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What's Past is Prologue: Enforcing the Federal Securities Laws in the Age of Crypto

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WHAT'S PAST IS PROLOGUE: ENFORCING THE FEDERAL SECURITIES LAWS IN THE AGE OF CRYPTO

GURBIR S. GREWAL*

PROLOGUE

What follows is a speech I delivered at the William & Mary Business Law Review's Third Annual Symposium entitled "Regulating Finance in a Changing Administrative State" on April 1, 2023. Since then, there have been many developments in the world of crypto asset securities, some of which I address in an epilogue to the speech, below.

* Gurbir S. Grewal was appointed Director of the United States Securities and Exchange Commission's (SEC) Division of Enforcement in June 2021, effective July 26, 2021. Immediately before joining the Commission, Gurbir was the Attorney General for the State of New Jersey. Prior to that, he served as the Bergen County Prosecutor, the chief law enforcement officer for New Jersey's most populous county. Earlier in his career, Gurbir served as an Assistant United States Attorney for the District of New Jersey, where he was Chief of the Economic Crimes Unit, and an Assistant United States Attorney for the Eastern District of New York, where he was assigned to the Business and Securities Fraud Unit. He was also an attorney in private practice. He holds a JD from the College of William & Mary, Marshall-Wythe School of Law, and a BS in Foreign Service from the Georgetown University School of Foreign Service. Since assuming the role of Director, Gurbir has focused on enhancing investor protection and confidence in our markets by emphasizing proactive enforcement efforts and stressing the need to create a culture of compliance among market participants.

This Article is provided in the author's official capacity as the SEC's Director of the Division of Enforcement but does not necessarily reflect the views of the Commission, the Commissioners, or other members of the staff.

I would like to thank Theis Finlev, Counsel to the Director; David Hirsch, Chief of the SEC's Crypto Assets and Cyber Unit; and Jorge G. Tenreiro, Deputy Chief of the SEC's Crypto Assets and Cyber Unit, for their assistance with this Speech and Article.

TABLE OF CONTENTS

INTRODUCTION	477
I. EVERYTHING “NEW” IS OLD—REALLY OLD—AND WELL-ESTABLISHED	478
II. INVESTORS IN CRYPTO ASSET SECURITIES ARE BEING HARMED AS WE SPEAK	481
III. INNOVATION AND COMPLIANCE ARE NOT INCOMPATIBLE	486
IV. PUBLIC TRUST REQUIRES ROBUST ENFORCEMENT OF THE SECURITIES LAWS	488
CONCLUSION	492
EPILOGUE.....	492

INTRODUCTION

Thank you to the *William & Mary Business Law Review* for hosting this symposium and for inviting me to participate.

I'm thrilled to be back at my law school alma mater. This is a special place—one that not only helped me hone my legal skills, but also one that helped mold me into a “citizen lawyer.”

For me, it was my experience with the late Professor John Levy and participating in the legal aid clinic that he ran that first showed me how we can use our law degrees to not only protect, but also to uplift others. It's an experience that has helped shape my entire public service journey.

I'm grateful that the law school continues to train excellent citizen lawyers—a number of whom I've had the privilege of working with during my time as New Jersey Attorney General and now at the U.S. Securities and Exchange Commission (SEC).

I am equally grateful that in developing the next generation of citizen lawyers the law school is emphasizing inclusion—a core value that has guided much of my work.

* * *

Today's topic—“Regulating Finance in a Changing Administrative State”—is no doubt a timely one, but also one that could easily serve as my job description. And the panels you've organized touch on nearly every aspect of our work in the Enforcement Division.

So naturally, I have many thoughts I would like to share with you, but before I do, I must make clear that my remarks today are in my official capacity as the Director of the Division of Enforcement, but do not necessarily reflect the views of the Commission, the Commissioners, or other members of the staff.

Perhaps I should also add to that disclaimer that the views I plan to share this morning may not be the most popular you will hear today. I think that is because the theme underlying this symposium is a concept that I not only disagree with, but is also one that is frequently advanced in some corners—that technological innovations have so dramatically transformed the financial

markets since the 1930s, when Congress first passed the federal securities laws and created the SEC to enforce them,¹ that those laws are now somehow ill-suited to regulate our financial markets, especially when it comes to crypto assets.

Some of our critics—perhaps a number of you—argue, instead, that new, bespoke rules and regulations are needed for this particular industry. They believe that this is best achieved either through notice and comment agency rulemaking or by Congress developing an entirely new regulatory framework for crypto assets.

At the same time, a number of defendants are using newly crafted legal concepts like the “major questions doctrine,” to challenge certain SEC enforcement actions as being beyond the authorities Congress delegated to the SEC.²

You will no doubt discuss all of these issues and more throughout the day, but in many cases you will do so in the abstract. What I would like to do this morning is provide you with some context because the securities laws are anything but abstract to the millions of investors that are harmed when promoters of securities, including crypto asset securities, and others engage in fraudulent activity or otherwise violate our rules and regulations.

I. EVERYTHING “NEW” IS OLD—REALLY OLD— AND WELL-ESTABLISHED

The history of our securities laws makes clear that Congress always intended the definition of what is a security to be principles-based and flexible to cover the many kinds of schemes where promoters seek others’ money and promise profits in return.³

Following the stock market crash of 1929, in the midst of the Great Depression and during a period of grave economic

¹ The Securities Act of 1933 (“Securities Act”), 15 U.S.C. § 77a; The Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78a.

² See Allison Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 5 (2024) (noting that the phrase, “major questions doctrine,” “was used just once by any federal judge before 2017, and in only five federal decisions—at any level of court—before 2020.”).

³ Elisabeth A. Keller, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L. REV. 339, 340–41 (1988).

crisis, there was a general loss of trust in our financial markets. In response, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934, which created the SEC, to protect investors and the markets.⁴

A key feature of the Securities Act was to require companies offering “securities” and raising money from the public to register their offerings with the SEC and to provide investors full, fair, and truthful disclosures of material information about their offerings, their financial health, and their executives.⁵ The Act defined “securities” broadly to include various kinds of investments, including what it called an “investment contract.”⁶

No sooner was the Act passed than companies began arguing that whatever they were doing did not constitute the offer and sale of securities and, therefore, they did not need to comply with the law’s registration requirements. To support their positions, the companies often focused on the name or form of the product or transaction, not its substance. They argued that because their form of offering was not specifically enumerated by statute, it did not need to be registered.⁷

Sound familiar?

