

NOTES

THE WILD WEST, CRYPTOCURRENCY, AND SINGAPORE: WHY THE UNITED STATES SHOULD FOLLOW SINGAPORE'S LEAD IN CRYPTOCURRENCY REGULATION

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INTRODUCTION

“Right now, we just don’t have enough investor protection in crypto. Frankly, at this time, it’s more like the Wild West.”¹

For many Americans, references to “The Wild West” recalls vivid imagery of the exploits of legendary outlaws like Jesse James and Billy the Kid.² Indeed, the Wild West, a colloquial term used to describe the Western American states during the period between 1849 and the dawn of the twentieth century, has historically been characterized by gun duels, outlaws, and a general aura of lawlessness.³ Similarly, “[cryptocurrency] is rife with fraud, scams, and abuse in certain applications. There’s a great deal of hype and spin about how crypto assets work. In many cases, investors [are not] able to get rigorous, balanced, and complete information.”⁴ Thus, it is easy to see why Gary Gensler, the Chair of the Securities and Exchange Commission (SEC) compared the American

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1. Gary Gensler, Chair, SEC, Remarks Before the Aspen Security Forum (Aug. 3, 2021), <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03> [<https://perma.cc/9AMM-H7R7>].

2. Lesley Kennedy, *5 Legendary Wild West Outlaws*, HIST. CHANNEL (Nov. 18, 2020), <https://www.history.com/news/famous-wild-west-outlaws-billy-the-kid-jesse-james-butch-cassidy> [<https://perma.cc/33TK-NC68>].

3. See *The Wild West*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/wild-west-0> [<https://perma.cc/4Q6K-U6DE>].

4. Gensler, *supra* note 1.

cryptocurrency industry to the Wild West.⁵

On one hand, Gensler is correct: cryptocurrency holders within the United States are currently plagued by consumer hazards.⁶ However, many cryptocurrency holders have weathered these hazards to lay claim to a stake in the cryptocurrency market, which has been dubbed a “digital goldrush.”⁷ Coincidentally, the Wild Western Frontier was born out of the California Gold Rush of 1849, when hundreds of thousands of people moved to the western area of the United States in pursuit of a chance to strike gold and secure untold riches.⁸ The cryptocurrency industry, too, is something of a goldrush opportunity to pursue untold riches. In 2021, twelve of the people listed on the Forbes Billionaires List were “crypto billionaires.”⁹ Moreover, as of November 2021, the two cryptocurrencies with the highest market caps, Bitcoin and Ethereum, had grown exponentially since their inceptions, with the price of a Bitcoin increasing 9,000,000% between 2010 and 2020 and the price of Ethereum growing from 31 cents per coin in 2014 to \$4,379 per coin in May 2021.¹⁰ To put this into perspective, an investment of \$1 in Bitcoin in 2010 would have been worth \$9,000,000 in 2020, while a \$1 investment in Ethereum in 2014 would have been worth approximately \$13,270 in May 2021.

Many sharp similarities undoubtedly exist between the Wild West and cryptocurrency. The Wild Western era came about in the wake of the California Gold Rush, which caused an influx of thousands of people to move to the region.¹¹ This vast migration, combined with a lack of adequate regulation, were instrumental factors in the Wild Western Frontier gaining a reputation as a land of outlaws and lawlessness.¹² Parallels can be drawn to the emergence of the cryptocurrency industry. Just as people were drawn to the Wild West for the opportunity to gain wealth and change their lives, many people—approximately 40 million Americans by some estimates—have been drawn to crypto for the

5. *Id.*

6. Dante Alighieri Disparte, *Beware of Crypto Risks – 10 Risks to Watch*, FORBES (July 21, 2018, 5:34 PM EDT), <https://www.forbes.com/sites/dantedisparte/2018/07/21/beware-of-crypto-risks-10-risks-to-watch/?sh=1a4378de5f17> [<https://perma.cc/7Y5K-8KWY>].

7. John Hyatt, *The Cryptocurrency Tycoons on Forbes' 2021 Billionaires List*, FORBES (Apr. 6, 2021, 6:00 AM EDT), <https://www.forbes.com/sites/johnhyatt/2021/04/06/the-cryptocurrency-tycoons-on-forbes-2021-billionaires-list/?sh=5aadd2cc25e2> [<https://perma.cc/DN5B-4NG5>].

