web/20210909081423/https://www.coinbase.com/lend> [https://perma.cc/NL4E-B7U4].

¹⁰⁰ Lucas Matney, *Following SEC Lawsuit Threat, Coinbase Cancels Launch of 'Lend' Product*, TECHCRUNCH (Sept. 20, 2021, 10:25 AM), <https://techcrunch.com/2021/09/20/following-sec-lawsuit-threat-coinbase-cancels-launch-of-lend-product/#:~:text=Less%20than%20a%20couple%20weeks,the%20Lend%20product%20after%20all> [https://perma.cc/49HN-MS3X].

¹⁰¹ Paul Grewal, *The SEC Has Told us it Wants to Sue us Over Lend. We Don't Know Why.*, COINBASE (Sept. 7, 2021), <https://www.coinbase.com/blog/the-sec-has-told-us-it-wants-to-sue-us-over-lend-we-have-no-idea-why> [https://perma.cc/TTC5-6ELJ].

¹⁰² Todd Ehret, *SEC Spat with Coinbase Previews Complex Legal Battle Over Crypto*, REUTERS (Sept. 28, 2021, 10:51 AM), <https://www.reuters.com/legal/transactional/sec-spat-with-coinbase-previews-complex-legal-battle-over-crypto-2021-09-28/> [https://perma.cc/3PJH-9E4S].

rules to explain which cryptoassets are securities,¹⁰³ and when the SEC failed to respond or comment on the request, Coinbase filed a writ of mandamus seeking a court order forcing the SEC to reply.¹⁰⁴

In December 2023, the SEC, compelled by the U.S. Court of Appeals for the Third Circuit, finally issued a short response denying Coinbase's request for rulemaking.¹⁰⁵ Coinbase challenged that denial as arbitrary and capricious,¹⁰⁶ and the Third Circuit ultimately agreed, sending the request for rulemaking back to the agency again for an explanation of its refusal to act.¹⁰⁷

III. CONCLUDING OBSERVATIONS

On March 5, 2024, a former crypto exchange, ShapeShift AG ("ShapeShift"), settled with the SEC, agreeing to pay a relatively modest civil monetary penalty of \$275,000 for failing to register as a securities dealer.¹⁰⁸ The settlement might have been of limited significance other than to the named entity except for the strongly worded dissent filed by SEC Commissioners Hester Peirce and Mark Uyeda.¹⁰⁹

ShapeShift had dissolved in mid-2021, but the enforcement action and settlement with the SEC was not announced until 2024.¹¹⁰ The agency's claims related to conduct by the company dating back to August 2014,¹¹¹ but the Commission declined to specify which of the approximately 79 different cryptoassets that the business had traded were securities.¹¹² There were no allegations of fraud.¹¹³

¹⁰³ Shalini Nagarajan, *Coinbase Sues SEC To Demand Regulatory Clarity on Crypto*, BLOCKWORKS (Apr. 25, 2023, 4:08 AM), <https://blockworks.co/news/coinbase-sec-rulemaking-petition> [<https://perma.cc/98HJ-FD9J>].

¹⁰⁴ Petition for Writ of Mandamus at 1, *In re Coinbase, Inc.*, (3rd Cir. Apr. 26, 2023) (No. 23-1179) 2024 U.S. Dist. LEXIS 160023.

¹⁰⁵ See Chairman Gary Gensler, *Statement on the Denial of a Rulemaking Petition Submitted on Behalf of Coinbase Global, Inc.*, U.S. SEC. & EXCH. COMM'N (Dec. 15, 2023), <https://www.sec.gov/news/statement/gensler-coinbase-petition-121523> [<https://perma.cc/D6GE-GNP4>].

¹⁰⁶ See Casey Wagner, *Coinbase Moves Forward with Appeal of SEC's Rulemaking Petition Denial*, BLOCKWORKS (Mar. 11, 2024, 5:28 PM), <https://blockworks.co/news/coinbase-appeals-sec-rulemaking-petition> [<https://perma.cc/DPK2-BNXX>].

¹⁰⁷ *Coinbase, Inc. v. Sec. & Exch. Comm'n*, 126 F.4th 175 (3d Cir. 2025).

¹⁰⁸ See *SEC Charges ShapeShift AG Crypto Platform with Operating as an Unregistered Dealer*, U.S. SEC. & EXCH. COMM'N (Mar. 5, 2024), <https://www.sec.gov/enforce/34-99676-s> [<https://perma.cc/2YZX-XJFE>].