And as happens today, back then the SEC sued to stop ongoing unregistered securities offerings. Time and again, federal courts focused on the economic reality of the transactions at issue and the broad investor protections Congress intended to advance in enacting the federal securities laws.

And time and again, those courts determined that the transactions at issue—ranging from investment opportunities in oil barrels to fishing boats to silver foxes—did in fact constitute the offer or sale of securities.⁸

⁴ See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194–95 (1976) (explaining that the Securities Act of 1933 was passed in the aftermath of the market crash of 1929 and “was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing.”).

⁵ *Id.*

⁶ Securities Act § 2(a)(1).

⁷ See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 297 (1946); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943).

⁸ See, e.g., *SEC v. Crude Oil Corp.*, 93 F.2d 844, 848 (7th Cir. 1937) (sales of barrels of oil); *SEC v. Pyne*, 33 F. Supp. 988, 989 (D. Mass. 1940) (sales of

And then in 1946, the Supreme Court issued its seminal opinion in *SEC v. Howey*, setting forth the test for what constitutes an “investment contract,” and therefore a security, for purposes of the federal securities laws.⁹ The Court explained that Congress intended “investment contract” to apply broadly to a variety of situations in which individuals invested money in a common enterprise with the expectation that they would earn a profit through the efforts of others.¹⁰ This approach “embodie[d] a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.”¹¹

And *Howey* has proven to be a remarkably flexible and resilient test that courts have since applied to find a wide variety of offerings to be investment contracts and, thus, securities. The list includes offerings related to whiskey, cosmetics, self-improvement courses, and pay phones,¹² as well as a surprising number of creatures: earthworms, beavers, chinchillas, and even cattle embryos.¹³

Notably, none of these offerings involved stocks or bonds or the kinds of investments you or I might have in our portfolios. And that’s really the point of *Howey*: whether something is a security depends on the *substance* of the transaction—not its name, not its form, and not its underlying technology.

shares in fishing boats); *SEC v. Payne*, 35 F. Supp. 873, 877 (S.D.N.Y. 1940) (sales of silver foxes, for breeding and resale purposes).

⁹ *W.J. Howey Co.*, 328 U.S. at 298–301.

¹⁰ *Id.* Courts have since divided the *Howey* test into three elements: (1) an investment of money; (2) in a common enterprise; and (3) with a reasonable expectation of profits derived from the efforts of others.

¹¹ *Id.*

¹² *SEC v. Edwards*, 540 U.S. 389, 391, 397 (2004) (payphone sale-and-leaseback agreements); *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1035 (2d Cir. 1974) (casks of Scotch whiskey); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 485–86 (5th Cir. 1974) (cosmetics distributorships); *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482–83 (9th Cir. 1973) (self-improvement courses).

¹³ *Eberhardt v. Waters*, 901 F.2d 1578, 1579, 1582 (11th Cir. 1990) (cattle embryos); *Smith v. Gross*, 604 F.2d 639, 641–43 (9th Cir. 1979) (earthworms); *Miller v. Cent. Chinchilla Grp., Inc.*, 494 F.2d 414, 415–16 (8th Cir. 1974) (chinchillas); *Cont’l Mktg. Corp. v. SEC*, 387 F.2d 466, 468, 471 (10th Cir. 1967) (beavers).

As Justice Thurgood Marshall put it decades later, “Congress painted with a broad brush,”¹⁴ and its “purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called.”¹⁵

Critics who now dismiss *Howey* as outdated because it involved orange groves nearly 80 years ago and demand a new regulatory regime overlook this history and, I think, completely miss the point: the definition of a security is, and has always been, principles-based to allow for the flexibility that comes with innovative investment products, technology-driven or otherwise.

II. INVESTORS IN CRYPTO ASSET SECURITIES ARE BEING HARMED AS WE SPEAK

Against this backdrop, the “major question” for us is: are investors being hurt within our remit? If the answer is yes, then we must act, and we must do so with a sense of urgency. And increasingly, the answer to that question has been yes.

The current turmoil in the crypto markets is taking a real toll on everyday Americans. According to one survey, approximately 16% of U.S. adults have invested, traded, or used crypto, and among that group approximately 46% report their investments have done worse than they expected.¹⁶ While some of this may be the result of natural market forces, some of it is certainly due to fraud and other unlawful activity.

Let me give you an overview of the type of activity we are encountering because it’s quite often left out of conversations like the ones you will have at this conference. To date, the SEC has charged many issuers with failing to register initial coin offerings, as well as their offerings of so-called lend, earn, and staking products, meaning that the offerings lacked required disclosures—disclosures that ensure that investors can make informed investment decisions.¹⁷

¹⁴ *Reves v. Ernst & Young*, 494 U.S. 56, 60 (1990).

¹⁵ *Id.* at 61.

¹⁶ See Michelle Faverio & Navid Massarat, *46% of Americans Who Have Invested in Cryptocurrency Say It’s Done Worse Than Expected*, PEW RSCH. CTR. (Aug. 23, 2022), <https://www.pewresearch.org/fact-tank/2022/08/23/46-of-americans-who-have-invested-in-cryptocurrency-say-its-done-worse-than-expected/> [<https://perma.cc/5KNU-MXQ9>].