8. *The California Gold Rush*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/goldrush-california/> [<https://perma.cc/DF9Y-BTJ7>].

9. Hyatt, *supra* note 7.

10. *Bitcoin Price*, COINDESK, <https://www.coindesk.com/price/bitcoin/> [<https://perma.cc/F5KP-9A75>] (stating that Bitcoin price increased by 9,000,000 percent from 2010 to 2020); *Ether Price*, COINDESK, <https://www.coindesk.com/price/ethereum/> [<https://perma.cc/5PEA-GM79>] (stating that Ethereum was launched in 2014 at 31 cents per coin before hitting a price of \$4,379 per coin in May 2021).

11. *The California Gold Rush*, *supra* note 8.

12. *The Wild West*, *supra* note 3.

same reason.¹³ As was the case in the Wild West, these American early adopters to cryptocurrency have found themselves in new, unfamiliar territory with a lack of adequate regulation to address the multitude of hazards that exist, such as fraudulent initial coin offerings (ICOs), the use of cryptocurrency for criminal enterprises, and an extremely volatile market.¹⁴

In contrast to the United States, Singapore has successfully implemented regulations that not only effectively govern cryptocurrency, but that do so without stifling the growth of the industry.¹⁵ Singapore’s regulatory scheme has been so successful that it has led some to dub the country a “crypto haven.”¹⁶ This Note argues that the United States should look to Singapore for guidance in implementing a federal cryptocurrency regulation to protect American crypto holders while promoting the growth of the industry. Part I lays a foundational background on cryptocurrency. Part II considers the unsuccessful attempts at cryptocurrency regulation that have been implemented by the United States. Part III examines Singapore’s effective approach to cryptocurrency regulation. Part IV advocates that Singapore’s regulatory scheme is superior because it creates concrete regulation, provides consumer protection, and manages to make the country attractive to cryptocurrency companies. Finally, Part V concludes this Note by recommending that the United States adopt a regulatory framework in the same vein as the one Singapore has implemented.

I. CRYPTOCURRENCY—THE GROWING PAINS OF A CURRENCY IN ITS INFANCY

When coin issuers want to introduce their cryptocurrency to the public, they will often do so through an initial coin offering, which is like an initial public offering of stock in the United States.¹⁷ When an ICO occurs, the crypto

13. THE WHITE HOUSE, FACT SHEET: PRESIDENT BIDEN TO SIGN EXECUTIVE ORDER ON ENSURING RESPONSIBLE DEVELOPMENT OF DIGITAL ASSETS (2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/09/fact-sheet-president-biden-to-sign-executive-order-on-ensuring-responsible-innovation-in-digital-assets/> [<https://perma.cc/84ZA-UXEQ>].

14. *Id.*; *Spotlight on Initial Coin Offerings (ICOs)*, SEC, <https://www.sec.gov/ICO> [<https://perma.cc/2WZ3-EL23>] (July 14, 2021) (“While some ICOs may be attempts at honest investment opportunities, many may be frauds, separating you from your hard earned money with promises of guaranteed returns and fortunes.”); Joshua Ehrenfeld, Ryan Gallagher, Matthew Lyon, Thomas Potter & Josh Rosenblatt, *Legal Issues Surrounding Blockchain, Cryptocurrency, & Bitcoin*, 20 TENN. J. BUS. L. 1135, 1158 (2019) (stating that without developed regulatory structures, the cryptocurrency market contains “a lot of real active players looking to exploit it for fraud and criminal activity”); Nicole Lapin, *Explaining Crypto’s Volatility*, FORBES (Dec. 23, 2021, 6:00 AM EST), <https://www.forbes.com/sites/nicolelapin/2021/12/23/explaining-cryptos-volatility/?sh=610ca55e7b54> [<https://perma.cc/5KUK-5XWS>].

15. Timothy Smith, *Cryptocurrency Regulations Around the World*, INVESTOPEDIA, <https://www.investopedia.com/cryptocurrency-regulations-around-the-world-5202122> [<https://perma.cc/X8CY-JVJQ>] (Nov. 2, 2022).

