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## Critiquing the SEC's Ongoing Efforts to Regulate Crypto Exchanges

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# CRITIQUING THE SEC'S ONGOING EFFORTS TO REGULATE CRYPTO EXCHANGES

CAROL R. GOFORTH\*

## ABSTRACT

*Despite the so-called “Crypto Winter” in the spring of 2022, which saw a deep plunge in global crypto markets, interest in the appropriate way to develop, use, and regulate cryptoassets and crypto-based businesses continues to be high. In the United States, a Presidential Executive Order and multiple bills that seek to tackle various issues of crypto regulation are regularly highlighted in the news, suggesting the appropriate treatment of crypto is a growing national priority. Despite these discussions, which tend to focus on finding a balanced way to regulate those within the industry without stifling the technology, the Securities and Exchange Commission (SEC) continues to seek to assert its jurisdiction unilaterally. A pending proposal from the SEC, misleadingly characterized as an attempt to regulate trading in government securities, would broaden the definition of “exchange” with potentially destructive consequences. This Article carefully considers the existing definition of “exchange” under the Securities Exchange Act of 1934 (the ’34 Act), and then examines a proposal from the Commission that would substantially broaden the current interpretation to reach a much larger group of persons involved in trading cryptoassets without adding clarity or a path to compliant operation for such persons. It then evaluates why the proposal creates problems, identifying a number of such issues before concluding that a better approach would be to allow the legislative process to play out.*

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## INTRODUCTION

Bitcoin purists originally prophesied and dreamt of an alternative to fiat currency that could facilitate economic transactions without the necessity of intermediaries such as legacy financial institutions.<sup>1</sup> The desire to avoid the costs and delays,<sup>2</sup> as well as the loss of privacy<sup>3</sup> that such intermediaries entailed, supported the agenda of libertarians among many early adopters of Bitcoin.<sup>4</sup>

Unfortunately for those early adopters and other believers in the libertarian underpinnings of cryptocurrencies, while Bitcoin has been adopted by millions<sup>5</sup> and, as of the end of 2021, had a market capitalization of approximately \$900 billion,<sup>6</sup> the goal of having a currency substitute that functions without intermediaries

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<sup>1</sup> Michael Oved, *Here's How Blockchain Will Eliminate Middlemen and Usher in a New Paradigm*, FUTURISM (Aug. 23, 2017), <https://futurism.com/block-chain-will-eliminate-middlemen-and-usher-in-a-new-paradigm> [<https://perma.cc/T3US-TS39>] (identifying lawyers, bankers, brokers, clearinghouses, and governments as potential intermediaries to conventional financial transactions). “A new paradigm of transaction execution called blockchain could eliminate the need for all of these middlemen.” *Id.*

<sup>2</sup> *How Blockchain Could Disrupt Banking*, CBINSIGHTS (Feb. 11, 2021), <https://www.cbinsights.com/research/blockchain-disrupting-banking/> [<https://perma.cc/NXM4-HJP5>] (noting that blockchain-based payment processing, for example, is faster, cheaper, and as secure as traditional banking).

<sup>3</sup> Rich Barlow, *The Pros and Cons of Cryptocurrency*, BU TODAY (Feb. 22, 2022), <https://www.bu.edu/articles/2022/pros-and-cons-of-cryptocurrency/> [<https://perma.cc/CM56-WDKW>] (describing Bitcoin as a “decentralized, peer-to-peer system that wants to operate outside of governmental oversight.”).

<sup>4</sup> Corin Faife, *Live Free or Mine: How Libertarians Fell in Love with Bitcoin*, COINDESK (Oct. 8, 2016), <https://www.coindesk.com/markets/2016/10/08/live-free-or-mine-how-libertarians-fell-in-love-with-bitcoin/> [<https://perma.cc/7ZBD-PM53>].

<sup>5</sup> In 2021, it was estimated that there were 106 million Bitcoin owners worldwide, utilizing 200 million wallets. *How Many People Own & Use Bitcoin?* BUY BITCOIN WORLDWIDE, <https://www.buybitcoinworldwide.com/how-many-bitcoin-users/> [<https://perma.cc/6J8Q-68DU>]. Because of the pseudonymous nature of crypto ownership, the exact number of owners at any given point in time is not currently knowable. *Id.*

<sup>6</sup> *Bitcoin Historical Data*, COINMARKETCAP.COM, <https://coinmarketcap.com/currencies/bitcoin/historical-data/> [<https://perma.cc/8H7L-2QSU>] (click button labeled “Date Range” and restrict dates to December 22 to 31, 2021) (showing between \$876 and \$961 billion from December 22 to 31, 2021). The market cap for Bitcoin did drop precipitously in mid-2022, bottoming out in June 2022, to around \$360 billion, before rebounding slightly and then falling again. *Bitcoin to USD Chart*, COINMARKETCAP.COM, <https://coinmarketcap.com/currencies/bitcoin/> [<https://perma.cc/2QSU-8H7L>] (select “Market Cap” above the graph; then select the calendar icon; then restrict dates to April 1 to September 1, 2022).

(and the governmental oversight they bring) has not been realized.<sup>7</sup> There are, in fact, a growing number of intermediaries providing services in the crypto ecosystem.<sup>8</sup> Wallet services help individual users keep track of their cryptoassets;<sup>9</sup> payment processors like BitPay<sup>10</sup> and PayPal<sup>11</sup> help both merchants and their customers deal with the complexity of accepting or making a payment in Bitcoin or other cryptoassets; and crypto exchanges like Coinbase, Binance, Kraken, Gemini, and others<sup>12</sup> bring together potential buyers and sellers of cryptoassets.<sup>13</sup>

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<sup>7</sup> There are, of course, multiple reasons why some oversight is a good thing. See David Adler, *Silk Road: The Dark Side of Cryptocurrency*, FORDHAM J. CORP. & FIN. L. BLOG (Feb. 21, 2018), <https://news.law.fordham.edu/jcfl/2018/02/21/silk-road-the-dark-side-of-cryptocurrency/> [<https://perma.cc/AWK5-Q8GE>]. The presence of those who would use cryptoassets to further criminal enterprises or launder money has been an obvious risk since the early days of crypto, as evidenced by dark web activity such as that which occurred on the Silk Road. See, e.g., *id.* (discussing the risks that “widespread use would empower hackers and other criminals.”).

<sup>8</sup> See *Personal vs. Hosted Wallets*, EBRARY, [https://ebrary.net/7911/education/personal\\_hosted\\_wallets](https://ebrary.net/7911/education/personal_hosted_wallets) [<https://perma.cc/K7E3-RV23>].

<sup>9</sup> “Many companies offer Bitcoin wallet services and programs to help you store your bitcoins . . . . [W]ith a hosted wallet, a third party knows your private keys and doesn’t reveal them to you, but the company will send, receive, and store bitcoins on your behalf (not unlike a traditional bank . . .).” *Id.*

<sup>10</sup> “Bitpay is a payment institution that was established in 2011 with the headquarter[s] in Atlanta, Georgia. It is a payment gateway that offers merchants the availability to accept funds using bitcoin.” *What is BitPay?*, IKAJO, <https://ikajo.com/payment-methods/what-is-bitpay> [<https://perma.cc/L2KH-6JME>].

<sup>11</sup> “PayPal users will be able to use digital currency to make purchases at all 29 million merchants that accept PayPal. When you use Checkout with Crypto, your cryptocurrency will be converted to fiat currency (national currency, such as the U.S. dollar) during the checkout process.” Natasha Gabrielle, *Pay with Crypto Using PayPal: Here’s How*, THE ASCENT, [https://www.fool.com/the-ascent/personal-finance/articles/pay-with-crypto-using-paypal-heres-how/#:~:text=PayPal%20users%20will%20be%20able,dollar\)%20during%20the%20checkout%20process](https://www.fool.com/the-ascent/personal-finance/articles/pay-with-crypto-using-paypal-heres-how/#:~:text=PayPal%20users%20will%20be%20able,dollar)%20during%20the%20checkout%20process) [<https://perma.cc/U2K4-S2EH>] (Jan. 13, 2022).

<sup>12</sup> Forbes Advisor ranked Coinbase as the best crypto exchange for beginners as of February 2022. Taylor Tepper & John Schmidt, *The Best Crypto Exchanges of February 2022*, FORBES ADVISOR, <https://www.forbes.com/advisor/investing/best-crypto-exchanges/> [<https://perma.cc/247X-7BUX>] (Feb. 1, 2022, 11:06 AM). In addition to Coinbase, Forbes Advisor listed Binance.US, Kraken, Crypto.com, Gemini, Gate.io, KuCoin, Bitstamp, Bittrex, and BitFlyer as crypto exchanges worth mentioning. *Id.*

<sup>13</sup> Kendall Little, *Want to Buy Crypto? Here’s What to Look for in a Crypto Exchange*, TIME (May 3, 2022), <https://time.com/nextadvisor/investing/cryptocur>

Each of those businesses offers services that parallel those available in conventional financial markets,<sup>14</sup> but they also bring potential expense,<sup>15</sup> increased risk of security lapses,<sup>16</sup> and additional regulatory oversight into the picture.<sup>17</sup> These developments

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rency/what-are-cryptocurrency-exchanges/ [https://perma.cc/9M2X-VB8W] (explaining crypto exchanges as “digital marketplaces where you can buy and trade crypto.”).

<sup>14</sup> See EBRARY, *supra* note 8.

<sup>15</sup> For example, for crypto exchanges, “[t]ypical costs might include fund transfer fees to/from your bank account, maker/taker fees, set transaction fees, or tiered transaction fees based on trading volume.” Nathan Reiff, *How Much Are Cryptocurrency Exchange Fees?* INVESTOPEEDIA, <https://www.investopedia.com/tech/how-much-does-it-cost-buy-cryptocurrency-exchanges/> [https://perma.cc/26XM-P8R7] (June 2, 2022). Wallet services tend to charge for transactions. *Id.* “If you’re only storing Bitcoin in the wallet, then using a Bitcoin wallet costs nothing. If you’re trying to complete a transaction, however, the owner of the exchange or device that houses your wallet will charge you different fees, depending on what you’re trying to do.” *Bitcoin Wallets: A Beginner’s Guide to Storing BTC*, COINTELEGRAPH, <https://cointelegraph.com/bitcc/U8PE-PWU9>. With regard to payment processors, BitPay (for example) charges a 1% processing fee to merchants. *What Is the Network Cost Fee on BitPay Invoices, and Why Is BitPay Charging It?*, BITPAY SUPPORT, <https://support.bitpay.com/hc/en-us/articles/115002990803-What-is-the-Network-Cost-fee-on-BitPay-invoices-and-why-is-BitPay-charging-it-#:~:text=BitPay%20charges%20a%201%25%20processing,fee%20on%20to%20the%20buyer> [https://perma.cc/HJG9-54LN] (Aug. 22, 2022). Effective March 21, 2022, PayPal charges a minimum flat fee based on the transaction amount, capped at \$1.50 for transactions over \$1000. Yaël Bizouati-Kennedy, *PayPal and Venmo to Change their Crypto Transaction Fees*, YAHOO! (Feb. 17, 2022), <https://www.yahoo.com/video/paypal-venmo-change-crypto-transaction-13483726.html#:~:text=Under%20the%20current%20crypto%20fee,fee%2C%20according%20to%20their%20websites> [https://perma.cc/4VNS-22S4].

<sup>16</sup> Kevin Collier, *Crypto Exchanges Keep Getting Hacked, and There’s Little Anyone Can Do*, NBC NEWS (Dec. 17, 2021, 11:32 AM), <https://www.nbcnews.com/tech/security/bitcoin-crypto-exchange-hacks-little-anyone-can-do-rcna7870> [https://perma.cc/2TYC-BYL2] (reporting on twenty hacks of at least ten million dollars from crypto exchanges or projects).

<sup>17</sup> For example, in 2019, the Financial Crimes Enforcement Network (FinCEN), a bureau of the Treasury Department, issued guidance explaining that it would regulate crypto exchanges, hosted wallet services, and payment processors as money services businesses. FIN. CRIMES ENFT NETWORK, U.S. TREASURY, *Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies 1* (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> [https://perma.cc/N7PH-BFZU]. Under the U.S. Bank Secrecy Act, codified at

make cryptoassets more accessible and potentially more useful to mainstream adopters,<sup>18</sup> but at the same time, they also add incentives for regulators to increase their involvement in and oversight of various persons operating in the crypto ecosystem.<sup>19</sup>

One potential source of such oversight in the United States is the Securities and Exchange Commission (SEC), which has already acted aggressively to assert jurisdiction over the sale of cryptoassets.<sup>20</sup> It is now also poised to act even more vigorously against crypto exchanges that engage with U.S. citizens, repeating claims that these businesses need to register with the SEC pursuant to the terms of section 5 of the Securities Exchange Act of 1934 (the '34 Act)<sup>21</sup> or, in the alternative, to comply with an exemption from such registration.<sup>22</sup>

SEC Chair Gary Gensler has recognized that many crypto exchanges, which he has referred to as “cryptocurrency trading

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31 U.S.C. §§ 5311 et seq., a money services business must not only register with FinCEN, it becomes obligated to verify the identity of customers, maintain records, report large transactions and suspicious activity, and comply with additional requirements as overseen by FinCEN. *BSA Requirements for MSBs*, FIN. CRIMES ENFT NETWORK, U.S. TREASURY, <https://www.fincen.gov/bsa-requirements-msbs> [<https://perma.cc/NL65-T5BH>].

<sup>18</sup> See EBRARY, *supra* note 8.

<sup>19</sup> “After largely standing aside for years as cryptocurrency grew from a digital curiosity into a volatile but widely embraced innovation, federal regulators are racing to address the potential risks for consumers and financial markets.” Tom O’Brien, *Regulators Racing Toward First Major Rules on Cryptocurrency*, CENT. RECORDER (Sept. 23, 2021), <https://centralrecorder.com/regulators-racing-toward-first-major-rules-on-cryptocurrency/> [<https://perma.cc/N4YQ-NMVJ>].

<sup>20</sup> Douglas Eakeley et al., *Crypto-Enforcement Around the World*, 94 S. CAL. L. REV. POSTSCRIPT 99, 99–100 (2021) (reporting that the SEC “brings more enforcement actions against digital-asset issuers, broker-dealers, exchanges, and other crypto-market participants than any other major crypto-jurisdiction.”); see also 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, 1 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3694709](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694709) [<https://perma.cc/USM2-R3YW>].

<sup>21</sup> *Statement on Potentially Unlawful Online Platforms for Trading Digital Assets Divisions of Enforcement and Trading and Markets*, DIVS. OF ENFT AND TRADING AND MKTS., SEC (Mar. 7, 2018), <https://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading> [<https://perma.cc/EAL3-UFG2>].