¹⁷ See, e.g., Press Release, SEC, Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay \$30 Million

The SEC has also alleged in a number of our actions that certain unregistered crypto offerings are nothing but straight rips, Ponzi schemes, affinity frauds, or other types of scams.¹⁸

to Settle SEC Charges (Feb. 9, 2023) (settled order), <https://www.sec.gov/news/press-release/2023-25> [<https://perma.cc/9VD4-VKYS>] (announcing the SEC charging Kraken “with failing to register the offer and sale of its crypto asset staking-as-a-service program whereby investors transfer crypto assets to Kraken for staking in exchange for advertised annual investment returns of as much as 21 percent.”); Press Release, SEC, SEC Charges Genesis and Gemini for the Unregistered Offer and Sale of Crypto Asset Securities through the Gemini Earn Lending Program (Jan. 12, 2023), <https://www.sec.gov/news/press-release/2023-7> [<https://perma.cc/Y2K7-J9L8>] (announcing the SEC charging Genesis and Gemini “for the unregistered offer and sale of” “the Gemini Earn crypto asset lending program” through which Gemini customers loaned their crypto assets to Genesis in exchange for Genesis’s promise to pay interest); Press Release, SEC, BlockFi Agrees to Pay \$100 Million in Penalties and Pursue Registration of its Crypto Lending Product (Feb. 14, 2022) (settled order), <https://www.sec.gov/news/press-release/2022-26> [<https://perma.cc/SLX8-WMWP>] (announcing the SEC charging BlockFi “with failing to register the offer and sale of its retail crypto lending product”); Press Release, SEC, SEC Charges Three Individuals in Digital Asset Frauds (Feb. 1, 2021), <https://www.sec.gov/news/press-release/2021-22> [<https://perma.cc/M6PU-ZLT7>] (announcing the SEC charging “three individuals with defrauding hundreds of retail investors out of more than \$11 million through two fraudulent and unregistered digital asset securities offerings”); Press Release, SEC, Unregistered ICO Issuer Agrees to Disable Tokens and Pay Penalty for Distribution to Harmed Investors (Sept. 15, 2020) (settled order), <https://www.sec.gov/news/press-release/2020-211> [<https://perma.cc/62EC-RDU4>] (announcing the SEC charging operator of an online eSports gaming and gambling platform with “conduct[ing] . . . unregistered initial coin offering . . . of digital asset securities”); Press Release, SEC, SEC Charges Film Producer, Rapper, and Others for Participation in Two Fraudulent ICOs (Sept. 11, 2020) (settled order against some parties), <https://www.sec.gov/news/press-release/2020-207> [<https://perma.cc/7L3U-Q6J9>] (announcing the SEC charging film producer and others for their roles in unregistered and fraudulent ICOs in which producer allegedly misappropriated millions of dollars raised from ICOs to fund own lavish purchases); Press Release, SEC, SEC Charges Issuer and CEO With Misrepresenting Platform Technology in Fraudulent ICO (Aug. 13, 2020) (settled order), <https://www.sec.gov/news/press-release/2020-181> [<https://perma.cc/HK3X-KHFL>] (announcing the SEC charging Boon.Tech and CEO with fraud and unregistered offer and sale of “\$5 million . . . ICO of digital asset securities.”).

¹⁸ See, e.g., Press Release, SEC, SEC Charges Exiled Chinese Businessman Miles Guo and His Financial Advisor William Je in \$850 Million Fraud Scheme (Mar. 15, 2023), <https://www.sec.gov/news/press-release/2023-50> [<https://perma.cc/N26D-ANEE>] (announcing the SEC charging Guo for his role in several unregistered and fraudulent offerings, including fraudulent crypto asset offering known as H-Coin or Himalaya Coin which “raised hundreds of millions of

In the actions the SEC has recently brought in this space, our allegations have described, among other things:

- Products labeled as “defi” offerings that are neither decentralized, nor finance, but rather frauds;¹⁹
- Stablecoins that are neither stable, nor coins, but rather fraudulent;²⁰
- So-called “trusted” protocols and “smart contracts” that, despite representations to the contrary, can be, and are, used to manipulate the market for crypto asset securities;²¹

dollars”); Press Release, SEC, Charges Creator of CoinDeal Crypto Scheme and Seven Others in Connection with \$45 Million Fraud (Jan. 4, 2023), <https://www.sec.gov/news/press-release/2023-2> [<https://perma.cc/5KJ4-MNQQ>] (announcing the SEC charging promoters for falsely claiming that investors could earn “extravagant returns by investing in a blockchain technology called CoinDeal that would be sold for trillions of dollars to a group of prominent and wealthy buyers.” SEC alleged that supposed sale never occurred and promoters “misappropriated millions of dollars of investor funds for their personal use.”); Press Release, SEC, SEC Charges Creator of Global Crypto Ponzi Scheme and Three US Promoters in Connection with \$295 Million Fraud (Nov. 2, 2022), <https://www.sec.gov/news/press-release/2022-201> [<https://perma.cc/3UQS-NT7L>] (announcing the SEC charging individuals for their role in “a fraudulent crypto Ponzi scheme that raised” bitcoin worth more than \$295 million “from more than 100,000 investors worldwide”); Press Release, SEC, SEC Charges The Hydrogen Technology Corp. and its Former CEO for Market Manipulation of Crypto Asset Securities (Sept. 28, 2022), <https://www.sec.gov/news/press-release/2022-175> [<https://perma.cc/F52K-94AL>] (announcing the SEC charging Hydrogen Technology Corp. and former CEO for roles in “unregistered offers and sales of crypto asset securities called “Hydro” and for perpetrating a scheme to manipulate the trading volume and price of those securities,” “yield[ing] more than \$2 million for Hydrogen”).

¹⁹ See, e.g., Blockchain Credit Partners et al., Securities Act Release No. 10961, Exchange Act Release No. 92588, Administrative Proceeding File No. 3-20453, 2021 WL 3470599, at *1–2 (Aug. 6, 2021) (settled order) (alleging that “DeFi Money Market” used smart contracts and “decentralized finance” to sell \$30 million in unregistered and fraudulent offerings).

²⁰ See, e.g., Press Release, SEC, SEC Charges Terraform and CEO Do Kwon with Defrauding Investors in Crypto Schemes (Feb. 16, 2023), <https://www.sec.gov/news/press-release/2023-32> [<https://perma.cc/UZ9V-SDTC>] (announcing the SEC alleging that price of purported “Terra USD” stablecoin was in fact controlled by defendants).

²¹ See, e.g., Press Release, SEC, SEC Charges Avraham Eisenberg with Manipulating Mango Markets’ ‘Governance Token’ to Steal \$116 Million of Crypto Assets (Jan. 20, 2023), <https://www.sec.gov/news/press-release/2023-13>

- Platforms, protocols, and exchanges that fail to provide any details about their cybersecurity risks subjected to malicious attacks that result in investor harm;²² and
- In the end, investors, large and small, defrauded, and billions in customer assets misused or stolen.²³

Some of these alleged schemes have resulted in lines of investor victims at the doors of bankruptcy courts hoping to recover a fraction of their hard-earned money.²⁴

And just this week, the SEC alleged that a noncompliant crypto intermediary simultaneously acted as exchange, broker, and clearing agency without registering with the SEC—thereby

[<https://perma.cc/B7GB-GSCP>] (announcing the SEC alleging Eisenberg used accounts he controlled on Mango Markets crypto asset trading platform to manipulate market for so-called governance token MNGO).