¹⁰⁹ See Comm'r Hester M. Peirce & Mark T. Uyeda, *On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG*, U.S. SEC. & EXCH. COMM'N (Mar. 5, 2024), <https://www.sec.gov/news/statement/peirce-uyeda-statement-a-crypto-world-turns-03-06-24> [<https://perma.cc/G3F6-JS7Q>].

¹¹⁰ See ShapeShift AG, Exchange Act Release No. 99676, Admin. Proc. File No. 3-21891 (Mar. 5, 2024).

¹¹¹ *Id.* at 2.

¹¹² Peirce & Uyeda, *supra* note 109.

¹¹³ *Id.*

The problems exemplified by this particular action are set out in the dissent, which characterizes the SEC's crypto policy as being "poorly conceived."¹¹⁴ In the words of Commissioners Peirce and Uyeda:

This enforcement action underscores the adverse consequences of the Commission's approach to regulation in the crypto space and adds to the ambiguity that hangs over the crypto world. It is entirely unclear how ShapeShift was to discern that the Commission would consider crypto assets generally—and any crypto asset in particular—a security in the form of an investment contract. Even now, ten years on, it is hardly more discernable. But perhaps that ambiguity is exactly the result the Commission wants.¹¹⁵

The implication of this comment is that the SEC's failure to clarify which cryptoassets are securities alongside a vigorous enforcement agenda "is intentionally seeking to foster ambiguity and intimidate crypto innovators."¹¹⁶ While this may have overstated the Commission's official opposition to crypto businesses, it did not overstate the impact of the agency's posture.

As explained by Coinbase in its current fight with the SEC over rulemaking, "[d]igital asset firms are therefore in a [c]atch-22 of the SEC's own making: The agency insists they comply with its regulations, but it refuses to conduct the rulemaking needed to establish regulations by which firms feasibly could do so...."¹¹⁷

While there is no indication that the SEC would refuse to comply with a court order or legislative directives requiring the Commission to change its focus, this history painted the picture of an agency that had become convinced that crypto is for criminals.¹¹⁸ This did not result in clear and predictable rules

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Bracewell LLP, *ShapeShift Fine Epitomizes SEC's Crypto Policy, and its Flaws*, LEXOLOGY (Mar. 29, 2024), https://www.lexology.com/library/detail.aspx?g=e2717696-8cef-433e-b9a7-befca0d7bfe5&utm_source=lexology+daily+newsfeed&utm_medium=html+email&utm_campaign=arkbar+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2024-04-03&utm_term=https://perma.cc/G5N8-WGPT].

¹¹⁷ Wagner, *supra* note 106.

¹¹⁸ One recent commentator pointed out how the SEC drove LBRY into bankruptcy despite assertions from the company CEO that "he did everything to comply with confusing rules the SEC wouldn't explain." Roslyn Layton, *Stop Ignoring the SEC's Malfeasance on Crypto*, REAL CLEAR POL'Y (Dec. 14, 2023), https://www.realclearpolicy.com/articles/2023/12/14/stop_ignoring_the_secs_malfeasance_on_crypto_998937.html [https://perma.cc/KK8E-L7CH]. The same source noted that "Ripple weathered the SEC's 'regulation by enforcement' strategy because it had \$100 million in reserve to cover the legal costs." *Id.*

with which it was possible for crypto businesses to comply.¹¹⁹ While the SEC's concern for investors and suspicion of industry participants might make the agency a perfect watchdog for fraud and other illegality,¹²⁰ it was clearly not successful in providing a regulatory regime that companies could comply with. In fact, the SEC under Chairman Gensler made few efforts to clarify how crypto companies should understand and comply with rules designed for other kinds of assets.¹²¹ This means that absent judicial or

¹¹⁹ One of the most vivid illustrations of this lack comes directly from Commissioners Peirce and Uyeda, who suggested in their dissent from the ShapeShift enforcement just how unrealistic it is to believe crypto businesses can comply with the current requirements. Peirce & Uyeda, *supra* note 109. They imagined that a conversation between a future ShapeShift and the SEC might go like this if the company seeks to comply with existing regulations:

Future ShapeShift ("FSS"): Hello, I would like to register as a dealer.

SEC: Why?

FSS: Because I think some of the assets that I plan to deal might be deemed at some point by the SEC to be securities.

SEC: Which ones?