16. *Id.*

17. Rani Shulman, *Are Centralized Cryptocurrency Regulations the Answer? Three*

developer offering the coin typically publishes a whitepaper, simply describing the fundraising purposes behind the ICO and detailing the token being offered.¹⁸ These whitepapers usually offer little or no information about the developers of the coin and do not include the developer's contact information.¹⁹ Often, investors are drawn to ICOs due to promises of large returns on their investments.²⁰ More often than not though, these returns are not realized.²¹ Even more alarmingly, many ICOs turn out to be fraudulent. In the case of a fraudulent ICO, a coin offeror fails to allocate the funds raised towards productive market use, opting instead to put these funds to personal use, and in some instances, even going to such extremes as using proceeds from the ICO to fund their disappearance.²² As a result, investors in fraudulent ICOs lose their monies outright.²³ One of the most prominent of these fraudulent ICOs came about in 2018 when a Vietnamese tech company, Modern Tech, launched two coins, swindling an estimated 32,000 investors for approximately \$660 million before disappearing with the fraudulent proceeds, leaving the holders of these coins with no legitimate recourse to recoup their investments.²⁴ In executing this scheme, Modern Tech first launched Pincoin, promising investors large returns and commissions for recruiting new investors to Pincoin.²⁵ These rewards were initially paid in cash, but eventually Modern Tech started paying the rewards out in iFan, a different cryptocurrency that the company created.²⁶ Then, after only a few months, the company stopped paying recruitment rewards altogether and the developers disappeared without a trace, taking the investments of their coin holders with them.²⁷ To put this investor loss into perspective, Modern Tech was able to steal an average of \$20,625 per investor from a total of 32,000 investors.

As if fraudulent ICOs are not detrimental enough—the United States' failure to adequately regulate cryptocurrency effectively fosters the growth of criminal enterprise within the nation. A Report of the Attorney General's Cyber Digital Task Force on Cryptocurrency states that bad actors generally use cryptocurrency

Countries; Three Different Directions, 45 BROOK. J. INT'L L. 835, 844 (2020).

18. *Id.* at 849.

19. *Id.* at 849-50.

20. *Id.* at 850; *Spotlight on Initial Coin Offerings (ICOs)*, *supra* note 14.

21. Klaus Grobys, *Did You Fall for It? 13 ICO Scams That Fooled Thousands*, COINTELEGRAPH (Dec. 6, 2020), <https://cointelegraph.com/news/did-you-fall-for-it-13-ico-scams-that-fooled-thousands> [<https://perma.cc/DL9E-V6LS>].

22. John Biggs, *Exit Scammers Run off with \$660 Million in ICO Earnings*, TECHCRUNCH, (Apr. 13, 2018, 9:27 AM EDT) <https://techcrunch.com/2018/04/13/exit-scammers-run-off-with-660-million-in-ico-earnings/> [<https://perma.cc/DHN3-KL3D>].

23. *Id.*

24. David Floyd, *Vietnam Investigates ICO Fraud After \$660 Million in Losses Reported*, COINDESK, <https://www.coindesk.com/markets/2018/04/11/vietnam-investigates-ico-fraud-after-660-million-in-losses-reported/> [<https://perma.cc/4ZMU-SDAK>] (Sept. 13, 2021, 3:48 AM EDT).

25. Biggs, *supra* note 22.

26. *Id.*

27. *Id.*

for criminal enterprise in one of three ways: (1) to engage in financial transactions associated with the commission of crimes, such as buying and selling illegal contraband on the dark web or soliciting funds to support terrorism; (2) to engage in money laundering or to shield themselves from tax, reporting, or other requirements imposed by law; or (3) to commit crimes directly implicating the cryptocurrency marketplace itself, like stealing cryptocurrency from exchanges through hacking or by defrauding unwitting investors.²⁸

One of the more prevalent ways in which crypto assets are used by criminal organizations is for the purposes of money laundering.²⁹ Often, criminals are paid in cryptocurrency for illegal activities, such as dark web commerce and terrorism funding, because regulated institutional payment processors, such as Visa or Mastercard, will not allow their services to be used if a transaction appears suspect or potentially illegal.³⁰ To solve this problem, criminals have begun to use cryptocurrency, as it allows them to easily launder their ill-gotten crypto to government-issued currency, also known as fiat currency, simply by utilizing a cryptocurrency exchange.³¹ Indeed, the anonymous, decentralized nature of cryptocurrency and blockchain technology makes it an appealing, available, and easy option for criminals, hackers, blackmailers, and ransomware attackers looking to carry out illegal transactions without raising suspicions from institutional authorities who oversee traditional financial institutions.³²