<sup>22</sup> See *id.*; section 5 of the '34 Act is codified at 15 U.S.C. § 78e.

platforms,” have chosen to be treated and regulated as money transmitters, which subjects them to regulation by FinCEN and state money transmitter regulators.<sup>23</sup> The fact that another regulatory system is in place has not dissuaded him from the view that the SEC also needs to exert its authority.<sup>24</sup> Although in the past, such money services businesses have not been subject to direct regulation by the SEC,<sup>25</sup> Gensler has concluded that crypto exchanges are different because traditional “money transfer services have not quoted prices or offered other services akin to securities, commodities, and currency exchanges. In short, the currently applicable regulatory framework for cryptocurrency trading was not designed with trading of the type we are witnessing in mind.”<sup>26</sup>

Chair Gensler is correct on more than one level.<sup>27</sup> To date, crypto exchanges have not generally registered as securities exchanges.<sup>28</sup> And the current regulatory framework was most definitely not designed with these new business operations in mind.<sup>29</sup> In fact, this is one of the major reasons why the SEC’s efforts at regulating the crypto ecosystem do not appear to have had the hoped-for positive impact.<sup>30</sup>

A number of crypto entrepreneurs, academics, and others have concluded that the SEC’s existing regulatory requirements are a poor fit for cryptoassets and businesses working with the new distributed ledger technologies.<sup>31</sup> Aggressive enforcement

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<sup>23</sup> *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission: Hearing Before the S. Comm. on Banking, Hous., and Urb. Aff.*, 115th Cong. 39 (2018) (statement of Jay Clayton, Chairman, SEC).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Catherine Rowsey et al., *SEC to Keep Watchful Eye on Digital Asset Trading Platforms*, HOLLAND & KNIGHT SECOND OP. BLOG (Feb. 16, 2022), <https://www.hklaw.com/en/insights/publications/2022/02/sec-to-keep-watchful-eye-on-digital-asset-trading-platforms> [<https://perma.cc/B75J-LBLW>].

<sup>28</sup> See *infra* notes 75–80 and accompanying text.

<sup>29</sup> Given that the SEC regulates securities exchanges under a statute enacted in 1934, this is not surprising. See Securities Exchange Act of 1934 §§ 5–6, codified at 15 U.S.C. §§ 78e–78f.

<sup>30</sup> Carol R. Goforth, *Using Cybersecurity Failures to Critique the SEC’s Approach to Crypto Regulation*, 65 S.D. L. REV. 433, 463 (2020).

<sup>31</sup> See, e.g., Carol R. Goforth, *Cinderella’s Slipper: A Better Approach to Regulating Cryptoassets as Securities*, 17 HASTINGS BUS. L.J. 271 (2021)



has pushed a number of potentially viable businesses away from the United States or has precluded U.S. citizens from participating in their products.<sup>32</sup> The only study to date of the economic impact of regulatory enforcement of registration requirements by

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[hereinafter Goforth, *Cinderella's Slipper*] (noting that the SEC has attempted to force “crypto into an antiquated framework designed with very different interests in mind.”); Megan McDermott, *The Crypto Quandary: Is Bankruptcy Ready?*, 115 NW. U. L. REV. 1921, 1924 (2021) (concluding that “existing regulatory efforts—while substantial—nonetheless fall short of answering a critical question: What is a crypto asset?”); J.S. Nelson, *Cryptocommunity Currencies*, 105 CORNELL L. REV. 909, 933 (2020) (“Cryptocurrencies are not comfortably either securities or commodities.”); Goforth, *supra* note 30, at 466 (“The SEC’s current approach . . . has created a scenario where the rules can be bent to fit some of the regulatory needs, but the fit is awkward at best.”); Ronald J. Mann, *Reliable Perfection of Security Interests in Crypto-Currency*, 21 SMU SCI. & TECH. L. REV. 159, 163 (2018) (citation omitted) (explaining that cryptoassets do not fit squarely into any existing framework and should therefore be considered “general intangibles” for the purposes of the UCC).

The lack of clarity on how current regulations fit in the crypto ecosystem has also been the subject of criticism by various legislators. Sarah Wynn, *Gensler Takes Heat on SEC's Lack of Cryptocurrency Clarity at Senate Panel*, CQ ROLL CALL, 2021 WL 4165659 (Sept. 14, 2021). “Five months into the job, Securities and Exchange Commission Chair Gary Gensler was grilled by lawmakers on what they say is a lack of clarity in regulating cryptocurrency.” *Id.*

<sup>32</sup> “The government taking a hardline stance on crypto-assets and ICOs will lead to the exclusion of its constituents from the fledgling industry and expatriation of entrepreneurs to friendlier jurisdictions.” Nate Crosser, *Initial Coin Offerings as Investment Contracts: Are Blockchain Utility Tokens Securities?*, 67 U. KAN. L. REV. 379, 416 (2018); accord Randolph A. Robinson II, *The New Digital Wild West: Regulating the Explosion of Initial Coin Offerings*, 85 TENN. L. REV. 897, 951 (2018) (“As is true with any insertion of governmental regulation, those adverse to the costs of compliance will move from locations where that cost is high to where it is low.”); see also Goforth, *Cinderella's Slipper*, *supra* note 31, at 306 (“It is not enough for the SEC to argue that crypto is a security, and then expect that compliance with inapt disclosure requirements will adequately protect investors. Instead, the requirement simply halts innovation or drives it out of the country.”); Carol Goforth, *Securities Treatment of Tokenized Offerings Under U.S. Law*, 46 PEPP. L. REV. 405, 423 (2019); Kate Rooney, *Crypto Industry Leaders Warn Congress: Figure Out Regulation, or Watch Innovation Leave the US*, CNBC, <https://www.cnbc.com/2018/09/26/crypto-leaders-to-congress-figure-out-regulation-or-innovation-leaves.html> [<https://perma.cc/4KRD-UWTW>] (Sept. 26, 2018, 1:02 PM); Tiana Laurence, *ICOs: Looking Back on 2017 and Ahead to 2018*, FORBES (Dec. 21, 2017, 11:00 AM), <https://www.forbes.com/sites/yec/2017/12/21/icos-looking-back-on-2017-and-ahead-to-2018/?sh=2d1a57c73faa> [<https://perma.cc/G2RH-5FTW>] (noting the bulk of ICO fundraising took place outside of the United States because of regulation by the SEC).

the SEC has demonstrated a significant negative impact on pricing,<sup>33</sup> further suggesting that the SEC's current enforcement activity is not serving the goal of "protecting" U.S. investors.<sup>34</sup> This Article, therefore, suggests that the SEC's current proposal, which would expand the reach of the '34 Act to cover additional crypto-trading platforms, is undesirable and should not be adopted.<sup>35</sup> Instead, it appears to be time for Congressional intervention.<sup>36</sup>

Part I of this Article looks at the SEC's role to date in regulating securities exchanges, including a consideration of the relevant statutory provisions and long-standing regulations.<sup>37</sup> Part II considers the SEC's proposed amendments to Regulation ATS,<sup>38</sup> originally designed to bring certain government securities and their trading systems within the ambit of the SEC's jurisdiction.<sup>39</sup> Part III of this Article considers some of the problems likely to be encountered if the SEC's proposal is adopted.<sup>40</sup> Part IV of this Article explains why the SEC should step back from its current efforts to impose existing rules on crypto exchanges, leaving Congress to work out the best path forward.<sup>41</sup>

## I. THE SEC'S AUTHORITY OVER SECURITIES EXCHANGES

The logical starting point for assessing the SEC's authority over securities exchanges is to consider what kinds of operations

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<sup>33</sup> Yuliya Guseva-Schnol et al., *Global Crypto Markets and U.S. Regulators: Evidence from SEC and CFTC Enforcement* (June 29, 2022) (unpublished manuscript) (on file with author) ("Importantly, global crypto markets exhibit a significantly more adverse reaction to SEC enforcement."); Yuliva Guseva & Irena Hutton, *Digital Asset Innovations and Regulatory Fragmentation: The SEC versus the CFTC*, B.C. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4249503](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4249503) [<https://perma.cc/T69Q-BR2J>].

<sup>34</sup> Guseva & Hutton, *supra* note 33.

<sup>35</sup> See discussion *infra* Part III.

<sup>36</sup> See discussion *infra* Part IV.

<sup>37</sup> See discussion *infra* Part I.

<sup>38</sup> ATS stands for Alternative Trading System, which is the terminology used in the United States and Canada to describe venues that match buyers and sellers but which are not exchanges. 17 C.F.R. § 242.300. In Europe, the equivalent terminology would be "multilateral trading facilities." Council Directive 2014/65/EU, On Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU, 2014 O.J. (L 173) 382.

<sup>39</sup> See *infra* Part II.

<sup>40</sup> See *infra* Part III.

<sup>41</sup> See *infra* Part IV.

are included within the definition of “exchange,” as such term is used in the ’34 Act.<sup>42</sup> Section 3 of that statute explains that “‘exchange’ means any organization, association, or group of persons . . . which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange . . . .”<sup>43</sup>

This definition has been expanded upon by the Commission in ’34 Act Rule 16(a),<sup>44</sup> which was adopted as part of the SEC’s efforts to adapt to technological change and, in part, to bring proprietary electronic trading venues for securities under the umbrella of federal regulation in Regulation ATS.<sup>45</sup> This rule specifies that “an organization, association, or group of persons” shall be deemed to provide such a marketplace or facilities if it:

- (1) Brings together the orders for securities of multiple buyers and sellers; and
- (2) Uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.<sup>46</sup>

If a particular operation falls within this definition of an exchange, the requirements of section 5 of the ’34 Act apply.<sup>47</sup> Section 5 prohibits brokers, dealers, and exchanges from effectuating any transaction in a security using any facility of an exchange unless the exchange is registered with the SEC or exempt.<sup>48</sup> As will be discussed in greater detail later in this

<sup>42</sup> 15 U.S.C. § 78c(a)(1).

<sup>43</sup> *Id.*

<sup>44</sup> See Soo J. Yim, Commentary, *Online Securities Trading: An Overview of Regulatory Developments*, 7 No. 4 ANDREWS DERIVATIVES LITIG. & REG. REP. 10 (2001).

<sup>45</sup> *Id.* Regulation ATS consists of a number of related provisions, including requirements that are codified at 17 C.F.R. § 242.300–.304. The general definition of “exchange” was updated at the same time as Regulation ATS was adopted. 17 C.F.R. §§ 240.3b-16, 242.300.

<sup>46</sup> 17 C.F.R. § 240.3b-16(a).

<sup>47</sup> 15 U.S.C. § 78(e).

<sup>48</sup> See 15 U.S.C. § 78e. The statute states the following:

It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or

Article,<sup>49</sup> Regulation ATS provides an alternative to registration as an exchange that is generally regarded as less burdensome, but it still requires registration with the Commission and compliance with a number of rules.<sup>50</sup>

For registration as an exchange, the initial step is for the marketplace or facility (or the persons who are maintaining or providing it) to file an application for registration as an exchange under the '34 Act.<sup>51</sup> The SEC publishes notice of these filings in order to give interested parties an opportunity “to submit written data, views and arguments concerning such application.”<sup>52</sup> The SEC then has ninety days to grant registration or institute proceedings to evaluate whether to deny the application.<sup>53</sup>

To be approved as an exchange, the applicant must meet a number of requirements,<sup>54</sup> including proving that it can comply with the '34 Act and enforce compliance by members and persons associated with members.<sup>55</sup> In addition, the exchange must have rules that guarantee fair access and adequate representation for

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instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as national securities exchange under section 78f of this title, or (2) is exempted from such registration . . . .

*Id.*

<sup>49</sup> See *infra* notes 62–66 and accompanying text.

<sup>50</sup> See 17 C.F.R. § 242.300–304.

<sup>51</sup> The process of registration begins as set out in section 6 of the '34 Act, which says that “[a]n exchange may be registered as a national securities exchange . . . by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe . . . .” 15 U.S.C. § 78f(a). Form 1 is used to register as a securities exchange or to request an exemption on the basis of limited trading volume. Rule 6a-1(a) under the 1934 Act, codified at 17 C.F.R. § 240.6a-1. Other potential exemptions, for example, for those filing as an ATS (alternative trading system), are also available. *Id.*

<sup>52</sup> 15 U.S.C. § 78s(a)(1).

<sup>53</sup> *Id.*

<sup>54</sup> See *The Securities Exchange Act of 1934—Registration of National Securities Exchanges*, 2 WEST’S FED. ADMIN. PRAC. § 2306, Westlaw (database updated July 2022).

<sup>55</sup> Section 6(b)(1) of the '34 Act prohibits the SEC from granting an exchange’s application unless the exchange meets these requirements. 15 U.S.C. § 78f(b)(1).

members, issuers, and investors;<sup>56</sup> it must have a system that equitably allocates fees and other charges;<sup>57</sup> it must possess adequate disciplinary procedures;<sup>58</sup> and it must be organized and operated in a manner that respects competition.<sup>59</sup> Only registered brokers and dealers or persons associated with them may be members of a registered securities exchange.<sup>60</sup>

As mentioned above,<sup>61</sup> the SEC adopted a new regulatory structure in the form of Regulation ATS<sup>62</sup> in order to bring alternative systems that competed with legacy markets such as the New York Stock Exchange or NASDAQ within its jurisdiction.<sup>63</sup> Effective April 21, 1999, the “new structure materially change[d] the definition of the term ‘exchange’ and significantly expand[ed] the quote display requirements for certain publicly traded equity securities.”<sup>64</sup> As conceived and initially applied, the new regulations governed systems that typically shared “three basic components:”<sup>65</sup> (1) terminals (which were either computers or microprocessors) that entered and received trade information; (2) a central processing operation that handled information from the terminals and matched orders and provided confirmations; and (3) a communications network that linked the central operation with the terminals.<sup>66</sup>

<sup>56</sup> 15 U.S.C. § 78f(b)(3).

<sup>57</sup> 15 U.S.C. § 78f(b)(4).

<sup>58</sup> 15 U.S.C. § 78f(b)(7).

<sup>59</sup> See 15 U.S.C. § 78f(b)(2)–(10).

<sup>60</sup> 15 U.S.C. § 78f(c)(1).

<sup>61</sup> See *supra* notes 44–45, 50 and accompanying text.

<sup>62</sup> Regulation of Exchanges and Alternative Trading Systems, 63 Fed. Reg. 70,844 (Dec. 22, 1998) (codified at 17 C.F.R. § 242.300–.304) [hereinafter ATS Release].

<sup>63</sup> Mark Klock, *The SEC’s New Regulation ATS: Placing the Myth of Market Fragmentation Ahead of Economic Theory and Evidence*, 51 FLA. L. REV. 753, 754 (1999) (citation omitted) (“The changes [were] designed to impose additional regulatory restraints on Alternative Trading Systems (ATS) which compete against older financial markets such as the NYSE and NASDAQ for order flow.”).

<sup>64</sup> Yim, *supra* note 44.