FSS: I'm not sure because I can't really understand what criteria you use to decide whether a token offering is a securities transaction and, if it is, whether the token that was the subject of the investment contract remains a security in secondary market transactions.

SEC: Well, if you don't know whether you're dealing in securities, you can't register. And by the way, if some of the assets you're dealing in are not securities, you also can't register.

FSS: So can you help us think through which assets are securities?

SEC: No. We suggest that you read the 2017 DAO report, and it will all be clear to you. You can also look at our enforcement actions if you want.

FSS: I read it, and I've read about your enforcement actions. I still have questions.

SEC: Hire a lawyer.

FSS: I did, and the lawyer has even more questions.

SEC: Sorry, we cannot help any more than we already have. We don't give legal advice.

Id. The 2017 DAO Report referenced in this hypothetical conversation is discussed *supra* at note 29.

¹²⁰ Markets, which generally react negatively to enforcement actions by the SEC as compared to CFTC enforcement, react more positively to anti-fraud actions. Yuliya Guseva & Irena Hutton, *Regulatory Fragmentation: Investor Reaction to SEC and CFTC Enforcement in Crypto Markets*, 64 B.C. L. REV. 1555, 1610 (2023). In 2022, the SEC hired additional personnel to specifically assist with "preventing fraud that uses crypto asset offerings, crypto asset exchanges, crypto asset lending and staking products, decentralized finance platforms, non-fungible tokens and stablecoins." Reuters, *U.S. SEC Ramps up Crypto Fraud Oversight by Adding 20 Employees*, YAHOO FIN. (May 3, 2022), https://finance.yahoo.com/news/u-sec-ramps-crypto-fraud-091649253.html?fr=yhssrp_catchall [<https://perma.cc/KK5J-C5RD>]. In 2023, more than half of the forty-six crypto enforcement actions pursued by the SEC involve fraud. Simola Mola, *SEC Cryptocurrency Enforcement: 2023 Update*, CORNERSTONE RSCH. at 6, <https://www.cornerstone.com/wp-content/uploads/2024/01/SEC-Cryptocurrency-Enforcement-2023-Update.pdf> (fraud claims were made in twenty of the twenty-six cases brought in court and in nine of twenty administrative proceedings). From 2013 to 2023, fraud was alleged in 85 of the 108 court cases (and only in 16 of 65 administrative actions). *Id.* See also Carol R. Goforth, *Regulation by Enforcement: Problems with the Sec's Approach to Cryptoasset Regulation*, 82 MD. L. REV. 107, 152-53 (2022) (specifically suggesting that the SEC is well suited to crypto fraud enforcement).

¹²¹ The disconnect between the existing regulatory requirements and cryptoasset operations has been noted elsewhere. See, e.g., Yuliya Guseva, *When the Means Undermine the End: The Leviathan of Securities Law and Enforcement in Digital-Asset Markets*, 5 STAN. J. BLOCKCHAIN L. & POL'Y 1, 34 (2022) ("[T]he rules have yet to acknowledge an important quality of digital assets—there are circumstances where issuers do not control their cryptoassets, including asset circulation, pricing, and, ultimately, investors' return after a platform launch and asset delivery."); Syren Johnstone, *Secondary Markets in Digital Assets: Rethinking Regulatory Policy in Centralized and Decentralized Environments*,

legislative direction requiring the SEC to change its approach, a different agency may need to be the primary crypto regulator when fraud or similar illegality is not involved. The catch-22 here is that no other agency has Congressional authority to regulate the spot markets¹²² in which cryptoassets trade¹²³ or the businesses that operate in such markets, and there is no self-regulatory agency with authority to set standards either.¹²⁴

The purpose of this Article is not to keep the SEC out of crypto regulation. In fact, as noted above, the SEC is both well situated and can be effective at combatting fraud in the crypto space.¹²⁵ Rather, by pointing out the apparent bias in past SEC initiatives involving crypto, perhaps minds can be changed. This is particularly likely given the change in administration following the 2024 presidential election.