Furthermore, the crypto market has proved to be exceedingly volatile, thus exposing investors to an even greater risk.³³ The market, in its current state, is heavily influenced by market manipulation and a lack of investor protection measures.³⁴ Market manipulation is defined as “an attempt to artificially influence an asset’s price or the behavior of the markets,” and it is done using a variety of techniques, including pump and dumps and wash trading.³⁵ By manipulating

28. U.S. DEP’T OF JUST., REPORT OF THE ATTORNEY GENERAL’S CYBER DIGITAL TASK FORCE: CRYPTOCURRENCY 5-6 (Oct. 2020).

29. Alexandra Comolli & Michele R. Korver, *Surfing the First Wave of Cryptocurrency Money Laundering*, 69 DOJ J. FED. L. & PRAC., no. 3, 183 (2021).

30. *Id.* at 190.

31. *See id.* at 191; *see also* James Chen, *What is Fiat Money?*, INVESTOPEDIA (Oct. 26, 2021), <https://www.investopedia.com/terms/f/fiatmoney.asp> [<https://perma.cc/8HMR-WJMA>] (explaining that fiat currency is “government-issued currency that is not backed by a physical commodity, such as gold or silver, but rather by the government that issued it”).

32. Nikita Malik, *How Criminals and Terrorists Use Cryptocurrency: And How to Stop It*, FORBES (Aug. 31, 2018), <https://www.forbes.com/sites/nikitamalik/2018/08/31/how-criminals-and-terrorists-use-cryptocurrency-and-how-to-stop-it/?sh=4fa321f03990> [<https://perma.cc/R7ZN-9UBD>]; Comolli & Korver, *supra* note 29, at 184-85.

33. John McCrank, *U.S. SEC Chair Says More Investor Protection Needed on Crypto Exchanges*, REUTERS (May 20, 2021, 5:39 PM EDT), <https://www.reuters.com/technology/us-secs-gensler-says-crypto-exchanges-should-face-more-regulation-2021-05-20/> [<https://perma.cc/J2AN-KPTP>].

34. *Id.*

35. *What is Market Manipulation in Cryptocurrency?*, BINANCE (Oct. 18, 2021),

crypto markets, bad actors can create an illusion in that market, artificially inflating or deflating the price of an asset for only a temporary time.³⁶ The result of this is that crypto markets are extremely volatile, risky, and dangerous for investors.³⁷

Given the current regulatory backdrop of cryptocurrency within the United States, market manipulation can be pulled off with something as simple as a tweet; however, as regulations are introduced, market manipulation will become more difficult.³⁸ With that being said, additional regulatory measures are certainly necessary to reduce these investor risks and, in the process, legitimize the crypto industry. Regulation is desperately needed in order to provide cryptocurrency holders in the United States more protection against the plethora of dangers, including extreme volatility, that have come to be associated with the current market.³⁹

Despite these glaring issues, the United States has failed to implement any uniform federal regulations to protect its millions of crypto owners.⁴⁰ The regulatory scheme currently in use in the United States is confusing, inefficient, and ineffective. As a result of this lack of uniform federal rules, regulations have been delegated to a variety of governmental agencies, each of which regulates crypto in its own separate way.⁴¹ This delegation imposes a litany of rules on crypto investors and exchanges that are confusing, hard to understand, and even harder to comply with.

II. AMERICA'S AGENCY APPROACH AND ITS PROBLEMS

The United States' regulatory framework for cryptocurrency is still very much evolving. The SEC is widely seen as the most powerful regulator, although the Treasury's Financial Crimes Enforcement Network (FinCEN), the Federal Reserve Board, and the Commodity Futures Trading Commission (CFTC) have all issued their own guidance.⁴² Further, each of these agencies has issued its own

<https://www.binance.com/en/blog/fiat/what-is-market-manipulation-in-cryptocurrency-421499824684902912> [<https://perma.cc/9CGW-CW44>].

36. *Id.*

37. *Id.*

38. *Id.*

39. Thomas Franck, *U.S. Treasury Calls for Stricter Cryptocurrency Compliances with IRS, Says They Pose Tax Evasion Risk*, CNBC, <https://www.cnbc.com/2021/05/20/us-treasury-calls-for-stricter-cryptocurrency-compliance-with-irs.html> [<https://perma.cc/5BDF-DFQQ>] (May 20, 2021, 4:03 PM EDT).