²² See, e.g., *id.*; see generally Complaint, SEC v. BitConnect, No. 1:21-cv-07349 (S.D.N.Y. Sept. 1, 2021) (alleging that approximately \$1.71 million worth of Bitcoin stolen in hack).

²³ See, e.g., *supra* notes 7–11 and accompanying text; Press Release, SEC, SEC Charges Four Individuals in Crypto Pyramid Scheme that Targeted Spanish-Speaking Communities (Dec. 14, 2023), <https://www.sec.gov/news/press-release/2022-227> [<https://perma.cc/WQ3T-K9QV>] (announcing the SEC alleging defendants created and promoted “a fraudulent crypto asset pyramid scheme that raised more than \$8.4 million from hundreds of retail investors primarily from Spanish-speaking communities . . .”); Press Release, SEC, SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX (Dec. 13, 2022) [hereinafter SEC Charges Samuel Bankman-Fried], <https://www.sec.gov/news/press-release/2022-219> [<https://perma.cc/7LR7-FKC2>] (announcing the SEC alleging Samuel Bankman-Fried orchestrated scheme to defraud investors in FTX crypto trading platform and misappropriated FTX customer funds for lavish real estate purchases and other personal purchases).

²⁴ See, e.g., David Yaffe-Bellany, *Embattled Crypto Exchange FTX Files for Bankruptcy*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/business/ftx-bankruptcy.html> [<https://perma.cc/Z4F5-D5RJ>]; Hamza Shaban, *Crypto Broker Voyager Digital Files for Bankruptcy as Industry Falter*, WASH. POST (July 6, 2022, 12:33 PM), <https://www.washingtonpost.com/business/2022/07/06/voyager-bankruptcy-three-arrows/> [<https://perma.cc/Q5X5-SXL5>]; MacKenzie Sigalos, *Voyager Customer Lost \$1 Million Saved Over 24 Years and Is One of Many Now Desperate to Recoup Funds*, CNBC (Aug. 15, 2022, 3:45 PM), <https://www.cnbc.com/2022/08/15/voyager-customers-beg-new-york-judge-for-money-back-after-bankruptcy.html> [<https://perma.cc/K9FJ-2CF>].

putting investors at risk from conflicts of interest and inadequate oversight.²⁵

So, while we can appreciate the innovation around, and the technological advancements of, blockchain and distributed ledger technology, we must also be cognizant of the risks and harms to investors associated with the related products and offerings. As in any other space, we have a duty to analyze whether the activity is subject to the federal securities laws and, if so, whether those laws have been violated.

And that's precisely what we have done. Over the last decade, based on Enforcement Division investigations and recommendations, the SEC has brought well over 100 crypto-related actions involving unlawful activity across the crypto markets as I have just outlined.

And in every case, where federal courts have had to determine whether there were "securities" at issue, the courts have applied the *Howey* test—looked at the economic realities of the offerings, and, even though the offerings at issue involved supposedly novel technologies, rejected defense arguments that they were not securities.²⁶

During this same period, the SEC has spoken clearly and consistently about the applicability of the securities laws in the crypto space, citing decades of Supreme Court precedent explaining

²⁵ See, e.g., Press Release, SEC, SEC Charges Crypto Trading Platform Beaxy and its Executives for Operating an Unregistered Exchange, Broker, and Clearing Agency (Mar. 29, 2023) [hereinafter SEC Charges Beaxy], <https://www.sec.gov/news/press-release/2023-64> [<https://perma.cc/X527-877S>] (announcing the SEC alleging crypto asset trading platform beaxy.com and its executives operated unregistered exchange, clearing agency, and broker).

²⁶ SEC v. LBRY, Inc., 639 F. Supp. 3d 211, 221–22 (D.N.H. 2022) (granting SEC summary judgment on grounds that LBRY offered blockchain token LBC as a security); SEC v. Kik Interactive Inc., 492 F. Supp. 3d 169, 174, 182–84 (S.D.N.Y. 2020) (granting SEC summary judgment on grounds that Kik offered digital currency Kin as a security); SEC v. Telegram Group Inc., 448 F. Supp. 3d 352, 359 (S.D.N.Y. 2020) (finding SEC has shown substantial likelihood of success on motion for preliminary injunction); SEC v. Blockvest, LLC, 18-CV-2287-GPB(BLM), 2019 WL 625163, at *9, *11 (S.D. Cal. Feb. 14, 2019) (same). See also United States v. Zaslavskiy, 17-CR-647, 2018 WL 434 6339, at *7, *9 (E.D.N.Y. Sept. 11, 2018) (denying criminal defendant's motion to dismiss indictment on the grounds that virtual currencies did not constitute securities).

the test for determining whether something is an “investment contract,” and thus a security.²⁷

To put it bluntly, there is not a lawyer or market participant in this area that does not know the applicable regulatory framework and tests. As Chair Gensler has stated, “Not liking the message isn’t the same thing as not receiving it.”²⁸ That is also likely why courts have rejected “fair notice” and due process arguments in a number of these actions.²⁹

III. INNOVATION AND COMPLIANCE ARE NOT INCOMPATIBLE

I would like to turn now to another topic that also sometimes gets lost in the headlines, and that is the importance of compliance in the crypto markets.

First, when issuers of crypto asset securities do not comply with registration requirements, investors and analysts do not

²⁷ See SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, 117 SEC Docket 745 (July 25, 2017) [hereinafter DAO Report] (finding that tokens offered and sold by a “virtual” organization known as “The DAO” were securities and therefore subject to the federal securities laws) (citing SEC v. Edwards, 540 U.S. 389, 393 (2004); SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946); United Housing Found., Inc. v. Forman, 421 U.S. 837, 852–53 (1975); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)); Munchee Inc., Securities Act Release No. 10445, 118 SEC Docket 975, 979 (Dec. 11, 2017) (“As the Commission discussed in the DAO Report, tokens, coins or other digital assets issued on a blockchain may be securities under the federal securities laws, and, if they are securities, issuers and others who offer or sell them in the United States must register the offering and sale with the Commission or qualify for an exemption from registration.”); STRATEGIC HUB FOR INNOVATION AND FINANCIAL TECHNOLOGY (FINHUB), *Framework for Investment Contract Analysis of Digital Assets*, SEC (Apr. 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [<https://perma.cc/3G6P-GG85>].