<sup>65</sup> *Id.*

<sup>66</sup> See Michael B. Sundel & Lystra G. Blake, *Good Concept, Bad Executions: The Regulation and Self-Regulation of Automated Trading Systems in United States Futures Markets*, 85 NW. U. L. REV. 748, 752–54 (1991).

Speaking very generally, there are nine requirements for any such operation to comply with Regulation ATS.<sup>67</sup> The most important are membership in a self-regulatory organization (SRO), market transparency, and fair access.<sup>68</sup> The other requirements cover topics such as notice, integrity and security standards, inspection and investigation, record-keeping, reporting, and confidentiality.<sup>69</sup> While the regulation attracted a fair share of negative commentary following its adoption,<sup>70</sup> it did bring many online trading facilities within the ambit of the SEC's jurisdiction.<sup>71</sup> As of May 31, 2022, seventy online trading facilities had registered with the SEC under the regulation.<sup>72</sup>

What does this have to do with crypto-trading platforms? The SEC reportedly declared in 2018 that “cryptocurrency exchanges are an unregulated mess.”<sup>73</sup> While the SEC has worked

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<sup>67</sup> The release announcing the ATS rules included in the Table of Contents a list of nine requirements in Section IV.A.2. ATS Release, *supra* note 62, at 70,844.

<sup>68</sup> *Id.* at Table of Contents IV.A.2.(a), (c)–(d).

<sup>69</sup> *Id.* at Table of Contents IV.A.2.(b), and (e)–(i).

<sup>70</sup> In the adopting release, for example, the SEC noted a number of commentators who “thought that the Commission should continue the present framework for alternative trading systems.” ATS Release, *supra* note 62, at 70,846 (sample objection noted at footnote 13). The same release noted that “several” commentators were concerned that the proposed definition of “order” was too broad and needed to be further clarified to be sure that it applied only to genuinely “firm” orders. *Id.* at 70,850 (sample objection noted at footnote 44). More general criticisms of Regulation ATS as adopted can be found in Klock, *supra* note 63; John Polise, *A Bridge Too Far: A Critical Analysis of the Securities and Exchange Commission's Approach to Equity Market Regulation*, 11 BROOK. J. CORP. FIN. & COM. L. 285, 317–23 (2017); Yesha Yadav, *Oversight Failure in Securities Markets*, 104 CORNELL L. REV. 1799, 1804 (2019).

<sup>71</sup> *Alternative Trading System (“ATS”) List*, SEC, <https://www.sec.gov/foia/docs/atlist.htm> [<https://perma.cc/8L8D-Q4FL>] (Aug. 29, 2022) (list available for download; subject to future updates).

<sup>72</sup> *Id.*

<sup>73</sup> Romain Dillet, *SEC Says Cryptocurrency Exchanges Are an Unregulated Mess*, TECHCRUNCH (Mar. 7, 2018, 1:22 PM), <https://techcrunch.com/2018/03/07/sec-says-cryptocurrency-exchanges-are-an-unregulated-mess/> [<https://perma.cc/3MNH-QHGS>]. The claim of that article's title is not quite reflected by the words used by the SEC, which the text makes clear actually involved concerns about the SEC not having a role in overseeing such operations. However, the tenor of the SEC's complaints seemed clear. Employees at the agency were “concerned that many online trading platforms will appear to investors as SEC-registered and regulated marketplaces . . .” *The SEC says Crypto-Currency*

to address some of the issues contributing to that “mess”<sup>74</sup> and has issued repeated warnings to crypto exchanges that they need to register with the SEC,<sup>75</sup> many of these platforms continue to operate without registering or operating as an ATS, prompting the SEC to issue even more warnings about the need for vigorous oversight.<sup>76</sup>

From the industry’s perspective, however, it is not all that clear when a particular platform is required to register.<sup>77</sup> Most importantly, it continues to be difficult to know which cryptoassets are properly considered to be securities,<sup>78</sup> and obviously, the SEC cannot compel registration as a securities exchange if the only cryptoassets that are being traded on a particular platform are not securities.<sup>79</sup> The uncertainty about the reach of the SEC’s jurisdiction is not surprising, given that exchanges are expected to

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*Exchanges Are an Uncontrolled Mess*, NEWSBEEZER (Mar. 7, 2018), <https://newsbeeze.com/the-sec-says-crypto-currency-exchanges-are-an-uncontrolled-mess/> [<https://perma.cc/C6VH-VSZB>]. The concern was that these unregulated businesses “may give investors the false impression that they are regulated or meet the regulator standards of a national securities exchange.” *Id.* To date, although the SEC has claimed jurisdiction over exchanges, their authority to regulate them has not actually changed.

<sup>74</sup> Richard B. Levin et al., *Time to Do the Foxtrot (Three Step) SEC Establishes Improved Process for Settlement of Digital Asset Securities*, Vol. X NAT’L L. REV. 274 (Sept. 30, 2020), <https://www.natlawreview.com/article/time-to-do-foxtrot-three-step-sec-establishes-improved-process-settlement-digital> [<https://perma.cc/5FFV-F4YT>].

<sup>75</sup> For example, in his September 2021 prepared remarks before the Senate Committee on Banking, Housing and Urban Affairs, SEC Chair Gensler warned that crypto-trading platforms should “[m]ake no mistake: to the extent that there are securities on these trading platforms, under our laws they have to register with the commission unless they qualify for an exemption . . . .” Nelson Wang, *Gensler Says Most Crypto Trading Platforms Need to Register With SEC*, COINDESK (Sept. 13, 2021, 5:50 PM), <https://www.coindesk.com/policy/2021/09/13/gensler-says-most-crypto-trading-platforms-need-to-register-with-sec/> [<https://perma.cc/3ZUB-TK7N>].

<sup>76</sup> Rowsey et al., *supra* note 27.

<sup>77</sup> *Id.*

<sup>78</sup> “A lack of clarity around which tokens are securities creates spillover ambiguity for these platforms and exposes them to significant risks that can handcuff startup entities before they even get off the ground.” *Id.*

<sup>79</sup> See James Chen, *Securities and Exchange Commission (SEC)*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sec.asp> [<https://perma.cc/QAL3-QCF4>] (April 27, 2022).

apply a framework that includes more than three dozen unweighted factors in order to predict which digital assets are securities.<sup>80</sup>

Despite various difficulties associated with the process, a few crypto-based companies have complied with the Regulation ATS requirements,<sup>81</sup> and others have affiliated with registered ATSs to facilitate trading of digital assets that are or may be securities.<sup>82</sup> For example, Oasis Pro Markets promotes itself as having been “[t]he first US-regulated [ATS] registered to allow its Subscribers to trade digital (‘blockchain’) securities and make payment for those digital securities in digital cash (i.e. stable coins) or fiat.”<sup>83</sup> Another crypto-trading platform, Prometheus ATS, also operates as a registered broker-dealer ATS, designed for both retail customers and financial professionals.<sup>84</sup> It apparently took Prometheus a number of years to obtain its ATS approval.<sup>85</sup>

One of the earliest efforts at complying came from tZERO, which has an ATS for trading digital securities: “Established in 2003, tZERO ATS is a FINRA [Financial Industry Regulatory Authority] member broker dealer which operates an SEC-registered Alternative Trading System that facilitates trading of security tokens and US equities alike.”<sup>86</sup> It reports that it conducted “the first reported trade of a blockchain-based security in 2016.”<sup>87</sup> It then launched the tZERO Crypto App in 2019, allowing “investors to buy, sell, and hold Bitcoin (BTC), Ethereum (ETH), Litecoin (LTC), Chainlink (LINK), Dogecoin (DOGE), USD Coin (USDC), 0x (ZRX),

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<sup>80</sup> This extensive list of factors is found in *Framework for “Investment Contract” Analysis of Digital Assets*, SEC [hereinafter *2019 Framework*], <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [<https://perma.cc/SBF5-P474>] (Apr. 3, 2019).

<sup>81</sup> See Tomio Geron, *A Crypto Trading Firm Has Gotten FINRA Approval. It Hopes the SEC Is Next.*, PROTOCOL (Aug. 11, 2021), <https://www.protocol.com/fintech/prometheum-crypto-ats-finra> [<https://perma.cc/QM5T-NTPT>].

<sup>82</sup> See Oasis Pro Markets, *Full-Service Investment Bank and a FINRA Registered Marketplace & Alternative Trading System for Digital Asset Securities*, OASIS PRO MARKETS, <https://www.oasispromarkets.com> [<https://perma.cc/3PFQ-4RPS>].

<sup>83</sup> *Id.*

<sup>84</sup> *Prometheum ATS*, PROMETHEUM, <https://www.prometheum.com/ats> [<https://perma.cc/G75Z-6NLC>].

<sup>85</sup> Geron, *supra* note 81.

<sup>86</sup> tZero, *Enabling Liquidity*, <https://ats.tzero.com> [<https://perma.cc/X5NJ-FX2B>].

<sup>87</sup> *Id.*



Bitcoin SV (BSV), Basic Attention Token (BAT), Ravencoin (RVN), Bitcoin Cash (BCH), Stellar Lumen (XLM), Cardano (ADA), Compound (COMP), and Uniswap (UNI).”<sup>88</sup>

Figure Securities, Inc., a subsidiary of Figure Technologies, Inc., has also become a FINRA-approved broker-dealer and has registered with the SEC as an ATS for certain digital securities.<sup>89</sup> More recently, Gemini Galactic Markets, part of Gemini (a conglomerate associated with the Winklevoss twins), has been approved for FINRA membership,<sup>90</sup> a development that Gemini has explained as meaning “Gemini Galactic is able to operate an alternative trading system (ATS), which will facilitate the trading of digital asset securities.”<sup>91</sup>

The largest U.S.-based crypto exchange, Coinbase,<sup>92</sup> began responding to the SEC’s push for additional regulation of crypto exchanges back in 2018.<sup>93</sup> It did this by acquiring three other companies: Keystone Capital Corp., Venovate Marketplace Inc.,

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<sup>88</sup> *tZERO Crypto Continues to Grow Crypto Footprint with the Launch of Five New Crypto Assets*, BUSINESS WIRE (Oct. 4, 2021, 10:00 AM), <https://www.businesswire.com/news/home/20211004005333/en/tZERO-Crypto-Continues-to-Grow-Crypto-Footprint-with-the-Launch-of-Five-New-Crypto-Assets> [<https://perma.cc/B8FP-C8Y8>].

<sup>89</sup> *Figure’s Alternative Trading System (ATS) Allows the Company to Operate Security Token Exchange, Bringing Liquidity to Digital Assets*, THE TOKENIZER (May 18, 2021), <https://thetokenizer.io/2021/05/18/figures-alternative-trading-system-ats-allows-the-company-to-operate-security-token-exchange/> [<https://perma.cc/Z6Q9-4AKE>].

<sup>90</sup> Ian Allison, *Winklevoss-Owned Gemini Galactic Snags FINRA Broker-Dealer Approval*, COINDESK, <https://www.coindesk.com/business/2022/01/26/winklevoss-owned-gemini-galactic-snags-finra-broker-dealer-approval/> [<https://perma.cc/EU8J-ZXG4>] (Jan. 26, 2022, 10:47 AM).

<sup>91</sup> *Gemini Galactic Markets Approved for FINRA Membership and Broker-Dealer Operation*, GEMINI BLOG (Jan. 26, 2022), <https://www.gemini.com/blog/gemini-galactic-markets-approved-for-finra-membership-and-broker-dealer-operation/> [<https://perma.cc/X9B8-374V>].

<sup>92</sup> “Founded in 2012 just three years after the creation of Bitcoin, Coinbase has since become the largest cryptocurrency exchange in the U.S. by trading volume, with more than 73 million verified users in over 100 countries.” Bailey Reutzel, *Coinbase Review: A Crypto Exchange for New Investors and Traders*, CNBC.COM, <https://www.cnbc.com/select/coinbase-crypto-exchange-review/> [<https://perma.cc/VD7U-NVA5>] (Mar. 7, 2022).

<sup>93</sup> Bhushan Akolkar, *Coinbase Confirms SEC Approval to List Digital Tokens as Securities*, COINSPEAKER, <https://www.coinspeaker.com/coinbase-confirms-sec-approval-to-list-digital-tokens-as-securities/> [<https://perma.cc/X6EP-YJPZ>] (Oct. 23, 2018, 9:45 AM).

and Digital Wealth LLC.<sup>94</sup> However, Coinbase itself is not a registered broker-dealer or ATS, despite its affiliation with these companies.<sup>95</sup> In fact, major crypto-trading platforms, including Circle and Bittrex, have also not registered as national securities exchanges or as broker-dealers,<sup>96</sup> although they have also affiliated with registered ATSs, either through acquisition or partnership arrangements.<sup>97</sup>

Despite these industry efforts at creating compliant trading options, the SEC continues to push for the crypto-trading platforms to register as exchanges or ATSs.<sup>98</sup> In December 2021, current SEC Chair Gary Gensler and his predecessor Jay Clayton participated in a “fireside chat” at the Digital Asset Compliance &

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<sup>94</sup> *Crypto Exchange Coinbase Buys Broker-Dealers in a Move to Offer Regulated Securities*, THE DI WIRE (June 11, 2018), <https://thediwire.com/crypto-exchange-coinbase-buys-broker-dealers-move-offer-regulated-securities/#:~:text=Coinbase%2C%20a%20%241.6%20billion%20digital,and%20Digital%20Wealth%20LLC> [https://perma.cc/X9PF-BYF3].

<sup>95</sup> Noelle Acheson, *Crypto Long & Short: Coinbase Going Public Isn't Selling Out—It's the Start of a Long Game*, COINDESK, <https://www.coindesk.com/business/2021/04/18/crypto-long-short-coinbase-going-public-isnt-selling-out-its-the-start-of-a-long-game/#:~:text=Coinbase%20is%20not%20registered%20as,type%20on%20its%20main%20platform> [https://perma.cc/T3DS-9C8K] (Sept. 14, 2021, 8:42 AM).

<sup>96</sup> Nate Nead, *Alternative Trading Systems and Crypto*, INVESTMENT BANK, <https://investmentbank.com/ats-crypto/> [https://perma.cc/MRG8-PE25].

<sup>97</sup> Circle acquired SeedInvest, a registered ATS, in 2018. Bart Mallon, *Crypto Headlines from Week of April 26—Bitfinex/Tether & SeedInvest*, HEDGE FUND L. BLOG (June 29, 2018), <https://hedgefundlawblog.com/tag/ats> [https://perma.cc/PE8Y-H85B]. Bittrex partnered with Rialto Trading in 2018 with hopes that the joint venture would gain approval to offer digital asset securities. Shobhit Seth, *Bittrex Joins Rialto to Offer Crypto Securities*, INVESTOPEDIA (Aug. 27, 2018), <https://www.investopedia.com/news/bittrex-joins-rialto-offer-crypto-securities/> [https://perma.cc/W5YG-QGA3]. “Rialto Markets LLC announced today that its request to engage in private placements and to operate an alternative trading system (ATS) for digital securities has been granted by FINRA.” *Rialto Markets Receives Approval for ATS to Trade Digital Securities*, NAT'L MKTS. (May 13, 2020), <https://rialtomarkets.com/rialto-markets-receives-approval-for-ats-to-trade-digital-securities/#:~:text=WEBINARS-,Rialto%20Markets%20Receives%20Approval%20For%20ATS%20To%20Trade%20Digital%20Securities,has%20been%20granted%20by%20FINRA> [https://perma.cc/TG3Z-HJCP].