40. Avery Minor, *Cryptocurrency Regulations Wanted: Iterative, Flexible, and Pro-Competitive Preferred*, 61 B.C. L. REV. 1149, 1181 (2020).

41. Todd Ehret & Susannah Hammond, *Compendium—Cryptocurrency regulations by country*, THOMSON REUTERS (June 1, 2021), https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2021/06/Compendium_Cryptocurrency-Regs_FINAL.pdf [<https://perma.cc/U3T8-6M5M>].

42. *Id.*

working definition of what a cryptocurrency is: the SEC defines cryptocurrencies as securities; the CFTC calls them commodities; the FinCEN defines crypto assets as payment tokens; and the IRS views cryptocurrencies as digital representations of value.⁴³

To go along with these separate definitions of cryptocurrency, each agency has developed its own regulatory position. The SEC views cryptos as securities and regulates them as such using the *Howey* test, while the CFTC regulates them as commodities.⁴⁴ The Internal Revenue Service (IRS) has defined cryptocurrencies as “digital representation(s) of value that function as a medium of exchange, a unit of account, and/or a store of value” and views them as a type of property for taxation purposes.⁴⁵ Despite these other regulations, the FinCEN has stated that it does not consider cryptocurrency to be legal tender, but a “money transmitter” subject to its jurisdiction.⁴⁶ Further complicating the system for crypto holders, the United States Treasury has classified cryptocurrency as a currency and regulates it as such.⁴⁷ The current regulatory landscape in the United States can be very confusing to a retail investor. This unclear and contradictory regulatory framework creates a problem, as a substantial portion of crypto holders are retail investors who lack the complex knowledge and experience typically possessed by institutional investors.⁴⁸ Unfortunately, the United States has yet to offer any substantial clarification on cryptocurrency regulation.

A. The SEC

In 2017, the SEC investigated the Decentralized Autonomous Organization

43. *Id.*

44. *Id.*

45. *Id.*

46. FIN. CRIMES ENF’T. NETWORK, APPLICATION OF FINCEN’S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES (2013); Press Release, Fin. Crimes Enf’t Network, First Bitcoin “Mixer” Penalized by FinCEN for Violating Anti-Money Laundering Laws. (Oct. 19, 2020), [https://www.fincen.gov/news/news-releases/first-bitcoin-mixer-penalized-fincen-violating-anti-money-laundering-laws#:~:text=WASHINGTON%E2%80%94The%20Financial%20Crimes%20Enforcement,Secrecy%20Act%20\(BSA\)%20and%20its](https://www.fincen.gov/news/news-releases/first-bitcoin-mixer-penalized-fincen-violating-anti-money-laundering-laws#:~:text=WASHINGTON%E2%80%94The%20Financial%20Crimes%20Enforcement,Secrecy%20Act%20(BSA)%20and%20its) [https://perma.cc/PMZ5-9N6X].

47. FIN. CRIMES ENF’T. NETWORK, APPLICATION OF FINCEN’S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES (2013); Press Release, Fin. Crimes Enf’t Network, First Bitcoin “Mixer” Penalized by FinCEN for Violating Anti-Money Laundering Laws. (Oct. 19, 2020), [https://www.fincen.gov/news/news-releases/first-bitcoin-mixer-penalized-fincen-violating-anti-money-laundering-laws#:~:text=WASHINGTON%E2%80%94The%20Financial%20Crimes%20Enforcement,Secrecy%20Act%20\(BSA\)%20and%20its](https://www.fincen.gov/news/news-releases/first-bitcoin-mixer-penalized-fincen-violating-anti-money-laundering-laws#:~:text=WASHINGTON%E2%80%94The%20Financial%20Crimes%20Enforcement,Secrecy%20Act%20(BSA)%20and%20its) [https://perma.cc/PMZ5-9N6X].

48. See Reed Landberg, *Crypto Assets Poorly Understood by Retail Investors*, BOE SAYS, BLOOMBERG (May 17, 2022, 11:55 AM), <https://www.bloomberg.com/news/articles/2022-05-17/crypto-assets-poorly-understood-by-retail-investors-boe-says?leadSource=uverify%20wall> [https://perma.cc/FU2G-ZAF4].