²⁸ Gary Gensler, Chair, SEC, SEC Speaks: Kennedy and Crypto (Sept. 8, 2022) [hereinafter Gensler, Kennedy and Crypto], <https://www.sec.gov/news/speech/gensler-sec-speaks-090822> [<https://perma.cc/44GX-YRTG>].

²⁹ *LBRY*, 639 F. Supp. 3d at 221–22 (granting summary judgment for SEC and rejecting fair notice defense, explaining that “[t]he SEC has not based its enforcement action here on a novel interpretation of a rule that by its terms does not expressly prohibit the relevant conduct. Instead, the SEC has based its claim on a straightforward application of a venerable Supreme Court precedent that has been applied by hundreds of federal courts across the country over more than 70 years.”); *Kik Interactive Inc.*, 492 F. Supp. 3d at 183; *Zaslavskiy*, 2018 WL 4346669, at *9.

get mandatory disclosures about the issuer, their offerings, and their financial condition. Investors cannot make informed investment decisions without that information. Disclosures that are especially important in a market of thousands of different offerings involving technology that most laypeople do not understand.³⁰

Second, in a compliant securities market, separate functions generally are performed by different legal entities, each of which are subject to separate regulations that protect investors. This creates separation and even a healthy degree of antagonism between the functions: brokers do not want to execute their clients' trades on questionable exchanges, and exchanges do not want to work with unreliable clearing agencies. Importantly, national securities exchanges do not take custody of assets that trade on the exchange and thus do not have the ability to lend them out or use them to make risky bets.

In contrast, in the crypto world sometimes these functions collapse under one roof, as we alleged just this week with respect to the Beaxy exchange.³¹ This aggregation of functions creates significant conflicts of interest and exponentially increases risk of investor harm as we saw with the collapse of FTX, where we allege that Sam Bankman-Fried and others not only fraudulently raised billions of dollars from investors in FTX, but also misused billions in funds belonging to FTX's trading customers.³²

Finally, in a compliant securities market, the firms fulfilling these various functions, such as exchanges, broker-dealers, and clearinghouses, are subject to supervision, oversight, and examination by the SEC.³³ Among other things, they are required to maintain books and records and make them available to the SEC, and they are required to have internal controls.³⁴ This all provides additional, essential layers of protection for investors.

The quarrel, therefore, is with noncompliant actors, not the technology or its promises. The technology is actually beside

³⁰ See *Today's Cryptocurrency Prices by Market Cap*, COINMARKETCAP, <https://coinmarketcap.com> (demonstrating the vast number of cryptocurrency available and its complexity).

³¹ See SEC Charges Beaxy, *supra* note 25.

³² See SEC Charges Samuel Bankman-Fried, *supra* note 23.

³³ See Exchange Act, 15 U.S.C. § 78o.

³⁴ See 17 C.F.R. § 240.13a-15.

the point. We have to regulate markets and protect investors based on current realities and existing risks. There are no exceptions to the application of the federal securities laws based on the future potential or benefits that an offering may provide.

Moreover, innovation and compliance with the securities laws are not mutually exclusive. As Chair Gensler has repeatedly stated, the SEC staff stand ready to work with crypto entrepreneurs and understand the need to be flexible in applying our disclosure requirements.³⁵

IV. PUBLIC TRUST REQUIRES ROBUST ENFORCEMENT OF THE SECURITIES LAWS

I would like to finish by touching on a topic that's important to this conversation and a bit personal for me: public trust.

In my early speeches as Enforcement Director, I spoke about the declining trust in our financial institutions and markets.³⁶ While there is no single cause for this decline, it is in part due to the perception that we—the regulators—are failing to hold bad actors accountable, coupled with the belief that there are two sets of rules: one for the big and powerful and another for everyone else.

None of this is abstract either. I've seen it firsthand as a federal, county, and state prosecutor. I saw it firsthand speaking to victims as my state's attorney general, and I see it now in this role. And the effects of this diminished trust can be especially pronounced among minority and marginalized communities.

For example, studies show that a majority of Black Americans, Hispanic Americans, and LGBTQ Americans feel that traditional financial institutions “are not meant for people like me.”³⁷ Due to historical injustices and negative experiences, many

³⁵ See Gensler, Kennedy and Crypto, *supra* note 28.

³⁶ See, e.g., Gurbir S. Grewal, Dir., Div. of Enforcement, SEC, Remarks at SEC Speaks 2021 (Oct. 13, 2021), <https://www.sec.gov/news/speech/grewal-sec-speaks-101321> [<https://perma.cc/CK6U-74QL>].

³⁷ See Charisse Jones & Jessica Menton, *Black, Latino, LGBTQ investors see crypto investments like bitcoin as 'a new path' to wealth and equity*, USA TODAY (Aug. 15, 2021), <https://www.yahoo.com/now/black-latino-lgbtq-investors-see-100412051.html> [<https://perma.cc/HX86-ALCF>] (citing a 2021 Harris Poll for USA Today).

members of these communities may also have skepticism, or outright hostility, towards the government.

This lack of trust can lead to further victimization. I've seen this with certain types of affinity frauds, especially among immigrant communities, where the perpetrator may appeal to the victims' closeness to their own community and potentially their suspicion of outsiders.³⁸

Not infrequently, we encounter suspicion so strong that the victims are reluctant to cooperate with us or believe our allegations even in the face of overwhelming evidence of the fraud.