<sup>98</sup> See Chris Matthews, *Crypto Exchanges 'thought they could throw a fastball' by the SEC, but Enforcement is Coming, Chairs Gensler, Clayton Warn*, MARKET WATCH, <https://www.marketwatch.com/story/crypto-exchanges-thought-they-could-throw-a-fastball-by-the-sec-but-enforcement-is-coming-chairs-gensler-clayton-warn-11638380694> [https://perma.cc/32WE-GANU] (Dec. 2, 2021, 8:48 AM).

Market Integrity Summit, sharing the view that crypto exchanges need to register with the SEC.<sup>99</sup> Gensler warned that the SEC was prepared to “use the enforcement tool” to compel entities to register if they did not do so voluntarily.<sup>100</sup> These comments prompted the industry, speaking through Perianne Boring, the founder and president of the Chamber of Digital Commerce,<sup>101</sup> to ask for clarification, suggesting a lack of understanding as to exactly what the SEC expected.<sup>102</sup> “The fireside chat btwn [sic] Clayton and Gensler is over. Ppl [sic] in the room are looking around and asking ‘register as what?’<sup>103</sup> Lots of questions still remain about the future regulatory path for #crypto.”<sup>104</sup>

Gensler has continued to push crypto platforms such as Coinbase and Blockfi “to voluntarily register with the SEC,” claiming that if they fail to do so, “they’re operating outside of the law.”<sup>105</sup> With this backdrop, the SEC has announced plans to amend the definition of exchange as part of an update to Regulation ATS that was originally supposed to focus on government securities.<sup>106</sup>

## II. PROPOSED AMENDMENTS TO REGULATION ATS

On September 28, 2020, the SEC announced a proposed rule in the form of a concept release<sup>107</sup> designed to extend the

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The Chamber of Digital Commerce describes itself as “the world’s leading trade association representing the digital asset and blockchain industry.” *About*, CHAMBER OF DIG. COM., <https://digitalchamber.org/about/vision/> [<https://perma.cc/9XV3-YM2P>].

<sup>102</sup> See @PerianneDC, TWITTER (Dec. 1, 2021, 10:20 AM), <https://twitter.com/PerianneDC/status/1466064710365855756?s=20&t=yMQvSQy9riKBFOhIfSN00Q> [<https://perma.cc/J2RF-Q5CE>].

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Ben Werschkul, *Crypto Platforms That Don’t Register with the SEC Do Business ‘outside the law’: Gensler*, YAHOO! NEWS (Mar. 4, 2022), <https://news.yahoo.com/crypto-platforms-dont-register-with-sec-outside-the-law-gensler-164215740.html> [<https://perma.cc/M72H-NU2J>].

<sup>106</sup> Stephen P. Wink et al., *SEC Proposes to Expand the Definition of an “Exchange”*, LATHAM & WATKINS LLP, <https://www.globalfinregblog.com/2022/02/sec-proposes-to-expand-the-definition-of-an-exchange/> [<https://perma.cc/D94D-YXA8>] (May 9, 2022).

<sup>107</sup> *SEC Proposes Rules to Extend Regulations ATS and SCI to Treasuries and Other Government Securities Markets*, SEC (Sept. 28, 2020), <https://www.sec.gov/news/press-release/2020-227> [<https://perma.cc/NYN4-U3K4>].

SEC's authority over "Treasuries and Other Government Securities Markets."<sup>108</sup> Published in the Federal Register on December 31, 2020,<sup>109</sup> the primary focus of the proposal was to eliminate the exemption for ATSs limited to trading in government securities and repos.<sup>110</sup> It did not otherwise seek to expand the definition of what constitutes an exchange under the '34 Act.<sup>111</sup>

The SEC received a number of comments on the 2020 concept release,<sup>112</sup> and on January 26, 2022, the SEC released a substantially revised proposal which, according to its title and the accompanying press release, was still designed to focus on ATSs that trade U.S. government securities.<sup>113</sup> The 2022 proposal consisted of more than 650 pages of text,<sup>114</sup> and although neither the press release nor the proposal itself mentions digital or cryptoassets anywhere, on close reading, it is clear that the proposed rule could significantly impact trading systems handling all manner of assets that the SEC classifies as securities, including cryptoassets.<sup>115</sup> One commentator suggested that the

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<sup>108</sup> *Id.*

<sup>109</sup> *Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stock, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities; and Electronic Corporate Bond and Municipal Securities Markets*, 85 Fed. Reg. 87,016 (proposed Dec. 31, 2020) [hereinafter *Concept Release*].

<sup>110</sup> *Id.* at Section II.C.

<sup>111</sup> *Id.* at 87,112, 87,114.

<sup>112</sup> *See Comments on Regulation ATS for ATSs that Trade U.S. Government Securities, NMS Stock, and Other Securities; Regulation SCI for ATSs that Trade U.S. Treasury Securities and Agency Securities; and Electronic Corporate Bond and Municipal Securities Market*, SEC (Sept. 28, 2020), <https://www.sec.gov/rules/proposed/2020/34-90019.pdf> [<https://perma.cc/PK8P-R8P3>].

<sup>113</sup> *SEC Proposes Amendments to Include Significant Treasury Markets Platforms Within Regulation ATS*, SEC (Jan. 26, 2022), <https://www.sec.gov/news/press-release/2022-10> [<https://perma.cc/4CCZ-WMG2>].

<sup>114</sup> *See Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems that Trade U.S. Government Securities*, 87 Fed. Reg. 15,496 (proposed March 18, 2022) (to be codified at 17 C.F.R. pts. 232, 240, 242, 249) [hereinafter *2022 Proposal*].

<sup>115</sup> *See SEC, supra* note 113. The subtitle for the Press Release explicitly notes that the "Proposal Would Enhance Investor Protections and Cybersecurity for Alternative Trading Systems That Trade Treasuries and Other Government Securities." *Id.* The quote from Chairman Gensler included in the release also focuses only on government securities, and while the release notes that it covers "those that trade government securities or repurchase

proposed change in the definition of “exchange” is so significant that “if adopted, [it] could result in a seismic shift for many platforms in the digital asset space.”<sup>116</sup>

The proposal would amend Rule 3b-16 to define exchange so that the term would apply to businesses that bring together buyers and sellers “using trading interest.”<sup>117</sup> It would also expand the definition of “exchange” beyond those who “constitute, maintain or provide” the facilities of the exchange to include those who make it available, and further would add “communication protocols” to “market place or facilities.”<sup>118</sup> Each of these changes could significantly expand the SEC’s reach in the crypto ecosystem.<sup>119</sup>

The first change is that under the terms of the proposed rule, an “exchange” would include platforms or protocols that bring together any “trading interest,” as opposed to matching “orders” for securities.<sup>120</sup> Up until this point, in order to fall within the definition of an exchange, the underlying facility or market had to match “firm” offers, although the rules stopped short of defining precisely what that meant.<sup>121</sup> Nonetheless, the general understanding has been that a firm offer includes the terms of a proposed transaction, both as to price and the quantity of the security at issue.<sup>122</sup> The proposed change is explicitly intended to broaden

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and reverse repurchase agreements on government securities,” it also fails to mention crypto or digital asset securities. *Id.*

<sup>116</sup> *SEC to Keep Watchful Eye on Digital Asset Trading Platforms*, HOLLAND & KNIGHT SECOND OP. BLOG (Feb. 16, 2022), <https://www.hklaw.com/es/in-sights/publications/2022/02/sec-to-keep-watchful-eye-on-digital-asset-trading-platforms> [<https://perma.cc/X75J-9NAG>].

<sup>117</sup> *2022 Proposal*, *supra* note 114, at 15,496 (to be codified at 17 C.F.R. § 240.3b-16(a)(1)).

<sup>118</sup> *Id.* at 15,496, 15,498. The new language relating to these changes would appear in 17 C.F.R. § 240.3b-16(a)(2), which would provide that “exchange” includes those who “make[ ] available established, non-discretionary methods (whether by providing a trading facility or communication protocols, or by setting rules) under which buyers and sellers can interact and agree to the terms of a trade.” *Id.* at 15,504.

<sup>119</sup> *See 2022 Proposal*, *supra* note 114, at 15,496.

<sup>120</sup> *Id.* at 15,499.

<sup>121</sup> *Id.*

<sup>122</sup> The term “order” has been defined in Rule 3b-16(e) to mean any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order, but there is no similar definition as to what constitutes a “firm

the reach of the SEC's authority by covering venues or systems that bring together expressions of "non-firm trading interest" rather than being limited to those that deal in firm orders.<sup>123</sup>

The second way in which the proposal would expand the definition of "exchange" is by adding "communication protocols" as a potential vehicle for bringing together potential buyers and sellers.<sup>124</sup> Without offering a definition of the term, the SEC has indicated its intention of "taking 'an expansive view' of what would constitute 'communication protocols.'"<sup>125</sup> Instead of providing a definition, the SEC offered a non-exhaustive list of examples that could constitute a communication protocol, including a chat feature that requires certain information such as price or quantity and sets rules and establishes a system by which participants can communicate, that "would have established" a communication protocol.<sup>126</sup>

The third way in which the SEC has proposed expanding the definition of exchange in the '34 Act is by allowing the statutory requirement that an organization, association, or persons "constitute, maintain, or provide" a marketplace or facilities to be satisfied if such persons merely "make[ ] available established, non-discretionary methods" pursuant to which buyers and sellers interact.<sup>127</sup> Previously, in order to be an exchange, the responsible parties had to "use[ ]" those methods in facilitating the interaction between buyers and sellers.<sup>128</sup> According to the release announcing the proposed change, this modification could have significant ramifications:

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indication" of willingness to trade. *Id.* at 15,504. In the release originally adopting Regulation ATS, the SEC explicitly reacted to concerns about the lack of clarity over what could constitute a firm order by explaining that "a system that displays bona fide, non-firm indications of interest—including, but not limited to, indications of interest to buy or sell a particular security without either prices or quantities associated with those indications—will not be displaying 'orders' and, therefore, not fall within Rule 3b-16." ATS Release, *supra* note 62, at 70,850.

<sup>123</sup> The term "trading interest" would be defined in proposed Rule 3b-16(e) as an "order" but also "any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price." *2022 Proposal, supra* note 114, at 15,504, 15,540.

<sup>124</sup> *Id.* at 15,504.

<sup>125</sup> *Id.* at 15,507.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 15,498, 15,506.

<sup>128</sup> 17 C.F.R. § 240.3b-16(a)(2) (as amended June 29, 2005).

The proposed change to use the word “makes available” rather than “uses” is designed to capture established, non-discretionary methods that an organization, association, or group of persons may provide, whether directly or indirectly, for buyers and sellers to interact and agree upon terms of a trade. In contrast to the term “uses,” the Commission believes the term “makes available” would be applicable to Communication Protocol Systems because such systems take a more passive role in providing to their participants the means and protocols to interact, negotiate, and come to an agreement.<sup>129</sup>

As the SEC noted:

[t]he term ‘makes available’ is also intended to make clear that, in the event that a party other than the organization, association, or group of persons performs a function of the exchange, the function performed by that party would still be captured for purposes of determining the scope of the exchange under Exchange Act Rule 3b-16.<sup>130</sup>

When originally proposed, the SEC gave the public thirty days in which to comment on the proposed final rule.<sup>131</sup> This abbreviated comment period drew sharp criticism from SEC Commissioner Hester Peirce:

The document weighs in at a hefty 650 pages . . . and addresses about a dozen significant issues, several of which affect trading venues of all types (including currently unregulated communication protocol systems) . . . Notwithstanding the literal and figurative bulk of this release, the Commission has determined that it is appropriate to provide the public with 30 days to read, understand, consider, consult, identify, model, assess, and discuss these rules and how they are likely to affect trading venues for every type of security that is traded in our markets. It . . . is unconscionably reckless to [limit the public to a 30-day comment period] for a proposal the effects of which will reverberate through all of the markets that we regulate, in ways that we cannot foresee.<sup>132</sup>

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<sup>129</sup> *2022 Proposal*, *supra* note 114, at 15,506.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 15,496 (“Comments should be received on or before April 18, 2022.”).

<sup>132</sup> Hester M. Peirce, Commissioner, SEC, Dissenting Statement on the Proposal to Amend Regulation ATS (Jan. 26, 2022) [hereinafter Peirce Dissent], <https://www.sec.gov/news/statement/peirce-ats-20220126> [<https://perma.cc/BR4F-NTZQ>].

A number of the comments submitted within that time frame also decried the lack of adequate time to prepare a thoughtful analysis and response.<sup>133</sup> For example, the Chief Executive Officer of the American Securities Association wrote that “[t]he SEC has not provided sufficient time for the public to submit feedback on the Proposal and has failed to consider the cumulative impact of outstanding rule proposals.”<sup>134</sup> Two attorneys with the Investment Company Institute similarly complained that

[T]he Commission has provided an insufficient comment period for a rule proposal of this magnitude and complexity. Significantly expanding the scope of what constitutes an ‘exchange’—which is only one aspect of the Proposal—will have fundamental implications for trading and market structure across many different asset classes for all market participants, including funds and advisers.<sup>135</sup>

Still, others noted that the shortened time frame for comments necessarily limited their responses.<sup>136</sup>

Undoubtedly as a reaction to these concerns, on May 12, 2022, the SEC reopened the comment period, which gave the public until June 13, 2022, to respond.<sup>137</sup> Unfortunately, the

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<sup>133</sup> *2022 Proposal*, *supra* note 114, at 15,497.

<sup>134</sup> Letter from Christopher A. Iacovella, Chief Exec. Off. of the Am. Sec. Ass’n, to Vanessa Countryman, Sec’y of the SEC (Apr. 18, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20125314-284766.pdf> [https://perma.cc/4KMQ-68PF].

<sup>135</sup> Letter from Sarah A. Bessin and Nhan Nguyen, Assoc. and Assistant Gen. Couns. (respectively) for the Inv. Co. Inst., to Vanessa Countryman, Sec’y of the SEC (Apr. 18, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20124231-280809.pdf> [https://perma.cc/7FUM-GWX8].

<sup>136</sup> Letter from Dante Disparte, Chief Strategy Off. and Head of Glob. Pol’y, Circle Internet Fin., LLC, to Vanessa Countryside, Sec’y of the SEC (Apr. 18, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20124043-280174.pdf> [https://perma.cc/7ZZJ-BW8F] (complaining that “with a public comment period of just thirty days after publication of the proposed rulemaking in the Federal Register . . . our comments are submitted mainly to underscore to the Commission the importance of the proposed rulemaking to participants in the digital assets markets . . .”).