(DAO), a virtual organization that had been raising capital by allowing its investors to exchange Ethereum tokens for DAO tokens, which ran on the Ethereum blockchain and could be sold on the secondary cryptocurrency market.⁴⁹ The DAO operated as an investment fund, allowing investors to vote on investment contracts to decide how their pooled funds were to be spent, with profits apportioned among them depending on the amounts of their investments.⁵⁰ In 2016, however, the DAO was hacked, resulting in approximately one-third of investor funds being stolen—effectively bankrupting the DAO and leaving its members at a loss.⁵¹

In response, the SEC released a DAO No Action Letter, declaring that digital tokens are “investment contracts” under Section 2 of the Securities Act, thus requiring issuers of tokens within the United States to comply with securities regulations, including registration requirements.⁵² In arriving at this conclusion, the SEC applied the *Howey* test, which was developed in *SEC v. W.J. Howey Co.*⁵³ The *Howey* test defines investment contracts by posing four questions—(1) whether there is an investment of money; (2) whether there is a common enterprise; (3) whether there is a reasonable expectation of profits from an investment; and (4) whether the investment incomes result mostly from the efforts of others.⁵⁴ If these questions can all be answered in the affirmative, according to the SEC, a cryptocurrency is a security or an investment contract.⁵⁵ The SEC found that the DAO tokens were securities because investors in the DAO invested money into a common enterprise, holders reasonably expected profits from their investments, and said expectations were derived solely from the efforts of others because the holders of the coins did not manage the projects.⁵⁶

If a cryptocurrency asset is considered a security under *Howey* scrutiny it is subject to regulation under Section 5 of the Securities Act of 1933, thus making it illegal for said cryptocurrency to enter the stream of interstate commerce without being registered with the SEC.⁵⁷ Further, cryptocurrency exchanges that

49. *What Was the DAO?*, CRYPTOPEDIA, (Apr. 27, 2021), <https://www.gemini.com/cryptopedia/the-dao-hack-makerdao> [<https://perma.cc/4VAF-3J7B>]; Brian MacNiven, *Initial Coin Offerings: Striking a Balance Between Protecting Investors and Fostering Growth*, 14 RUTGERS BUS. L.J. 1, 6 (2019).

50. MacNiven, *supra* note 49, at 6.

51. *Id.*

52. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017); Securities Exchange Act of 1934, 15 U.S.C. § 77b.

53. Whyoon Song, *The Future of Korean Regulation on Initial Coin Offerings*, 12 GEO. MASON INT'L L.J. 1, 11-12 (2021); *see* SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

54. Nicholas Georgakopoulos, *The Ralston-Landreth-Gustafson Harmony: A Security!* 41 CAP. L. REV. 553-602 (2013).

55. Matt Criswell, *The Developing Universe of Cryptocurrency Regulation: A Quick Survey on Expanding Regulatory Authority over Cryptocurrency*, 24 NEB. LAW. 41, 42 (2021).

56. MacNiven, *supra* note 49, at 6.

57. Criswell, *supra* note 55, at 42; 15 U.S.C. § 77e (detailing that securities, in this case

deal in security-cryptos are subject to The Securities Exchange Act of 1934, which defines them as broker-dealers because they are “engaged in the business of effecting transactions in securities for the account of others.”⁵⁸ As such, ICO firms must follow SEC regulations that require transparency between companies and investors.⁵⁹ These regulations require that cryptocurrency offerors follow anti-fraud provisions that prohibit them from misleading investors or engaging in fraudulent, manipulative, or otherwise illegal acts.⁶⁰ These antifraud provisions are designed to maintain high industry standards, and include duties such as a duty of fair dealing, an obligation to seek the terms most favorable to customers when executing orders, and a duty to disclose necessary information to customers, among other obligations.⁶¹ Furthermore, cryptocurrency exchanges are required to maintain certain levels of financial responsibility under the Securities and Exchange Act of 1934.⁶² Among these obligations is the duty to maintain the requisite liquid assets to fulfill customer orders, to keep necessary books, records, and reports, and to conduct regular risk assessments.⁶³ A somewhat problematic requirement imposed on cryptocurrency exchanges by the Act is the Customer Protection Rule, which requires broker-dealers to maintain physical possession of all “fully-paid or excess margin securities held for the account of customers.”⁶⁴ This creates problems, of course, because cryptocurrency assets are not tangible—thus the question arises: how can a cryptocurrency exchange maintain physical possession of these intangible assets?