And through these experiences, I have developed a playbook, one that we are employing at the Enforcement Division, to protect investors and reclaim and enhance public trust. It's built on three principles: **robust enforcement**—moving our investigations with a sense of urgency and addressing emerging risks; **robust remedies**—seeking penalties and remedies at levels adequate to both hold bad actors accountable and deter misconduct; and **robust compliance**—working with market participants and gatekeepers to create a culture of compliance and cooperation to prevent misconduct.³⁹

Another response to this decline in trust has been the “predatory inclusion” tactics of crypto entities directed at Black, brown, and other marginalized communities.⁴⁰ Here, I'm talking about the familiar (but so far unsupported) narratives that crypto will be predicated on a permissionless and trustless environment; that it will increase financial inclusion;⁴¹ that it will uplift the

³⁸ See, e.g., SEC Halts Crypto Asset-Related Fraud Victimized Latino Investors, SEC Litigation Release No. 25547 (Oct. 3, 2022), <https://www.sec.gov/litigation/litreleases/lr-25547> [<https://perma.cc/V6RT-96A5>] (explaining that the SEC obtained emergency relief in an action alleging that defendant held paid classes for the ostensible purpose of educating and empowering the Latino community to build wealth through crypto asset trading, but was running a Ponzi scheme that raised over \$12 million from more than 5,000 investors).

³⁹ See, e.g., Gurbir S. Grewal, Dir., Div. of Enforcement, SEC, Remarks at PLI Broker/Dealer Regulation and Enforcement 2021 (Oct. 6, 2021), <https://www.sec.gov/news/speech/grewal-pli-broker-dealer-regulation-and-enforcement-100621> [<https://perma.cc/5B2T-FS38>].

⁴⁰ See, e.g., *supra* note 38 and accompanying text.

⁴¹ See, e.g., Tonantzin Carmona, *Debunking the Narratives About Cryptocurrency and Financial Inclusion*, BROOKINGS (Oct. 6, 2022), <https://www.brook>

unbanked or underbanked; that it will help them build wealth and increase upward mobility; and that if you “step right up, everyone’s a winner.”⁴²

We’ve also seen predatory tactics on full display in case after case, where the SEC has alleged that “influencers” are touting unregistered offerings to investors without disclosing that they are being compensated to do so.⁴³ We allege they do so by lying about their returns from their own, in some cases fictional, crypto investments, and without disclosing they are being paid tens of thousands of dollars for their tweets.⁴⁴

ings.edu/articles/debunking-the-narratives-about-cryptocurrency-and-financial-inclusion/ [https://perma.cc/XY9D-FY4B] (“[C]rypto may offer access to financial services (according to the industry’s narratives), but with the caveats of high risks and insufficient consumer protections.”); *see also* Alex Fredman & Todd Phillips, *Claims That Crypto Bolsters Financial Inclusion Are Dubious*, CTR. FOR AM. PROGRESS (Mar. 25, 2022), <https://www.americanprogress.org/article/claims-that-crypto-bolsters-financial-inclusion-are-dubious/> [https://perma.cc/4JQK-ZZYA] (noting that advocates’ claims that cryptocurrencies improve access to financial services lack evidence).

⁴² Much like the persona assumed by Tom Waits in his 1976 song “Step Right Up,” crypto proponents often put forward a list of the life-altering benefits that crypto provides. TOM WAITS, *Step Right Up*, on SMALL CHANGE (Asylum Records 1976). *See, e.g.*, Complaint, SEC v. Chandran, No. 23-cv-10017 (E.D. Mich. 2023) (discussing how the SEC is alleging that the defendants “creat[ed] and publiciz[ed] astronomical payout scales that ranged from multi-million dollar returns for investments of \$1,000 or less, to returns in excess of \$50 billion for investments of \$100,000.”).

⁴³ *See, e.g.*, Press Release, SEC, SEC Charges Crypto Entrepreneur Justin Sun and His Companies for Fraud and Other Securities Law Violations (Mar. 22, 2023) (settled orders against some parties), <https://www.sec.gov/news/press-release/2023-59> [https://perma.cc/74KQ-VQWW] (alleging that celebrities Lindsay Lohan, Jake Paul, DeAndre Cortez Way (Soulja Boy), Austin Mahone, Michele Mason (Kendra Lust), Miles Parks McCollum (Lil Yachty), Shaffer Smith (Ne-Yo), and Aliaune Thiam (Akon) illegally touted crypto asset securities Tronix (TRX) and BitTorrent (BTT) without disclosing that they were compensated for doing so); Press Release, SEC, SEC Charges NBA Hall of Famer Paul Pierce for Unlawfully Touting and Making Misleading Statements about Crypto Security (Feb. 17, 2023) (settled order), <https://www.sec.gov/news/press-release/2023-34> [https://perma.cc/G65K-4JEW]; Press Release, SEC, SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security (Oct. 3, 2022) (settled order), <https://www.sec.gov/news/press-release/2022-183> [https://perma.cc/Z2Q3-YP9J]

⁴⁴ *See, e.g.*, Paul Anthony Pierce, Securities Act Release No. 11157, Administrative Proceeding File No. 3-2130 (Feb. 17, 2023) (settled order) (finding

Whether it's the direct result of these efforts or for other reasons beyond the scope of this presentation, crypto assets are the only major financial products that Black Americans are more likely to own than white Americans.⁴⁵ And there is some evidence that Black and brown investors have now been disproportionately harmed during the downturn of crypto markets over the last two years.⁴⁶

But despite such losses in the crypto industry, distrust in the traditional financial system is still driving investors towards crypto. We saw that just a few weeks ago when the collapse of Silicon Valley Bank and questions about the stability of the wider banking system pushed increased interest in crypto assets.⁴⁷

In some ways, we are now at the intersection of the two responses to addressing diminished public trust I just outlined. People who looked to crypto as a refuge from the ills of traditional finance are now experiencing those same ills in the crypto markets. They are being harmed by the very types of behavior that led Congress to create the securities laws in the first place—the same behaviors that have led to reduced trust in the markets: misstatements or misleading disclosures, conflicts of interest, and insiders abusing their positions for personal advantages at the expense of ordinary investors.⁴⁸

that Pierce tweeted misleading statements related to EMAX tokens, which he was paid to promote, including tweeting a screenshot of an account showing large holdings and profits without disclosing that his own personal holdings were in fact much lower than those in the screenshot).

⁴⁵ See, e.g., *Why the crypto crash hit black Americans hard*, THE ECONOMIST (May 20, 2022), <https://www.economist.com/graphic-detail/2022/05/20/why-the-crypto-crash-hit-black-americans-hard> [<https://perma.cc/NY3S-922X>].