<sup>137</sup> *Reopening of Comment Periods for Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews; and Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems that Trade U.S. Government Securities*, 87 Fed. Reg. 16,886 (proposed Mar. 24, 2022) (to be codified at 17 C.F.R. pts. 232, 240, 242, 249), <https://www.federalregister.gov>



expanded comment time did nothing to address the more substantive issues created by the proposal.<sup>138</sup>

### III. PROBLEMS WITH THE SEC'S PROPOSAL

#### A. *It Exceeds Statutory Authority*

The Administrative Procedures Act (APA)<sup>139</sup> governs how federal administrative agencies are allowed to make rules.<sup>140</sup> The federal courts have the authority to evaluate agencies' compliance with the requirements of the APA,<sup>141</sup> and Congress has specified that a court called upon to review an agency action shall hold it "unlawful and set aside" such action in specified circumstances.<sup>142</sup> Included in those circumstances are situations where the action, findings, or conclusions of the agency are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"<sup>143</sup> are "in excess of statutory jurisdiction, authority, or limitations"<sup>144</sup> or are "unsupported by substantial evidence."<sup>145</sup>

Even presuming absolute good faith on the part of federal agencies, it is clear that "[d]ue to the sheer number of regulations, it is inevitable that some will exceed the agency's statutory authority, conflict with the authorizing statute's purpose, be unconstitutional, or otherwise unlawful."<sup>146</sup> In such cases, courts have the primary responsibility for preventing agency overreach.<sup>147</sup>

There is a rich and robust academic discussion of the authority of courts to set aside regulations (for example, those which

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.gov/documents/2022/05/12/2022-10195/reopening-of-comment-periods-for-private-fund-advisers-documentation-of-registered-investment [https://perma.cc/L2VU-KA83] ("The comment periods . . . are reopened. Comments should be received on or before June 13, 2022.").

<sup>138</sup> *Id.*

<sup>139</sup> The APA is codified at 5 U.S.C. §§ 551–59.

<sup>140</sup> 5 U.S.C. § 559.

<sup>141</sup> 5 U.S.C. § 552b(2)(i)–(j).

<sup>142</sup> 5 U.S.C. § 706.

<sup>143</sup> *Id.* § 706(2)(A).

<sup>144</sup> *Id.* § 706(2)(C).

<sup>145</sup> *Id.* § 706(2)(E).

<sup>146</sup> Jonathan Wood, *Standing Up to the Regulatory State: Is Standing's Redressability Requirement an Obstacle to Challenging Regulations in an Over-Regulated World?*, 86 UMKC L. REV. 147, 151 (2017).

<sup>147</sup> *Id.*

exceed the adopting agency's statutory authority) in their entirety under the terms of the Administrative Procedures Act.<sup>148</sup> While some experts have argued about the legal propriety of blanket injunctions or universal decrees vacating rules, the consensus seems to be that while such universal actions (particularly in the case of injunctions) may be unwise, they are nonetheless constitutional.<sup>149</sup> Certainly, an administrative action that appears to be in excess of statutory authority would be open to challenge on such grounds.<sup>150</sup>

In the case of the proposed amendments to Regulation ATS, a court might use a number of potential justifications to set aside new definitions.<sup>151</sup> The '34 Act gives the SEC the authority to impose rules for securities exchanges<sup>152</sup> and to establish conditions on which such exchanges may be exempted from registration requirements.<sup>153</sup> However, the definition of "exchange" under that Act targets persons who "constitute[ ], maintain[ ] or provide[ ] a market place or facilities for bringing together purchasers and

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<sup>148</sup> Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1162 (2020) ("There is a straightforward textual case that the APA authorizes universal vacatur of rules, as well as universal injunctions against them.").

<sup>149</sup> Consider this explanation: "Not every bad idea is unconstitutional. Those of us in the academy who have defended nationwide injunctions recognize that they are usually inadvisable." Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 978 (2020). See Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 921 (2020). For articles discussing a wide range of policy considerations relating to such actions on both sides of the propriety of such judicial intervention see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Howard M. Wasserman, "Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651 (2019); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017).

The issue of which remedies are appropriate in the event of a challenge to an administrative action is important but outside the scope of this Article and will, therefore, not be discussed further here.

<sup>150</sup> 5 U.S.C. § 706(2)(e).

<sup>151</sup> See *infra* notes 152–55 and accompanying text.

<sup>152</sup> 15 U.S.C. § 78f(a).

<sup>153</sup> *Id.* § 78e.

sellers of securities.”<sup>154</sup> There is a substantial argument to be made that the proposed changes go beyond the statutory definition and therefore exceed the agency’s authority.<sup>155</sup>

Others have also noted this problem. Representatives Patrick McHenry (R–North Carolina) and Bill Huizenga (R–Michigan) commented on the proposal, expressing concern that “the proposed rules can be interpreted to expand the SEC’s jurisdiction beyond its existing statutory authority to regulate market participants in the digital asset ecosystem, including in decentralized finance (DeFi) . . . .”<sup>156</sup>

The most obvious problem occurs because of the SEC’s attempt to reach not just persons who “constitute, maintain or provide” the exchange but also anyone who “make[s] [it] available.”<sup>157</sup> The proposal does not limit who might be included in this language.<sup>158</sup> David A. McCarville<sup>159</sup> filed a comment letter explaining his apprehension about the potential reach of this language.<sup>160</sup> He identified a long list of persons who could reasonably be affected: persons who write and publish smart contract code,<sup>161</sup> persons

<sup>154</sup> *Id.* § 78c(a)(1).

<sup>155</sup> Peirce Dissent, *supra* note 132.

<sup>156</sup> Representatives Patrick McHenry and Bill Huizenga, Comment Letter on Proposed Rule to Amend Exchange Act Rule 3b-16 and Further Definition of a Dealer-Trader (Apr. 18, 2022), <https://www.sec.gov/comments/s7-12-22/s71222-20128285-290981.pdf> [<https://perma.cc/9VH8-DZNC>]. These comments were joined in a Comment Letter by Adelle Nazarian and Todd A. White of the American Blockchain PAC. Adelle Nazarian and Todd A. White, Comment Letter on Proposed Rule to Amend Exchange Act Rule 3b-16 and Further Definition of a Dealer-Trader (Apr. 21, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20125269-284703.pdf> [<https://perma.cc/GA6K-96E4>].

<sup>157</sup> *2022 Proposal*, *supra* note 114, at 15,498. The proposed change would appear in 17 C.F.R. § 240.3b-16(a)(2), which would expand “exchange” to include those who “make available” the methods by which buyers and sellers interact.

<sup>158</sup> *See 2022 Proposal*, *supra* note 114.

<sup>159</sup> McCarville is an attorney and Adjunct Professor at Sandra Day O’Connor School of Law, Arizona State University. *David A. McCarville*, FENNEMORE, <https://www.fennemorelaw.com/people/attorneys/david-a-mccarville/> [<https://perma.cc/7F9Y-ABCP>].

<sup>160</sup> David A. McCarville, Comment Letter on Proposed Rule to Amend Exchange Act Rule 3b-16 and Further Definition of a Dealer-Trader (Feb. 22, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20117419-269096.pdf> [<https://perma.cc/9LWD-AG5A>].

<sup>161</sup> *See* Nikolai Kuznetsov, *DeFi Liquidity Pools, Explained*, COINTELEGRAPH (Jan. 28, 2021), <https://cointelegraph.com/explained/defi-liquidity-pools-explained> [<https://perma.cc/88QZ-RHP2>].

who act as miners or validators on a particular blockchain,<sup>162</sup> persons who provide liquidity to decentralized protocols that are established to facilitate disintermediated transactions,<sup>163</sup> “persons who run websites which facilitate use of” such computer protocols,<sup>164</sup> and those who write “blockchain client software” that enables mining, validation and other transactions on the network.<sup>165</sup> As he indicates in his letter, none of these persons are likely to be securities professionals or to have access to any of the information needed to comply with existing regulations for exchanges.<sup>166</sup>

In addition, it appears that the proposal exceeds statutory authority by attempting to add “communication protocols” to the definition of exchange,<sup>167</sup> going beyond the statutory definition, which focuses on persons that operate a “market place or facilities.”<sup>168</sup> Finally, the proposal also exceeds statutory authority by ignoring the requirement that the marketplace is the one that brings together orders of multiple buyers. Instead, the proposal would allow matching based on mere expressions of trading interest.<sup>169</sup> This would appear to be a significant expansion in what is meant by the word “exchange,” in contravention of the long-standing definition of that word.<sup>170</sup>

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<sup>162</sup> McCarville, *supra* note 160. Miners or validators are persons who run computer nodes that devote resources to verifying the validity of proposed blocks of transactions before they are added to the blockchain. Bruno Skvorc, *What is a Bitcoin Node? Mining versus Validation*, SITEPOINT BLOG (May 17, 2018), <https://www.sitepoint.com/bitcoin-nodes-mining-validation/> [<https://perma.cc/49JM-3CAU>].

<sup>163</sup> McCarville, *supra* note 160. McCarville refers to these protocols as “automatic-market making ‘smart contracts’ (‘AMM’s’).” *Id.* Almost anyone can become a liquidity provider by joining a DeFi liquidity pool, although they risk losing the value of the cryptoassets that they contribute in the event of price fluctuations, slippage, hacks, and other kinds of attacks. Kuznetsov, *supra* note 161.

<sup>164</sup> McCarville, *supra* note 160.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *2022 Proposal*, *supra* note 114, at 15,504.

<sup>168</sup> 15 U.S.C. § 78c(a)(1).

<sup>169</sup> 5 U.S.C. § 706(2)(e).

<sup>170</sup> Others have also noted the change in the SEC’s position on what constitutes an exchange.

[This] abandons the concept in the current definition of an exchange of bringing together “the orders for securities of multiple

Admittedly, nothing is per se impermissible about an administrative agency changing its position on what a word or phrase means,<sup>171</sup> even where that involves modifying a long-standing interpretation.<sup>172</sup> However, the SEC must comply with the Administrative Procedure Act in promulgating updated rules and regulations, and that requires (among other things) a reasonable basis for the new position and a record supporting the change in position.<sup>173</sup> The evidence required could be more than what might be necessary if the agency was not changing its interpretation of the law.<sup>174</sup>

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*buyers and sellers,”* and replaces it with the notion of bringing “together *buyers and sellers* of securities *using trading interest.*” These changes represent a material shift from the current regulatory construct where a central marketplace sets the non-discretionary methods for buyers and sellers to interact, to a decentralized marketplace where individual market participants and investors set their own unique, non-discretionary methods for trading.

Douglas A. Cifu, Comment Letter on Proposed Rule to Amend Exchange Act Rule 3b-16 and Further Definition of a Dealer-Trader (Apr. 18, 2022) [hereinafter Cifu Letter] (emphasis omitted), <https://www.sec.gov/comments/s7-02-22/s70222-20123990-280132.pdf> [<https://perma.cc/28B6-3S4W>].

<sup>171</sup> David H. Becker, *Changing Direction in Administrative Agency Rule-making: “Reasoned Analysis,” the Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS: ENVTL. L. & POL’Y J. 65, 73 (2006) (“in rulemaking, the Court has analyzed regulatory revisions in several . . . cases without conclusively stating how persuasive an agency’s explanation of a change of course must be to survive judicial review.”); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 130 (2011).

<sup>172</sup> Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1865 (2015) (advocating a presumption that a long-standing administrative rule is correct and therefore should not be freely changed and suggesting that the presumption should apply for interpretations that have been in existence for at least ten years). This same source also notes that other sources would require the interpretation to have been in place for 15 or more years. *Id.*

<sup>173</sup> The APA is codified at 5 U.S.C. §§ 551–59, and it sets out standards by which agency determinations are to be reviewed. 5 U.S.C. § 551. A court is required to set aside an agency finding or conclusion if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” if it exceeds statutory jurisdiction, or if it is “unsupported by substantial evidence . . . reviewed on the record of an agency.” *Id.* § 706(2).

<sup>174</sup> For example, in *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), the Court held that an agency “changing

*B. It Is Overly Broad*

A second, closely related concern with the proposed amendments stems from the sheer breadth of the SEC's proposal.<sup>175</sup> When the SEC first broached the issue of amending Regulation ATS in 2020 with the concept release, the SEC identified the “critical role of government securities in the U.S. and global economy,” and the fact that “the investor protection and fair and orderly market principles of Regulation ATS have limited application to Government Securities ATSs” as problems that needed to be addressed.<sup>176</sup> The stated purpose of the original release was to “promote operational transparency, investor protection, system integrity, fair and orderly markets, and regulatory oversight for Government Securities ATSs.”<sup>177</sup>

When the proposed rules were released in 2022, however, they addressed a much broader swath of operations.<sup>178</sup> In fact, the change in the breadth was so surprising that one SEC Commissioner felt compelled to note the difference in coverage:

Unexpectedly for me—and perhaps for many in the market—this proposed amendment goes far beyond the scope of the concept release that was issued with the initial September 2020 proposal. What the staff is recommending for our consideration today is an expansion in the definition of exchange that would apply to any trading venue, including so-called communication protocol systems, for any type of security, not just for government or fixed-income securities.<sup>179</sup>

In addition, notwithstanding the expanded reach of the new language, the new proposal failed to identify harms attributable to the full range of the operations that the expanded definition of “exchange” might reach.<sup>180</sup> The Securities Industry and Financial Markets Association (SIFMA) describes itself as the leading trade association for broker-dealers, investment

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its course” must “supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”

<sup>175</sup> Peirce Dissent, *supra* note 132.

<sup>176</sup> *2022 Proposal*, *supra* note 114, at 15,496.

<sup>177</sup> *Id.* at 15,497.

<sup>178</sup> Peirce Dissent, *supra* note 132.

<sup>179</sup> Peirce Dissent, *supra* note 132.

<sup>180</sup> *Id.*

banks, and asset managers operating worldwide.<sup>181</sup> Its Managing Director and Associate General Counsel filed a comment on the SEC proposal, specifically expressing concern over the “significant lack of alignment” between the scope of the proposed changes and the SEC’s stated objectives.<sup>182</sup> In particular, this letter notes that, if adopted, the new rules “would potentially capture market participants’ internal systems and third-party technology platforms that do not, in substance, perform market place functions and for which registration as a national securities exchange or operation subject to Regulation ATS brings no obvious policy benefit.”<sup>183</sup>

### *C. It Lacks Necessary Clarity*

An additional problem with the proposal is that it lacks clarity and definitions for essential phrases.<sup>184</sup> “As written, the proposed rule-making does not clarify what additional trading systems or protocols the SEC intends to regulate under the expanded definitions.”<sup>185</sup> Many of the new terms and concepts included in the proposal are not clearly defined.<sup>186</sup> For example, there is no definition of what constitutes “communication protocols,”<sup>187</sup>

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<sup>181</sup> Robert Toomey, Comment Letter on Proposed Rule to Amend Exchange Act Rule 3b-16 and Further Definition of a Dealer-Trader n.1 (Apr. 18, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20123991-280133.pdf> [<https://perma.cc/W2SH-RKNX>].