On February 26, 2021, the SEC attempted to remedy this problem when it issued a statement on the Custody of Digital Asset Securities by Special Purpose Broker-Dealers, an SEC Rule providing a five-year safe harbor shielding cryptocurrency exchanges from SEC enforcement action for violations of the Customer Protection Rule.⁶⁵ In this statement, the SEC acknowledged the difficulties that broker-dealers who transact in cryptocurrency experience when trying to comply with the Securities and Exchange Act of 1934, especially the Customer Protection Rule.⁶⁶ In response to these difficulties, the SEC announced that “special purpose broker-dealers” that transact exclusively in cryptocurrencies

cryptocurrencies, are prohibited from entering the stream of interstate commerce unless they are properly registered with the SEC).

58. *Id.* at 42-43; *Guide to Broker-Dealer Registration*, SEC, <https://www.sec.gov/reports-pubs/investor-publications/divisionsmarketregbdguidehtm.html> [<https://perma.cc/B6HW-WWJG>]; 15 U.S.C. § 78c.

59. Criswell, *supra* note 55, at 42.

60. *Guide to Broker-Dealer Registration*, *supra* note 58.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See* Custody of Digital Asset Securities by Special Purpose Broker-Dealers, 86 Fed. Reg. 11627 (February 26, 2021).

66. *Id.*

would not be subject to the Customer Protection Rule for a period of five years.⁶⁷ While this relief was certainly welcomed by cryptocurrency exchanges, such exchanges were also imposed with a number of conditions that must be met in order to be eligible for this safe harbor.⁶⁸ Namely, a cryptocurrency exchange, in order to qualify for this relief, is required to deal exclusively in cryptocurrencies.⁶⁹ Exchanges are also required to have access to, and the ability to transfer, the cryptocurrencies held by their customers.⁷⁰ This safe harbor rule also imposes a requirement that exchanges must develop, document, and enforce written policies for determining whether an asset is a security.⁷¹ In addition, the exchanges must refrain from maintaining any risky or problematic cryptocurrencies, provide written disclosures to potential customers that the exchange is deeming itself to be in custody of any crypto they purchase, and provide customers written notice of the dangers of cryptocurrency.⁷² Finally, exchanges are required to enter into a written agreement with each customer about the terms of holding a crypto asset with that exchange.⁷³ If any of these conditions are not met, an exchange will not fall under the umbrella of the safe harbor provided by the SEC.⁷⁴ While this safe harbor provision does offer some protection to exchanges, the SEC has acknowledged that it is only a temporary fix.⁷⁵ In the statement, the SEC asserted that it “envisions broker-dealers performing the full set of broker-dealer functions with respect to digital asset securities—including maintaining custody of these assets—in a manner that addresses the unique attributes of digital asset securities and minimizes risk to investors and other market participants.”⁷⁶

Although courts have held that cryptocurrencies, as a general matter, are investment contracts subject to the SEC’s jurisdiction, there are conceivable situations in which a hypothetical token might be designed for the purpose of personal consumption, thus failing to invoke *Howey*.⁷⁷ The SEC released guidelines in 2019 to help the public better understand the application of the *Howey* test to ICOs.⁷⁸ This guideline states that in the case of ICOs, the first two prongs of *Howey*—monetary investment and the reasonable expectation of profits—are typically easily satisfied; however, the prongs of the test concerning

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*

77. Song, *supra* note 53, at 14.

78. *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/EU8C-4ZLT>].

reasonable expectations of profits derived from the efforts of others tend to be more difficult to establish.⁷⁹ The guideline elaborates on specific features that may be found in a hypothetical ICO and identifies features that are likely to classify an ICO as an investment contract and, thus, a security. The SEC stated that two specific features that fail this test, and therefore indicate that the SEC does not possess regulatory authority, are a statement that “distributed ledger network and digital assets are fully developed and operational” and that “prospects for appreciation in the value of the digital asset are limited.”⁸⁰