⁴⁶ See, e.g., *id.*; see also Adrian Ma, *The promise and peril of crypto for Black investors*, NPR (June 28, 2022), <https://www.npr.org/2022/06/28/1108413738/the-promise-and-peril-of-crypto-for-black-investors> [<https://perma.cc/A4VP-QPBH>]; Paulina Cachero, *Crypto Collapse Threatens to Leave Black, Hispanic Investors Further Behind*, BLOOMBERG (July 7, 2022), <https://www.bloomberg.com/news/articles/2022-07-07/crypto-collapse-threatens-to-leave-black-hispanic-investors-further-behind> [<https://perma.cc/2CZD-CYMK>].

⁴⁷ See, e.g., Jacquelyn Melinek, *Top crypto app downloads rise over 15% following SVB collapse*, TECHCRUNCH (Mar. 16, 2023), <https://techcrunch.com/2023/03/16/top-crypto-app-downloads-rise-over-15-following-svb-collapse/> [<https://perma.cc/93R2-YHDV>].

⁴⁸ See *supra* note 3 and accompanying text.

I believe that in this moment, we have to leverage the playbook I described. We must act with all the tools at our disposal to protect investors and enhance public trust and confidence in our markets.

This means continuing to get behind the labels, focusing on substance over form, ensuring that actors comply with the securities laws, and holding those that do not accountable, without fear or favor.

CONCLUSION

In the end, I believe that it should be against this backdrop of real investor harm, precedent, and the need to enhance public trust and confidence in our markets, that you consider the familiar industry talking points (or tweets in this day and age), that I'm certain you'll hear (or reference) throughout the day—that according to some we are exceeding our authority, regulating by enforcement, stifling innovation, and driving it overseas.

As long as investors in securities are being harmed now, we must act now.

Thank you again to the *William & Mary Business Law Review* for inviting me to speak to you today. I am privileged to have had this opportunity and I hope that you have a great, contextualized discussion today.

Thank you so much.

EPILOGUE

By the time I became Enforcement Director in July 2021, the SEC had already brought dozens of enforcement actions to address widespread noncompliance in the crypto markets. But, noncompliance, and the attendant investor risk, remained pervasive. Meanwhile, four months later, the combined market capitalization of crypto assets reached approximately \$3 trillion.⁴⁹ This marked a 15-fold increase from just two years earlier.⁵⁰ Soon

⁴⁹ *Global Live Cryptocurrency Charts & Market Data*, COINMARKETCAP, <https://coinmarketcap.com/charts/> (last visited Apr. 8, 2024).

⁵⁰ *Id.* The market capitalization of crypto assets was around \$200 billion in November 2019.

after, however, the crypto market cratered, abetted by a series of high-profile failures and bankruptcies of major firms that caused extensive investor losses.⁵¹ It lost two-thirds of its market capitalization in just nine months, shedding value even quicker than it had gained it.⁵²

In short, my tenure as Director has coincided with extreme volatility and investor risk in the crypto markets. This has been vividly demonstrated by the dramatic increase in the number of complaints about crypto that investors submitted to the SEC's Office of Investor Education and Advocacy ("OIEA"), from 820 in fiscal year 2019,⁵³ the first year that OIEA's annual list of Top Ten Categories of Complaints included crypto, to 5,357 in fiscal year 2023.⁵⁴

In response to this upheaval and rampant noncompliance, we have redoubled our enforcement efforts, some of which I was privileged to highlight in my speech at William & Mary. Perhaps unsurprisingly, there have been even more developments in the crypto markets since those remarks. Just days later, the Pew Research Center released a survey finding that nearly a third of Americans who had ever invested in, traded, or used crypto, no longer held any.⁵⁵ The number of lower-income Americans who had gotten out of crypto was even higher, at 43%,⁵⁶ providing

⁵¹ See, e.g., Ari Levy & MacKenzie Sigalos, *Crypto peaked a year ago—investors have lost more than \$2 trillion since*, CNBC (Nov. 14, 2022, 3:07 AM), <https://www.cnbc.com/2022/11/11/crypto-peaked-in-nov-2021-investors-lost-more-than-2-trillion-since.html> [<https://perma.cc/T94T-3N77>]; *Crypto's string of bankruptcies*, REUTERS (Jan. 20, 2023), <https://www.reuters.com/business/finance/cryptos-string-bankruptcies-2023-01-20/> [<https://perma.cc/C9MS-8UR4>].

⁵² See, e.g., *Global Live Cryptocurrency Charts & Market Data*, *supra* note 49.

⁵³ *Investor Complaints Data Archive*, SEC (Feb. 22, 2024), <https://www.sec.gov/data/investor-complaints-data-archive> [<https://perma.cc/3SSZ-JAJV>].

⁵⁴ *Investor Complaints and Questions*, SEC (Feb. 20, 2024), <https://www.sec.gov/data/investor-complaints-data> [<https://perma.cc/6DNK-7Q4T>].

⁵⁵ Michelle Faverio & Olivia Sidoti, *Majority of Americans aren't confident in the safety and reliability of cryptocurrency*, PEW RSCH. CTR. (Apr. 10, 2023), <https://www.pewresearch.org/short-reads/2023/04/10/majority-of-americans-are-not-confident-in-the-safety-and-reliability-of-cryptocurrency/> ("Roughly three-in-ten adults (31%) who have ever invested in, traded or used cryptocurrency say they currently do not have any cryptocurrency.")

⁵⁶ *Id.* ("Those who live in lower-income households (43%) are more likely than those in middle- (30%) or upper-income (21%) households to have given up cryptocurrency.")

another vivid rejoinder to the narrative that crypto will uplift the unbanked, help them build wealth, and increase upward mobility.⁵⁷

The same survey found that a whopping three-quarters of Americans who have heard about crypto do not believe that crypto is reliable and safe.⁵⁸ Given the continued noncompliance in this space, they have good reasons to be concerned. For example, in June 2023, the SEC charged the operators of the largest crypto asset trading platform in the world with allegedly combining the functions of an exchange, broker, dealer, and clearing agency without complying with the registration provisions of the federal securities laws applicable to any of those functions, depriving investors of crucial investor protections.⁵⁹ The SEC's complaint also alleged that the operators commingled certain customer assets and attempted to evade U.S. securities laws by announcing sham controls that they disregarded so that they could keep high-value U.S. customers on their platforms.⁶⁰

The next day, the SEC also charged the operator of the largest crypto asset trading platform in the United States with intertwining the traditional services of an exchange, broker, and clearing agency without complying with the registration provisions applicable to any of them.⁶¹ Taken together, these matters,

⁵⁷ See, e.g., *supra* note 49.