<sup>182</sup> *Id.* (concluding that “the effect of the proposed changes would extend far beyond the SEC’s stated goal to ‘extend the benefits of the exchange regulatory framework to investors that use such systems, and reduce regulatory disparities among like markets.’”).

<sup>183</sup> *Id.* at 2–3.

<sup>184</sup> Karthik Mahalingam, Comment Letter on Proposed Rule to Expand Definition of an “Exchange” and an “Alternative Trading System” (ATS) (Apr. 19, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-280549.htm> [<https://perma.cc/2ED4-E8B>] (no affiliation listed for commentor).

<sup>185</sup> *Id.*

<sup>186</sup> This concern was noted in the comment letter from Gus Coldebella and Gregory Xethalis to Vanessa Countryman, Sec’y of the SEC (Apr. 18, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20124026-280152.pdf> [<https://perma.cc/S2NU-NVPT>] (affiliated with unnamed investment firms, writing in their personal capacities). They suggested that the new proposal might worsen the situation by substituting regulation by surprise for regulation by enforcement. *Id.*

<sup>187</sup> *2022 Proposal*, *supra* note 114, at 15,507, observing that such protocols “may take many forms,” offering several examples while also noting that the

and no explanation of who might be included as someone who “makes available” such protocols.<sup>188</sup>

One of the primary concerns that crypto entrepreneurs have had with respect to SEC enforcement efforts involving cryptoassets is that despite being very active in the space,<sup>189</sup> the agency’s regulatory reach has been uncertain, and its enforcement priorities have often seemed opaque.<sup>190</sup> As one commentator recently noted, “Despite the care with which it has drafted guidance, reports, and settlement releases, there is still significant ambiguity about when a token will be considered a security.”<sup>191</sup> In fact, the SEC has been widely criticized for a tendency to engage in regulation by enforcement rather than adopting clear rules.<sup>192</sup>

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provided list is “not exhaustive.” *Id.* The risk of an overbroad interpretation and application of the undefined term is only increased by the Commission’s explicit warning that it “would take an expansive view of what would constitute ‘communications protocols’ . . . .” *See id.*

<sup>188</sup> *Id.* (explaining that “make available” could capture actions by “a party other than the organization, association, or group of persons performs a function of the exchange,” it could still be within reach of the new rules).

<sup>189</sup> For an empirical assessment demonstrating just how active the SEC has been, especially in comparison to other enforcement regimes, see Douglas S. Eakeley et al., *Crypto-Enforcement Around the World*, 94 S. CAL. L. REV. POSTSCRIPT 99, 100 (2021).

<sup>190</sup> *Id.* at 100 (“The United States does not have a regulatory framework designed for crypto-markets, which effectively creates a pure regulation via enforcement environment.”); Paul Watkins & Danielle DuBose, *The Uniform Token Regulation Act: A Proposal for States to Lead on Regulatory Clarity for Digital Tokens*, 23 FEDERALIST SOC’Y REV. 130, 131 (2022) (noting that “[n]either Congress nor the Securities and Exchange Commission (SEC) has provided clear rules explaining when a digital asset is a security under federal law.”); James J. Park & Howard H. Park, *Regulation by Selective Enforcement: The SEC and Initial Coin Offerings*, 61 WASH. U. J.L. & POL’Y 99, 132 (2020) [hereinafter Park & Park]; Tessa E. Shurr, *A False Sense of Security: How Congress and the SEC are Dropping the Ball on Cryptocurrency*, 125 DICK. L. REV. 253, 253 (2020) (“[P]olicymaking by enforcement is harmful to the financial technology industry and perpetuates the lack of clarity surrounding regulation of digital assets.”). *See also* Carol R. Goforth, *Regulation of Crypto: Who Is the Securities and Exchange Commission Protecting?*, 58 AM. BUS. L.J. 643, 705 (2021) (suggesting that the SEC’s policy of regulating by enforcement is driving crypto entrepreneurs away from the United States)

<sup>191</sup> Park & Park, *supra* note 190, at 128.

<sup>192</sup> James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 637 (2007) (“The ‘Regulation by Enforcement’ critique reflects



To amend rules in such a way that the application of the law is more complicated and uncertain, with definitions that are less clear, would make it harder for legitimate entrepreneurs to know when and how to comply with legal requirements.<sup>193</sup> This concern would pile on top of uncertainties and complexities that have already driven a number of crypto businesses and opportunities overseas.<sup>194</sup> Moreover, it would put similar or worse pressure on fintech businesses that have not yet been subject to SEC jurisdiction.<sup>195</sup> This could be particularly problematic given the fact that there is no clear path for communication protocols or trading systems that have previously operated outside the scope of the U.S. regulatory structure to “comply with the rules designed for exchanges and ATSS—this is especially true for decentralised [sic] exchanges (DEX).”<sup>196</sup>

#### *D. It Lacks Sufficient Economic Analysis*

A fourth issue with the proposed rule is that it lacks sufficient economic analysis explaining how the rule would impact crypto exchanges, particularly DeFi platforms.<sup>197</sup> The lack might not be surprising given the ostensible focus of the proposal on treasury market and government securities rather than crypto exchanges,<sup>198</sup> but it is still extremely problematic.<sup>199</sup> While the proposal has an extensive cost-benefit analysis section,<sup>200</sup> only

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a general sense that norms are best initiated by rulemaking whereas enforcement actions should merely enact previously defined rules.”); Jonathan R. Macey, *The Tenth Abraham L. Pomerantz Program: Wall Street in Turmoil: Who is Protecting the Investor? State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 128 n.36 (2004) (“Rulemaking by enforcement refers to the presumptively illegitimate process by which regulators proceed with rulemaking ‘*ex post*,’ i.e. after certain conduct occurs, rather than through more legitimate formal notice-and-rulemaking procedures.”); Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead At the Next Decade*, 7 YALE J. ON REG. 149, 155–56 (1990).

<sup>193</sup> See *supra* note 32 and accompanying text.

<sup>194</sup> See *supra* note 32 and accompanying text.

<sup>195</sup> Mahalingam, *supra* note 184.

<sup>196</sup> *Id.*

<sup>197</sup> Coldebella & Xethalis, *supra* note 186.

<sup>198</sup> See *supra* notes 107, 109–10, 113 and accompanying text.

<sup>199</sup> Coldebella & Xethalis, *supra* note 186.

<sup>200</sup> 2022 Proposed Amendment, *supra* note 114, at 15,521–28.

about one page focuses on “efficiency, competition, and capital formation,”<sup>201</sup> and none of the discussion focuses on crypto markets or exchanges.<sup>202</sup>

The lack of detailed economic analysis is especially problematic for the SEC because section 23(a)(2) of the '34 Act provides that:

[I]n making rules and regulations . . . [the Commission] shall consider among other matters the impact any such rule or regulation would have on competition. The Commission . . . shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Securities Exchange Act of 1934].<sup>203</sup>

The courts take the obligation very seriously when the SEC’s regulatory pronouncements are challenged.<sup>204</sup>

For example, the Court of Appeals for the D.C. Circuit found in 2010 that a rule which would have regulated fixed indexed annuities was arbitrary and capricious because “the SEC failed properly to consider the effect of the rule upon efficiency, competition, and capital formation.”<sup>205</sup> A year later, in *Business Roundtable v. SEC*,<sup>206</sup> the D.C. Circuit Court struck down an attempt by the SEC to expand shareholder access to the proxy ballots for purposes of nominating directors.<sup>207</sup> As set out in the Federal Register, the notice of final rule-making included eighteen pages of cost-benefit analysis<sup>208</sup> and an additional six pages discussing the potential burdens on competition.<sup>209</sup> Nonetheless, the court concluded that the SEC had failed to adequately consider economic consequences, making its decision arbitrary and capricious.<sup>210</sup>

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<sup>201</sup> *Id.* at 15,593–94.

<sup>202</sup> Coldebella & Xethalis, *supra* note 186.

<sup>203</sup> 15 U.S.C. § 78w(a)(2).

<sup>204</sup> *See* *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177 (D.C. Cir. 2010).

<sup>205</sup> *Id.* at 167–68.

<sup>206</sup> 647 F.3d 1144 (D.C. Cir. 2011).

<sup>207</sup> *Id.* at 1147, 1156.

<sup>208</sup> Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,467, 56,753–71 (Sept. 16, 2010).

<sup>209</sup> *Id.* at 56,771–76.

<sup>210</sup> The court was brutal in its assessment of the SEC’s efforts: “Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain

The court's detailed analysis imposes what has been characterized by some as an "exhausting standard."<sup>211</sup>

Despite the clear indication that a detailed and thoughtful consideration of the economic consequences and impact on competition and capital formation is essential to the SEC when it is considering new rules,<sup>212</sup> the original 2020 concept release gave no indication that the Commission was looking at anything other than treasury market and government securities.<sup>213</sup> The pivot to a proposal that encompasses communication protocols, persons who make available such protocols or market place facilities, and to models that do not rely on firm offers means that there was no formal input from market participants or investors before the proposed final rule was announced.<sup>214</sup> And the justifications for the proposed final rule fail to mention crypto or digital assets anywhere in the 650-page document.<sup>215</sup>

The reality is that the proposed rule could have profound consequences for certain business models, notably crypto exchanges, which could be barred from operating in the United States because there is no reasonable way for them to comply with rules that were never designed with them in mind.<sup>216</sup> As explained in one comment letter:

The potential expansion of the SEC's regulatory authority to include these neutral technology tools and products may jeopardize their existence and/or increase their costs bases, either of which ultimately raises costs for investors and could deprive them of the significant benefits that streamlined workflows

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why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters." Bus. Roundtable, 647 F.3d at 1148–49.

<sup>211</sup> *Administrative Law—Corporate Governance Regulation—D.C. Circuit Finds SEC Proxy Access Rule Arbitrary and Capricious for Inadequate Economic Analysis—Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), 125 HARV. L. REV. 1088, 1088 (2012) ("By parsing in fine detail the methods and results of the SEC's cost-benefit analysis, the panel asserted judicial power in a field that courts struggle to oversee and applied an excessively exhausting standard . . .").

<sup>212</sup> Bus. Roundtable, 647 F.3d at 1148–49.

<sup>213</sup> *Concept Release*, *supra* note 109.

<sup>214</sup> Cifu Letter, *supra* note 170, at 2.

<sup>215</sup> *See id.* at 2–3.

<sup>216</sup> *See id.* at 12, 15.

provide to the marketplace—i.e., enabling investors to interact with market participants more efficiently. Unfortunately, these significant costs were not considered by the Commission, which declined to engage in an adequate economic analysis of the Proposal as required, *nor was the purported benefit against which such costs could be compared articulated or specified within the Proposal.*<sup>217</sup>

The same commentator also accurately pointed out that the SEC, based on disclosures contained in the proposal, “failed to ‘assess all costs and benefits of available regulatory alternatives’ . . . [or] to demonstrate that ‘changing requirements’ warrant an updated rule . . . .”<sup>218</sup> The significant, extensive changes contemplated by the proposal could actually stifle innovation and diminish competition by shuttering new technologies, but there is no recognition or discussion of this in the release.<sup>219</sup>

#### *E. It Is Likely to Stifle Innovation in the United States*

One of the realities of imposing existing regulations on crypto-trading platforms and those who make such services “available” is that compliance is likely to be difficult for many of those covered by the requirements.<sup>220</sup> Registration as an exchange is unlikely to be an attractive alternative for crypto-trading platforms because the ’34 Act makes it unlawful “to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange. . . .”<sup>221</sup> The problem here is the uncertainty in knowing which cryptoassets are securities.<sup>222</sup>

Although a few officials at the SEC had previously proclaimed that they did not believe Bitcoin or Ether to be securities,<sup>223</sup>

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<sup>217</sup> *Id.* at 4.

<sup>218</sup> *Id.* at 6 (citing the SEC’s Division of Risk, Strategy and Financial Innovation and its Office of General Counsel guidance on economic analysis).

<sup>219</sup> *See id.* at 4.

<sup>220</sup> *See id.* at 6, 10.

<sup>221</sup> 15 U.S.C. § 78l(a).

<sup>222</sup> *See Cifu Letter, supra* note 170, at 11.

<sup>223</sup> While in actuality, the only statements were from former Chairman Jay Clayton, former Chief of the Corporate Finance Division Bill Hinman, and Chair Gensler, each of whom purported to be speaking in their personal capacities, this has widely been reported as an official SEC position. *See, e.g.,*

the first official pronouncement covering multiple cryptoassets was not forthcoming from the Commission until the July 21, 2022, complaint in *SEC v. Ishan Wahi*<sup>224</sup> which listed nine cryptoassets that the SEC had determined to be securities.<sup>225</sup> While there were obviously valid reasons for identifying those particular cryptoassets,<sup>226</sup> none of them were among the most widely distributed or highly capitalized.<sup>227</sup> This leaves open the issue of when a cryptoasset becomes so decentralized that it is no longer a security, meaning that there is still a great deal of uncertainty for crypto exchanges trying to ascertain which assets have pricing

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Jeff Novel, *Is Crypto a Currency or Security? Litigation Involving the SEC May Provide Guidance*, (Nov. 4, 2021) KANE RUSSELL COLEMAN LOGAN BANKING L. BLOG, <https://www.krcl.com/insights/is-crypto-currency-or-security-litigation-involving-the-sec-may-provide-guidance> [<https://perma.cc/EGR9-55MX>] (“In recent years, the SEC has ruled that the two largest cryptocurrencies by market capitalization, Bitcoin (\$1.2 Trillion) and Ethereum (\$533 billion) are not securities, partly on the grounds that they are decentralized . . .”).

<sup>224</sup> Complaint at ¶¶ 1–3, 24, *SEC v. Wahi*, No. 2:22-cv-01009 (W.D. Wash. July 21, 2022) [hereinafter *Wahi* complaint], <https://www.sec.gov/litigation/complaints/2022/comp-pr2022-127.pdf> [<https://perma.cc/W68Z-H94L>]. The complaint alleges that Wahi engaged in repeated tips of inside information to his brother and close friend in violation of federal securities laws. *Id.* ¶ 1.

<sup>225</sup> The nine cryptoassets identified in the complaint were Flexa Network, Inc.’s AMP token, Rally Network Inc.’s RLY token, DerivaDEX protocol’s DDX token, XY Labs, Inc.’s XYO token, Rari Capital’s RGT token, Lichtenstein Cryptoassets exchange’s LCX token, Power Ledger Pty, Ltd.’s POWR token, DFX Finance’s DFX, and Kromatika Finance’s KROM token. *Id.* ¶¶ 95–206. These tokens and the complaint’s analysis of why they are deemed by the Commission to be securities appear in the *Wahi* complaint. *Id.*

<sup>226</sup> While the listed cryptoassets might appear to be a random collection of tokens to treat as securities, the reason for collecting and describing them is that the complaint involves allegations of insider trading in those tokens under section 10(b) and Rule 10b-5 of the ’34 Act. *Id.* ¶¶ 1–8.