Regardless of what one feels about other outcomes of the election, a more balanced approach to crypto regulation could reap rewards for markets and investors alike, helping to fulfil the mission of the SEC to not only protect them but also to help support capital formation.¹²⁶ Chairman Gary Gensler's term ended January 20, 2025, and new leadership could signal a change in direction.¹²⁷

3 STAN. J. BLOCKCHAIN L. & POL'Y 146, 184 (2020) (noting that even when digital assets are "designated as securities, they possess characteristics that may differ significantly from traditional securities"); Kevin Werbach, *Digital Asset Regulation: Peering into the Past, Peering into the Future*, 64 WM. & MARY L. REV. 1251, 1296 (2023) ("information disclosure, the centerpiece of the securities regulatory structure, means something different in a blockchain context in which all transactions are transparent and cryptographically guaranteed").

¹²² A spot or physical market is where a particular asset trades, as distinct from a market in which derivative financial products based on that market trade. Brian Nibley, *What Is the Spot Market & How Does It Work?*, SOFI (July 7, 2023), <https://www.sofi.com/learn/content/what-is-spot-market/> [https://perma.cc/M45M-FJZZ].

¹²³ The CFTC has no authority to regulate the markets in which cryptoassets traded even though the assets themselves are generally recognized as commodities. See CFTC, Statement of Commissioner Dawn D. Stump on the CFTC's Regulatory Authority Applicable to Digital Assets (Aug. 23, 2021), <https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement082321> [https://perma.cc/AV9T-LL8J].

¹²⁴ Former CFTC Chair Timothy Massad and Harvard Law Professor Howell Jackson, working out of the Brookings Institute, have suggested that the CFTC and SEC jointly create and oversee such an entity. Timothy G. Massad & Howell Jackson, *How to Improve Regulation of Crypto Today—Without Congressional Action—and Make the Industry Pay For It*, BROOKINGS (Oct. 13, 2022), <https://www.brookings.edu/articles/how-to-improve-regulation-of-crypto-today-without-congressional-action-and-make-the-industry-pay-for-it/> [https://perma.cc/ZHZ4-JGYZ]. However, this seems unrealistic given the current direction of SEC crypto actions and commentary.

¹²⁵ See Goforth, *supra* note 120, at 152–53.

¹²⁶ See *Mission*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/about/mission> [https://perma.cc/G95C-3TQ9] (Aug. 9, 2023).

¹²⁷ Even before he assumed office, President Trump announced that his pick to lead the SEC was Paul Atkins, a former SEC Commissioner. Rafael Nam, *Trump Picks Backer Paul Atkins as New Securities and Exchange Commission Chair*, NPR (Dec. 4, 2024), <https://www.npr.org/2024/12/04/g-s1-36803/trump-crypto-paul-atkins-sec-chair> [https://perma.cc/W5NF-MTF9]. Atkins is known as a strong supporter of crypto, suggesting that he is likely to at least attempt to lead the agency in a new direction on crypto regulation and enforcement.

If the SEC is not convinced to voluntarily reconsider its approach, perhaps Congress can be persuaded to step in to encourage development of a more targeted disclosure and regulatory regime,¹²⁸ with which it is possible for industry participants to comply. The fact that the House was willing to pass the Financial Innovation and Technology for the 21st Century Act by a vote of 279-136 on May 22, 2024,¹²⁹ indicates that there is a growing swell of support for the idea that realistic regulation is desperately needed.¹³⁰

Finally, the idea that realistic and reasonable crypto regulation is achievable is further supported by the results of the 2024 federal elections. President Trump had publicly proclaimed his support for crypto along with a desire to see crypto entrepreneurs in the U.S. succeed, and the Republican majorities in both houses following the 2024 election make this even more likely.¹³¹ Of course, only time will tell as to the precise nature of developments, regulatory and otherwise, in this continually evolving space.

IV. ADDENDUM

Between the time this Article was written and final edits, much had changed at the SEC. Commissioner Mark Uyeda was named acting Chairman,¹³² and Commissioner Hester Peirce was appointed to head a new Crypto Task Force at the agency.¹³³ These were the two Commissioners who

¹²⁸ For the kinds of disclosures that might be required, see *Proposed U.S. Disclosure Guidelines for a Particular Category of Tokens*, SIDLEY-RUTGERS FINTECH & BLOCKCHAIN SYMPOSIUM (May 3, 2024), https://www.sidley.com/en/-/media/uploads/mn23267-fintech-and-blockchain-symposium--token-standardized-disclosures-document_fnl.pdf?la=en [https://perma.cc/REZ5-ZYWS].

¹²⁹ See Jesse Hamilton & Nikhilesh De, *U.S. House Approves Crypto FIT21 Bill With Wave of Democratic Support*, COINDESK, <https://www.coindesk.com/policy/2024/05/22/us-house-approves-crypto-fit21-bill-with-wave-of-democratic-support/> (May 23, 2024, 7:45 PM) [https://perma.cc/7XZE-HLEQ].