⁵⁸ “Among the vast majority of Americans who say they have heard at least a little about cryptocurrency (88%), three-quarters say they are not confident that current ways to invest in, trade or use cryptocurrencies are reliable and safe, according to a Pew Research Center survey conducted March 13–19.” Faverio & Sidoti, *supra* note 55.

⁵⁹ See Press Release, SEC, SEC Files 13 Charges Against Binance Entities and Founder Changpeng Zhao (June 5, 2023), <https://www.sec.gov/news/press-release/2023-101> [<https://perma.cc/D76F-H5DT>].

⁶⁰ Underscoring the risks presented by the violations charged in the SEC's complaint, in November 2023, Binance pleaded guilty to criminal charges for failing to maintain an effective anti-money laundering program, conducting an unlicensed money transmitting business, and violating sanctions laws. Binance agreed to pay over \$4 billion to resolve the Justice Department's charges. Its founder Changpeng Zhao also pleaded guilty to failing to maintain an effective anti-money laundering program. See Press Release, DOJ, Binance and CEO Plead Guilty to Federal Charges in \$4B Resolution (Nov. 21, 2023), <https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution> [<https://perma.cc/AV2H-KR7E>].

⁶¹ See Press Release, SEC, SEC Charges Coinbase for Operating as an Unregistered Securities Exchange, Broker, and Clearing Agency (June 6, 2023), <https://www.sec.gov/news/press-release/2023-102> [<https://perma.cc/C8HU-6RJP>].

which were brought just about two months after my remarks, highlight what I believe to be the continued risk to investors in the crypto markets.⁶²

As if that were not enough, the Enforcement Division continues to address fraud and noncompliance in new and old forms in the crypto space. Among others, the SEC filed its first actions charging the illegal unregistered offerings of crypto asset securities in the form of purported non-fungible tokens (NFTs), applying the same well-trod test discussed above to determine that the NFTs were offered and sold as “investment contracts,” and therefore were securities.⁶³ The SEC also brought its first case charging a purportedly decentralized autonomous organization with failing to register its pooled crypto asset vehicles as investment companies, as required under the federal securities laws.⁶⁴ And in another recent action, the SEC brought charges against individuals allegedly responsible for a \$1.7 billion crypto asset-related pyramid scheme.⁶⁵

Also notable, since my remarks, several courts have issued rulings in ongoing litigation expressly reaffirming *Howey*'s application to crypto assets and rejecting not only the defendants' blanket arguments that the crypto assets at issue were not securities, but also, in the case where the court addressed it, their attempt to invoke the “major questions doctrine.”⁶⁶ One of those

⁶² Both matters were being actively litigated in United States District Courts at the time this Article was submitted for publication.

⁶³ See Press Release, SEC, SEC Charges LA-Based Media and Entertainment Co. Impact Theory for Unregistered Offering of NFTs (Aug. 28, 2023) (settled order), <https://www.sec.gov/news/press-release/2023-163> [<https://perma.cc/PHE9-NTN6>]; see Press Release, SEC, SEC Charges Creator of Stoner Cats Web Series for Unregistered Offering of NFTs (Sept. 13, 2023) (settled order), <https://www.sec.gov/news/press-release/2023-178> [<https://perma.cc/8HCD-9RGD>].

⁶⁴ See Press Release, SEC, BarnBridge DAO Agrees to Stop Unregistered Offer and Sale of Structured Finance Crypto Product (Dec. 22, 2023) (settled order), <https://www.sec.gov/news/press-release/2023-258> [<https://perma.cc/JY3P-QF5C>].

⁶⁵ See Press Release, SEC, SEC Charges Founder of \$1.7 Billion “HyperFund” Crypto Pyramid Scheme and Top Promoter with Fraud (Jan. 29, 2024), <https://www.sec.gov/news/press-release/2024-11> [<https://perma.cc/S89K-X6P7>].

⁶⁶ See *SEC v. Wahi*, No. 2:22-cv-01009-TL, 2024 WL 896148, at *6 (W.D. Wash. Mar. 1, 2024) (holding that, “under *Howey*, all of the crypto assets that Ramani purchased and traded were investment contracts,” including to the

matters was scheduled for trial at the time this Article was submitted for publication.⁶⁷

In sum, the crypto markets remain fast-moving, volatile, and, I believe, rife with investor risk. But as the foregoing remarks and this epilogue make clear (and if the past and my remarks at William & Mary are prologue), the Division of Enforcement has moved with urgency, and will continue to do so, to fulfill our investor protection mandate in these markets.

extent that the assets were traded on the secondary market); *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346 (JSR), 2023 WL 8944860, at *13 (S.D.N.Y. Dec. 28, 2023) (stating that “Howey’s definition of ‘investment contract’ was and remains a binding statement of the law, not dicta” and finding that “[t]here is no genuine dispute that the elements of the Howey test—(i) investment of money (ii) in a common enterprise (iii) with profits to be derived solely from the efforts of others’ [] have been met for UST, LUNA, wLUNA, and MIR [the crypto assets at issue]”); *SEC v. Ripple Labs, Inc.*, 20 Civ. 10832 (AT), 2023 WL 4507900, at *14–15 (S.D.N.Y. July 13, 2023) (rejecting defendants’ argument that, in addition to satisfying the *Howey* test, all investment contracts must contain certain additional “essential ingredients” and finding that Ripple’s institutional sales of its XRP crypto token constituted the unregistered offer and sale of investment contracts and therefore securities); *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346 (JSR), 2023 WL 4858299, at *7–9 (S.D.N.Y. July 31, 2023) (rejecting argument that the Major Questions Doctrine “prevent[s] the SEC from alleging the company’s digital assets to be ‘investment contracts’” and explaining that “Defendants cannot wield a doctrine intended to be applied in exceptional circumstances as a tool to disrupt the routine work that Congress expected the SEC and other administrative agencies to perform.”).

⁶⁷ At the time this Article was submitted for publication, the trial in *SEC v. Terraform Labs Pte. Ltd.* was scheduled to start on March 25, 2024.