<sup>227</sup> According to CoinMarketCap, the highest market capitalization for any of those tokens the day after the SEC announced its complaint was Flexa’s AMP token, which had a total market cap of approximately \$392.4 million, meaning it was the 91st-ranked cryptoasset by overall capitalization. *Amp Price Live Data*, COINMARKETCAP, <https://coinmarketcap.com/currencies/amp/historical-data/> [<https://perma.cc/DD7V-3H5J>]. Rally’s RLY token, the second most highly capitalized of the listed tokens, had a market cap of \$122.5 million, giving it a CoinMarketCap ranking of number 170. *RLY Price Live Data*, COINMARKETCAP, <https://coinmarketcap.com/currencies/rally/historical-data/> [<https://perma.cc/23FX-STB2>].

changes that are dependent on the actions of particular persons and which are instead reliant on market forces.<sup>228</sup> This makes it risky for exchanges to trade in even the most highly capitalized and dispersed cryptoassets, especially since the SEC, in another highly publicized case, chose to initiate legal proceedings against Ripple for trading in its XRP token as recently as December 2020.<sup>229</sup>

On the other hand, limiting an exchange's ability to know what cryptoassets it can trade in when it is doubtless going to compete against other businesses that draw the line in different ways or that do not even attempt to comply with U.S. requirements is a large incentive for businesses to leave the U.S. market if they cannot find another way to avoid the registration requirement.<sup>230</sup>

Regulation ATS, which provides the most likely exemption from registration as an exchange, also has requirements that make it ill-suited for crypto-trading platforms.<sup>231</sup> There are nine categories of requirements under Regulation ATS,<sup>232</sup> meaning that in order to comply, the system must be licensed as a broker-dealer, file certain reports with the SEC, and maintain

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<sup>228</sup> This appears to be the approach suggested or at least hinted at by the SEC in its 2019 Framework. *2019 Framework*, *supra* note 80, at 2–3. For example, that document suggests that one of the important inquiries is whether “[t]here are essential tasks or responsibilities performed and expected to be performed by an AP [Active Participant], rather than an unaffiliated, dispersed community of network users . . . .” *Id.* at 3. The Framework also specifically notes that at some point, the status of the cryptoasset can change, suggesting the need to reevaluate to determine “[w]hether the network . . . operates in such a manner that purchasers would no longer reasonably expect an AP to carry out essential managerial or entrepreneurial efforts.” *Id.*

<sup>229</sup> When the SEC initiated its action against Ripple on December 22, 2020, XRP had a market capitalization in excess of \$20 billion, making it one of the most highly capitalized and distributed cryptoassets in existence. Ryan Browne & Kate Rooney, *Cryptocurrency Firm Ripple Expects to be Sued by the SEC; XRP Plunges*, CNBC (Dec. 22, 2020, 10:59 AM), <https://www.cnbc.com/2020/12/22/cryptocurrency-firm-ripple-expects-to-be-sued-by-the-sec-xrp-plunges.html> [<https://perma.cc/T4UA-EH4W>]. A copy of the complaint in SEC v. Ripple, No. 1:20-cv-10832 (Dec. 22, 2020) is archived at <https://perma.cc/M5UT-S9P2>.

<sup>230</sup> See Ryan Browne, *\$10 Billion Crypto Firm Ripple Considers Relocating to London Over U.S. Regulation*, CNBC (Oct. 23, 2020, 10:35 AM), <https://www.cnbc.com/2020/10/23/crypto-firm-ripple-considers-relocating-to-london-over-us-regulation.html> [<https://perma.cc/TAE6-MJLZ>].

<sup>231</sup> Herrick K. Lidstone, Jr., *Crowdfunding in Colorado Is Now Available*, 44 COLO. LAW. 49, 56 (2015).

<sup>232</sup> Klock, *supra* note 63, at 768.

an open and fair quotation system for the securities quoted.<sup>233</sup> Because ATs must register as broker-dealers, “they are subject to SEC Rule 15c2-11, which prohibits brokers and dealers from initiating or resuming quotations of securities unless there is adequate public information available ‘to prevent fraudulent, deceptive, or manipulative acts or practices.’”<sup>234</sup> This requirement is a significant obstacle because, according to the SEC, there simply is not enough publicly available information about the Bitcoin-trading markets to prevent manipulation; this is the repeated rationale given by the SEC for steadfastly refusing to approve Bitcoin ETFs.<sup>235</sup> And if there is insufficient information about Bitcoin and its markets, the same is likely true for virtually every other cryptoasset.<sup>236</sup>

Keep in mind also that the persons subject to these requirements are not likely to be able to force compliance.<sup>237</sup> Remember that the SEC’s proposed definition of exchange would impose registration requirements on persons who “make available” the communication protocol.<sup>238</sup> As noted above, this might include coders, miners, validators, liquidity providers, persons who run websites, and those who write client software.<sup>239</sup> None of those are likely to have access to the kind of information or authority needed to comply with current registration requirements.<sup>240</sup>

In the words of one commentator, asserting jurisdiction and threatening enforcement without providing mechanisms to comply with legal requirements could result in “catastrophic

<sup>233</sup> *Id.*

<sup>234</sup> Lidstone, *supra* note 231, at 56.

<sup>235</sup> “Although varying proposals have been made by different issuers and exchanges, the SEC has consistently cited in its denials concerns about the potential for fraud and manipulation in the underlying market for bitcoin.” Jennifer J. Schulp, *Opinion: The SEC Is Illogical in Its Continued Refusal to OK a Bitcoin ETF*, MARKETWATCH (Feb. 1, 2022, 9:52 AM), <https://www.marketwatch.com/story/the-sec-is-illogical-in-its-continued-refusal-to-ok-a-bitcoin-etf-11643727161> [<https://perma.cc/HZC6-HZYW>].

<sup>236</sup> See *Geotagging Crypto Derivatives Traders with NLP*, INCA.DIGITAL (July 30, 2021), <https://inca.digital/intelligence/geotagging-crypto-traders/> [<https://perma.cc/5P5M-96AH>].

<sup>237</sup> See *supra* notes 119–23.

<sup>238</sup> *2022 Proposal*, *supra* note 114, at 556. This change would be codified at 17 C.F.R. § 240.3b-16(a)(2).

<sup>239</sup> See *supra* notes 162–64.

<sup>240</sup> *Id.*

harm’ to the DeFi industry ‘without protecting markets in any significant capacity.’”<sup>241</sup> Compliant operations will likely be forced away from the United States, decreasing competition and certainly not protecting markets or market participants.<sup>242</sup> Individuals with technological abilities who want to participate in these endeavors may also be pushed away from the United States.<sup>243</sup> Alternatively, they can continue to operate in legal limbo, uncertain about which cryptoassets are securities and whether the laws apply to their operations.<sup>244</sup>

#### IV. THE NEED FOR CONGRESSIONAL ACTION

The SEC made its initial pronouncement that it would regard cryptoassets as securities if they could be categorized as investment contracts in a 2017 document widely referred to as The DAO Report.<sup>245</sup> In that Report, the Commission also advised that a platform assisting with the trading of digital assets that are securities and operating as an “exchange” must register with the Commission as a national securities exchange or operate pursuant to an exemption from registration.<sup>246</sup>

In 2018, the SEC followed up with an explicit warning regarding the need for crypto-trading platforms to register with the Commission.<sup>247</sup> Since then, the SEC has consistently taken

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<sup>241</sup> Letter from Dunsmoor Law, P.C., to Vanessa Countryside, Sec’y of the SEC (Apr. 18, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20124038-280161.pdf> [<https://perma.cc/9BV3-E7Y5>]. *See also* Cifu Letter, *supra* note 170, at 12–13 (also explaining how the proposed amendments would harm crypto markets).

<sup>242</sup> *See* Browne, *supra* note 230.

<sup>243</sup> *See id.*

<sup>244</sup> *See* Cifu Letter, *supra* note 170, at 11.

<sup>245</sup> Report of Investigation Pursuant to section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, at 11 (July 25, 2017) [hereinafter DAO Report], <https://www.sec.gov/litigation/investreport/34-81207.pdf> [<https://perma.cc/2AFT-KZCX>]. Under section 3(a)(10) of the Exchange Act, a security includes “an investment contract.” *See* 15 U.S.C. § 78c(a)(10). An investment contract is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. SEC v. W.J. Howey Co., 328 U.S. 293, 298 (1946).

<sup>246</sup> DAO Report, *supra* note 245, at 16–17.

<sup>247</sup> “If a platform offers trading of digital assets that are securities and operates as an ‘exchange,’ as defined by the federal securities laws, then the platform must register with the SEC as a national securities exchange or be



the position that crypto-trading platforms that trade any crypto-assets categorized as securities need to comply with the registration requirements of the '34 Act.<sup>248</sup> This is hugely significant given that Chairman Gensler has claimed, “the probability is quite remote’ that the average platform has zero securities trading on it.”<sup>249</sup> His intentions regarding SEC enforcement actions in the crypto ecosystem are clear, with repeated warnings that the Commission “will continue to take our authorities as far as they go.”<sup>250</sup> His most recent statements reaffirm the SEC’s plans “to regulate both centralized and decentralized exchanges involved in trading or lending cryptocurrencies by requiring them to register with the agency.”<sup>251</sup>

The requirement to register as an exchange could impact hundreds of crypto businesses.<sup>252</sup> While many of those operations have no significant physical presence in the United States, the

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exempt from registration.” DIVS. OF ENF’T AND TRADING AND MKTS., SEC, *supra* note 21.

<sup>248</sup> Casey Wagner, *Gensler Says Centralized Regulation is Path for Crypto*, BLOCKWORKS (Dec. 1, 2021, 1:47 PM), <https://blockworks.co/gensler-says-centralized-regulation-is-path-for-crypto/> [<https://perma.cc/S645-VGR8>] (“US Securities and Exchange Commission (SEC) Chair Gary Gensler stuck to his guns on Wednesday, reiterating that cryptocurrency companies and exchanges will not be able to operate outside of regulatory oversight for much longer.”).

<sup>249</sup> *Chair Gensler Reaffirms Focus on Crypto Enforcement; SEC Brings Actions Against a DeFi Lender and a Crypto Exchange for Offering Unregistered Securities*, PAUL WEISS (Aug. 11, 2021), <https://www.paulweiss.com/practices/litigation/financial-institutions/publications/chair-gensler-reaffirms-focus-on-crypto-enforcement-sec-brings-actions-against-a-defi-lender-and-a-crypto-exchange-for-offering-unregistered-securities?id=40732> [<https://perma.cc/ZVX3-ACA5>].

<sup>250</sup> Gary Gensler, Chairman, SEC, Remarks Before the Aspen Security Forum (Aug. 3, 2021), <https://www.sec.gov/news/speech/gensler-aspen-security-forum-2021-08-03> [<https://perma.cc/DZW4-3P62>].

<sup>251</sup> *Gensler Says SEC Plans to Regulate Crypto Exchanges, Sharing Power With CFTC*, PYMNTS.COM (Apr. 5, 2022), <https://www.pymnts.com/news/regulation/2022/gensler-says-sec-plans-to-regulate-crypto-exchanges-sharing-power-with-cftc/> [<https://perma.cc/C3RA-PHGF>].

<sup>252</sup> Sergio Zammit, *How Many Cryptocurrency Exchanges Are There?*, CRYPTIMI (July 27, 2021), <https://www.cryptimi.com/guides/how-many-cryptocurrency-exchanges-are-there> [<https://perma.cc/9P3E-ZNUM>] (suggesting that as of the date of that report, there were around 200 startups not yet counted in CoinMarketCap’s totals). This source says that CoinMarketCap tracks 297 crypto exchanges, but as of June 23, 2022, that number had increased to 535. *Top Cryptocurrency Spot Exchanges*, COINMARKETCAP, <https://coinmarketcap.com/rankings/exchanges/> [<https://perma.cc/6TM2-7SFH>].

inherently global nature of crypto transactions and the difficulty of limiting access to persons from specified geographic regions mean that U.S. citizens and residents may well be using many of these platforms regardless of where the exchanges are physically located, or indeed, whether they have a physical presence anywhere.<sup>253</sup> The only way to stay beyond the reach of U.S. regulators is to operate exclusively out of jurisdictions that do not cooperate with the United States and to move all assets (and potentially personnel) outside the United States to such areas.<sup>254</sup> This serves no U.S. interests as it interferes with the ability of U.S. regulators to pursue necessary and appropriate regulation and anti-fraud initiatives while simultaneously limiting opportunities for U.S. entrepreneurs and investors.<sup>255</sup>

As discussed above, the SEC's efforts at expanding the definition of "exchange" so that the agency will have the authority to pursue enforcement against crypto-trading platforms do more than run these risks.<sup>256</sup> It opens the SEC to costly litigation that the agency could well lose,<sup>257</sup> and most importantly, it removes the incentive for Congress to work towards legislative solutions that do not depend upon applying regulations and requirements that are a poor fit for cryptoassets and business.<sup>258</sup> So long as the SEC continues to assert its jurisdiction while making claims that its authority and requirements are "clear,"<sup>259</sup> the need for Congressional intervention is obscured.<sup>260</sup>

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<sup>253</sup> Alexander Osipovich, *U.S. Crypto Traders Evade Offshore Exchange Bans*, WALL ST. J. (July 30, 2021), <https://www.wsj.com/articles/u-s-crypto-traders-evade-offshore-exchange-bans-11627637401> [<https://perma.cc/3SMW-C49M>] (referencing research reported at Inca. INCA.DIGITAL, *supra* note 236).

<sup>254</sup> *Id.*

<sup>255</sup> *E.g., id.* See also *supra* notes 189–96.

<sup>256</sup> See *supra* notes 250–55 and accompanying text.

<sup>257</sup> See *supra* notes 205–15 and accompanying text for examples of situations where the SEC's rule-making has, in fact, been set aside following litigation.

<sup>258</sup> See *supra* notes 167–96 and accompanying text.

<sup>259</sup> For example, SEC Chair Gensler has testified that the agency and its officials "have a 'great deal of authority . . . and a great deal of clarity' as to what is a security." *SEC Chair Gensler Signals Greater Regulation of Cryptocurrency Under Existing Authorities*, BROWNSTEIN ALERT, <https://www.bhfs.com/insights/alerts-articles/2021/sec-chair-gensler-signals-greater-regulation-of-cryptocurrency-under-existing-authorities> [<https://perma.cc/C787-VY5J>] (July 30, 2021, 10:55 AM).