¹³⁰ Among other things, the bill would set the CFTC as a leading regulator of cryptoassets and would establish certain consumer protections regarding issues such as disclosure requirements, custody of customer assets and bankruptcy protections. Jesse Hamilton, *Crypto Industry Rallies Behind House Bill as It Heads Toward Final Vote*, COINDESK, <https://www.coindesk.com/policy/2024/05/17/crypto-industry-rallies-behind-house-bill-as-it-heads-toward-final-vote/> (May 17, 2024, 3:29 PM) [https://perma.cc/7SF9-LXZ8].

¹³¹ “Trump has said he wants to make the US the ‘crypto capital of the planet.’ With the help of a Republican-controlled Congress, investors can reasonably expect more progress to come in creating a strong regulatory framework for digital assets.” Anqi Dong, *What Trump’s Win Could Mean for Digital Assets*, STATE ST. GLOB. ADVISORS (Nov. 27, 2024) <https://www.ssga.com/us/en/individual/insights/what-trumps-win-could-mean-for-digital-assets> [https://perma.cc/QQW6-YVKW].

¹³² Press Release, U.S. Sec. & Exch. Comm’n, *Mark T. Uyeda Named Acting Chairman of the SEC*, Rel. No. 2025-29 (Jan. 21, 2025), <https://www.sec.gov/newsroom/press-releases/2025-29> [https://perma.cc/ZS8N-8NUR].

¹³³ Press Release, U.S. Sec. & Exch. Comm’n, *SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force*, Rel. No. 2025-30 (Jan. 21, 2025), <https://www.sec.gov/newsroom/press-releases/2025-30> [https://perma.cc/JR5K-P8LD].

had formerly dissented to various crypto enforcement actions taken while Gary Gensler chaired the agency.¹³⁴

Under Acting Chairman Uyeda's leadership, many pending enforcement actions against various crypto companies were dismissed or stayed pending agreement on the precise wording of the proposed dismissals,¹³⁵ and Commissioner Peirce, in her capacity as Chair of the new task force, had indicated that there would be significant changes from the approach taken by the agency since it first released the DAO Report¹³⁶ on crypto classification back in 2017:

Throughout this time, the Commission's handling of crypto has been marked by legal imprecision and commercial impracticality. Consequently, many cases remain in litigation, many rules remain in the proposal stage, and many market participants remain in limbo.

. . . [T]he Task Force is working to help create a regulatory framework that both achieves the Commission's important regulatory objectives — including protecting investors — and preserves industry's ability to offer products and services. This framework will be within the statutory authority given to the Commission, and we will work with other regulators operating within their own statutory authorities.¹³⁷

These actions and statements are in line with President Trump's express desire to see the U.S. adopt a framework that supports "the responsible growth and use of digital assets, blockchain technology, and related technologies across all sectors of the economy."¹³⁸ As of this writing, exactly how that might be carried out is still unclear, but given the speed at which prior actions have been dismantled and abandoned, it might also be worth ensuring that we do not swing too far in the opposite direction. We do not want overzealous regulation, but an absence of effective oversight could easily be just as detrimental.

¹³⁴ See, e.g., *supra* notes 60 and 109 and accompanying text.

¹³⁵ See Prashant Jhn, *SEC Crypto Reversals: Every Case It Dropped in 2025 and the Legal Battles Still Ahead*, CCN (Mar. 28, 2025), <https://www.ccn.com/news/crypto/sec-crypto-reversals-2025-lawsuits/> [<https://perma.cc/PVN5-W3DX>].

¹³⁶ See DAO Report, *supra* notes 29, 119.

¹³⁷ Statement, Commissioner Hester Peirce, *The Journey Begins*, U.S. SEC. & EXCH. Comm'n (Feb. 4, 2025), https://business.cch.com/srd/20250205-SECgov_TheJourneyBegins.pdf [<https://perma.cc/94MZ-2NEW>].

¹³⁸ Exec. Order No. 14178, 90. FED. REG. 8647 (Jan. 23, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/strengthening-american-leadership-in-digital-financial-technology> [<https://perma.cc/8WV7-Z5LS>]. (President Donald J. Trump's order titled, *Strengthening American Leadership in Digital Financial Technology*).