<sup>260</sup> See *id.*

This Article does not purport to identify every possible issue or problem with the SEC's proposed amendments to the definition of "exchange."<sup>261</sup> It does set out a range of problems posed by the SEC's continuing efforts to assert jurisdiction over the cryptoassets markets without first ensuring that it is possible for persons who would be regulated to comply with legal requirements.<sup>262</sup> These are not problems that can be resolved by the SEC itself or, indeed, by any other regulatory agency acting without the express authorization of Congress.<sup>263</sup> What is needed now is for Congress to carefully consider the needs of the developing crypto ecosystem, along with the needs of consumers.<sup>264</sup>

Even SEC Chair Gensler has, at times, asked Congress to pass legislation to add clarity to the crypto regulatory space.<sup>265</sup> In fact, both Gensler and CFTC Chairman Rostin Behnam have called upon Congress to expand the authority of their respective agencies.<sup>266</sup> Behnam has been particularly vocal in articulating

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<sup>261</sup> As an example of a valid concern that is not otherwise addressed here, consider the complaint raised in the Comment Letter from Scot J. Halvorsen, Assoc. Gen. Couns. for Cboe, to Vanessa Countryman, Sec'y for the SEC (Apr. 18, 2022), <https://www.sec.gov/comments/s7-02-22/s70222-20124167-280560.pdf> [<https://perma.cc/NX92-NZYC>].

Cboe has significant concerns with the time and resources required to implement the proposal and requests sufficient time to implement a final rule . . . . The creation and implementation of policies, procedures, and systems to comply with the public disclosure and Regulation SCI requirements will take time, resources, and staff to complete.

*Id.*

<sup>262</sup> See discussion *supra* Part III.

<sup>263</sup> See, e.g., Thomas Franck, *The SEC Needs More Power from Congress to Fully Regulate Crypto*, Chair Gensler Says, CNBC.COM (Aug. 4, 2021, 5:35 PM), <https://www.cnbc.com/2021/08/03/the-sec-needs-more-power-from-congress-to-fully-regulate-crypto-chair-gensler-says.html> [<https://perma.cc/B9QF-G2HC>].

<sup>264</sup> See discussion *supra* Part IV.

<sup>265</sup> Franck, *supra* note 263 (quoting Gensler as having said, "We need additional congressional authorities to prevent transactions, products and platforms from falling between regulatory cracks . . .").

<sup>266</sup> Nihilish De, *CFTC Should be Crypto's 'Primary Cop,' Acting Chairman Says*, COINDESK (Oct. 27, 2021, 5:10 PM), <https://www.coindesk.com/policy/2021/10/27/cftc-should-be-cryptos-primary-cop-acting-chair-says/> [<https://perma.cc/VEC6-J3JC>] (noting both that Chairman Behnam asked for this responsibility while he was acting chair and that SEC Chair Gensler had also "indicated that he believes the SEC may be best suited to become the primary cop for crypto.").

the need for Congress to “bring regulatory structure to the crypto market.”<sup>267</sup>

A number of commentators have also explored the need for additional regulatory clarity,<sup>268</sup> including those who have suggested that the SEC is not the ideal regulator.<sup>269</sup> This Article does not take a position on how cryptoassets and businesses such as trading platforms should be regulated or under whose authority. It does suggest that the current approach of the SEC, particularly as it relates to the possible expansion of the definition of “exchange” without corresponding clarity as to how crypto “exchanges” can comply with regulatory requirements, is not the way to proceed.<sup>270</sup> Since the chair of the SEC seems insistent on an approach that is likely to lead the Commission down a path

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<sup>267</sup> Sebastian Sinclair, *CFTC Chair Asks Congress for Greater Oversight on Crypto Market*, BLOCKWORKS (Feb. 10, 2022, 7:01 AM), <https://blockworks.co/cftc-chair-asks-congress-for-greater-oversight-on-crypto-market/> [<https://perma.cc/9F22-PDM5>].

<sup>268</sup> 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 1,1,59 (2022) (critiquing the current SEC approach to crypto regulation); Jack J. Longley, *The Crypto-Currency Act of 2020: Evaluating First Steps Toward Clarifying the Digital-Asset Regulatory Landscape*, 54 SUFFOLK U. L. REV. 549, 572 (2021) (critiquing a particular bill while noting the need to update definitions and regulatory approaches); Goforth, *Cinderella's Slipper*, *supra* note 31, at 310; Tyler C. Lee, *Decrypting Crypto: Issues Plaguing Today's Hottest Regulatory Nightmare*, 16 N.Y.U. J.L. & BUS. 551, 577 (2020) (concluding that “a massive regulatory overhaul is needed in the United States if there is any aim to adequately regulate cryptocurrencies.”); Syren Johnstone, *Secondary Markets in Digital Assets: Rethinking Regulatory Policy in Centralized and Decentralized Environments*, 3 STAN. J. BLOCKCHAIN L. & POL'Y 146, 184, 186 (2020); Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235, 236 (2019) (proposing “supplemental administrative tools to support not only market, but also regulatory experimentation and innovation”).

<sup>269</sup> One such suggestion came from Professor Kristin Johnson before her appointment as a CFTC commissioner. See Kristin N. Johnson, *Decentralized Finance: Regulating Cryptocurrency Exchanges*, 62 WM. & MARY L. REV. 1911, 2000–01 (2021) (suggesting that the CFTC would be the optimal regulator for many cryptoassets). See also Kristin N. Johnson, *Regulating Cryptocurrency Secondary Market Trading Platforms*, U. CHI. L. REV. ONLINE (Jan. 7, 2020), <https://lawreviewblog.uchicago.edu/2020/01/07/298/> [<https://perma.cc/WBQ7-58PY>].

<sup>270</sup> See discussion *supra* Section III.C.

that will do more harm than good,<sup>271</sup> a strong case can be made for Congressional intervention.<sup>272</sup>

### CONCLUSION

In 2021–22, during the 117th Congress, fifty bills and resolutions relating to crypto regulation were introduced.<sup>273</sup> The bills covered a range of topics, including crypto taxation, central bank digital currencies (CBDCs), issues relating to sanctions and the use of crypto or blockchain technology by either China or Russia, and supporting blockchain technology in the United States.<sup>274</sup> In addition, a number of the proposals dealt, in one way or another, with the issue of how to improve regulatory clarity with regard to cryptoassets and transactions.<sup>275</sup> Some of the proposed regulations related to the application of Bank Secrecy Act provisions,<sup>276</sup>

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<sup>271</sup> See, e.g., Paul Kiernan, *Crypto Legislation Could Undermine Market Regulations, Gensler Says*, WALL ST. J., <https://www.wsj.com/articles/crypto-legislation-could-undermine-market-regulations-gensler-says-11655231512#:~:text=WASHINGTON%E2%80%94Securities%20and%20Exchange%20Commission,govern%20the%20broader%20capital%20markets> [https://perma.cc/D3BU-E2XG] (June 14, 2022, 3:39 PM). Chair Gensler has also taken issue with at least one current effort to reassign responsibilities over cryptoassets. See *id.* (reporting complaints that current Congressional proposals that would give the CFTC additional authority “could compromise regulations that govern the broader capital markets.”).

<sup>272</sup> See discussion *infra* Conclusion.

<sup>273</sup> “The 118th Congress has reached a milestone of seeing 50 bills and resolutions that have been introduced so far which cover the crypto regulatory landscape in a variety of ways.” Jason Brett, *Congress Has Introduced 50 Digital Asset Bills Impacting Regulation, Blockchain, And CBDC Policy*, FORBES (May 19, 2022, 11:59 PM), <https://www.forbes.com/sites/jasonbrett/2022/05/19/congress-has-introduced-50-digital-asset-bills-impacting-regulation-blockchain-and-cbdc-policy/?sh=91482694e3f0> [https://perma.cc/LNY9-YV7Q]. While the source says that the bills were introduced in the 118th Congress, this is not accurate, as the bills discussed in the article were, in fact, introduced in the 117th Congress. See, e.g., Clarity for Digital Tokens Act of 2021, H.R. 5496, 117th Cong. (Oct. 5, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/5496/text?r=5&s=1> [https://perma.cc/B6NP-G5WR].

<sup>274</sup> Some of the tax-related bills would modify the definition of broker who is required to report information to the IRS, and some would add de minimis exemptions for small-value transactions. Brett, *supra* note 273.

<sup>275</sup> *Id.*

<sup>276</sup> See, e.g., Blockchain Regulatory Certainty Act, H.R. 5045, 117th Cong. (Aug. 17, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/5045>

while others focused more on whether cryptoassets are securities or commodities.<sup>277</sup> As of this writing, none of the substantive proposals that have been made have been enacted, but interest in the topic has continued.<sup>278</sup>

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/text?r=4&s=1 [https://perma.cc/CD7E-DQFZ] (exempting certain noncontrolling blockchain participants from requirements to register as a money transmitter or financial institution). One problem with this particular bill was the breadth of the proposal, which included language exempting the providers of blockchain services from any licensing or registration requirement (with no limitation) unless they have “control” over a digital currency. *See, e.g., id.* This would presumably have completely exempted trading platforms that do not have their own cryptoassets from any registration requirement under the CFTC or SEC purview, including any anti-fraud requirements. *See, e.g., id.* This is doubtless broader than the proponents intended or than would be wise.

<sup>277</sup> An example of this type of proposal would be the Token Taxonomy Act, H.R. 1628, 117th Cong. (Mar. 8, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1628/text> [https://perma.cc/V9KX-J9Q3]. This bill would have removed cryptoassets (referred to in the bill as digital tokens) from the definition of “security,” unless they represent “a financial interest in a company or partnership, including an ownership interest or revenue share.” *Id.*

Another bill focused on the question of whether cryptoassets should be regulated as securities was The Securities Clarity Act, H.R. 4451, 117th Cong. (July 16, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/4451/text?r=4&s=1> [https://perma.cc/GXL7-GKMR]. This bill provided that “an investment contact asset,” specifically including without being limited to intangible assets in digital form, is not to be included within the definition of security unless it falls within one of the other enumerated categories. *Id.* Obviously, this language is substantially broader than just cryptoassets, but it clearly reflects an unease with the current regulatory approach of the SEC with regard to cryptoassets. *See, e.g., id.*

The Clarity for Digital Tokens Act of 2021, H.R. 5496, 117th Cong. (Oct. 5, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/5496/text?r=5&s=1> [https://perma.cc/N5XW-7Q5Q], reflected a similar level of dissatisfaction with the SEC’s current approach but was limited to cryptoassets. The stated purpose of the bill was to “exclude[ ] certain offerings of digital tokens (i.e., a digital representation of value or rights recorded on a publicly available ledger) from securities registrations.” *Id.* The bill would have essentially adopted the three-year safe harbor originally suggested by SEC Commissioner Hester Peirce. Hester Peirce, Commissioner, SEC, *Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization* (Feb. 6, 2020), <https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06> [https://perma.cc/T69A-5ABK].

<sup>278</sup> *See, e.g., The Clarity for Digital Tokens Act of 2021, H.R. 5496, 117th Cong.* (Oct. 5, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/5496/text?r=5&s=1> [https://perma.cc/SV9W-VWJT]. The Bill was introduced on October 5, 2021, but was not enacted.

On June 7, 2022, Senators Cynthia Lummis (R–Wyoming) and Kirsten Gillibrand (D–New York) introduced the Lummis-Gillibrand Responsible Financial Innovation Act.<sup>279</sup> This particular bill is far more detailed and encompassing than most other proposals initiated to date.<sup>280</sup> As filed, the bill included eight distinct parts and 56 sections, covering definitions, taxation, securities regulation, commodities regulation, consumer protection, payments innovation, and interagency coordination.<sup>281</sup> A section-by-section overview of the bill, released alongside the draft bill, describes the primary objectives of the proposal.<sup>282</sup>

This Article does not support any of the existing proposed bills and includes the previous examples as an indication of the degree of interest that Congress currently has in the crypto ecosystem.<sup>283</sup> Thus, the call for Congressional intervention may well fall on receptive ears.

On March 9, 2022, President Biden issued an Executive Order relating to digital assets.<sup>284</sup> In this order, he explicitly called for interagency coordination, study, and cooperative action.<sup>285</sup> He specifically asked various agencies to produce reports and recommendations<sup>286</sup> for the appropriate regulation of digital assets while looking at a wide range of topics, including “the protection of consumers, investors, and businesses, including data privacy

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<sup>279</sup> Lummis-Gillibrand Responsible Financial Innovation Act, S.B. 4356 (June 7, 2022) [hereinafter Lummis-Gillibrand Bill], <https://www.congress.gov/bill/117th-congress/senate-bill/4356/text?r=1&s=1> [https://perma.cc/2NGM-2U5G]; see also Kirsten Gillibrand, *Lummis, Gillibrand Introduce Landmark Legislation to Create Regulatory Framework for Digital Assets*, KIRSTEN GILLIBRAND U.S. SENATOR FOR N.Y. (June 7, 2022), <https://www.gillibrand.senate.gov/news/press/release/-lummis-gillibrand-introduce-landmark-legislation-to-create-regulatory-framework-for-digital-assets> [https://perma.cc/5PZG-S9XH].

<sup>280</sup> See, e.g., *id.*

<sup>281</sup> Lummis-Gillibrand Bill, *supra* note 279.

<sup>282</sup> *Lummis-Gillibrand Responsible Financial Innovation Act, Section-by-Section Overview*, CYNTHIA LUMMIS SENATOR FOR WYOMING, <https://www.lummis.senate.gov/wp-content/uploads/Lummis-Gillibrand-Section-by-Section-Final.pdf> [https://perma.cc/8KG5-6PAQ].

<sup>283</sup> See, e.g., *supra* notes 277–80.

<sup>284</sup> Exec. Order No. 14,067, 87 Fed. Reg. 14,143 (Mar. 9, 2022).

<sup>285</sup> *Id.* at 14,145.

<sup>286</sup> Sullivan & Cromwell LLP, *Executive Order on Digital Assets*, S & C MEMO (Mar. 9, 2022), <https://www.sullcrom.com/files/upload/sc-publication-executive-order-on-digital-assets.pdf> [https://perma.cc/ES3U-FN2A].

and security; financial stability and systemic risk; crime; national security; the ability to exercise human rights; financial inclusion and equity; and energy demand and climate change.<sup>287</sup>

While the Executive Order stops short of calling for a legislative response and does not provide a clear indication of the anticipated direction to be taken, it is further evidence that effective regulation of cryptoassets is a national priority.<sup>288</sup> This Article adds to the discussion of the issue by explaining how unilateral action, such as a sweeping expansion of a single agency's jurisdiction by broadening the definition of "exchange," is not the best way to proceed.<sup>289</sup>

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<sup>287</sup> Exec. Order No. 14,067, 87 Fed. Reg. at 14,143.

<sup>288</sup> See Sullivan & Cromwell LLP, *supra* note 286.

<sup>289</sup> See discussion *supra* notes 270–72 and accompanying text.