In applying the *Howey* requirements and issuing these guidelines, the SEC particularly seeks to regulate companies that raise capital through ICOs—an understandable goal given the prevalence of fraudulent coin offerings within the industry. However, in effect, the application of the *Howey* test to ICOs has made it exceedingly difficult for legitimate ICO firms to raise funds, and to make matters worse, the four-pronged analysis of *Howey* has done little to erase ambiguity, as it remains difficult in most instances to determine whether cryptos satisfy all four prongs.⁸¹

These difficulties imposed on even legitimate ICO offerors have led some to seek loopholes when attempting to offer coins to the public. Many American ICO firms have attempted to waive the requirements of *Howey* by using a Simple Agreement for Future Tokens (SAFT).⁸² SAFTs are generally used by coin offerors when it is “very likely” that an ICO will offer coins that will be regarded as an investment contract under the Securities Act.⁸³ When a SAFT is in place, ICO firms rely on Rule 506(c) of Regulation D under the Securities Act, allowing them to raise funds without having to comply with the regulatory measures that *Howey* would otherwise impose on a security by offering their coin only to accredited investors.⁸⁴ In turn, the idea is that these accredited investors would sell those tokens to the general public.⁸⁵ The general idea of this workaround was that by using a SAFT, coin offerors can skirt *Howey* requirements while still achieving the same, or similar, ends as a true public offering.

While this SAFT model does offer benefits to public investors, such as reducing the risk of a project defaulting and maintaining the benefits of investor protections, courts have scoffed at the fact that it allows ICO firms to skirt regulation.⁸⁶ Consequently, many courts in the United States have ruled that if the

79. *Id.*

80. *Id.*

81. See Song, *supra* note 53, at 14.

82. *Id.*

83. *Id.*

84. Juan Batiz-Benet, Jesse Clayburgh, & Marco Santori, *The SAFT Project: Toward A Compliant Token Sale Framework*, COOLEY 1 (Oct. 2, 2017), <https://www.cooley.com/-/media/cooley/pdf/reprints/saft-project-whitepaper.ashx> [<https://perma.cc/SN3X-8BZ7>]; *Rule 506 of Regulation D*, SEC, <https://www.investor.gov/introduction-investing/investing-basics/glossary/rule-506-regulation-d> [<https://perma.cc/2UAR-S3CY>].

85. Song, *supra* note 53, at 15.

86. *Id.*

initial purpose of an ICO was to distribute tokens, then the subsequent sale of these tokens cannot be exempted from securities regulations.⁸⁷ Reasoning that the economic reality of an ICO is important even though the initial sales of the coin were made to sophisticated investors, courts have prevented coin offerors from using SAFTs to avoid *Howey* regulation.⁸⁸

B. The FinCEN

The FinCEN defines money transmission services as “acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds or other value that substitutes currency to another location or person by any means.”⁸⁹ This definition implicates individuals, businesses, and exchanges who create, accept, distribute, exchange, or transmit virtual currencies.⁹⁰ FinCEN requirements obligate exchanges to report pertinent information regarding any suspicious activities to the FinCEN and to obtain both FinCEN and state licensing.⁹¹ Further, cryptocurrency exchanges, in particular, are required to provide documentation of any transaction involving a monetary amount greater than \$10,000 in cash from a single buyer.⁹² In imposing this requirement, the FinCEN seeks to provide law enforcement with information regarding suspicious activities.⁹³

In 2013, the FinCEN broadened the applicability of the Bank Secrecy Act (BSA) to include virtual transactions, thus subjecting cryptocurrency exchanges to the regulatory scope of the BSA.⁹⁴ The provisions of the BSA, as applied to cryptocurrency, aim to identify and deter the use of cryptocurrency in the context of criminal enterprise.⁹⁵ To comply with the BSA, crypto exchanges are required

87. *Id.*

88. *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020); Song, *supra* note 53, at 14; JAY B. SYKES, CONG. RSCH. SERV., R45301, SECURITIES REGULATION AND INITIAL COIN OFFERINGS: A LEGAL PRIMER 2 (2018) (asserting that when applying *Howey*, courts have “emphasized the importance of analyzing the ‘economic realities’ of a transaction, as opposed to its form or the label that its promoters give it”).

89. Jane Kim, *Suffocate or Innovate: An Observation of California’s Regulatory Framework for Cryptocurrency*, 52 LOY. L.A. L. REV. 339, 348 (2019); see Memorandum on the Application of FinCEN’s Regulations to Persons Administering, Exchanging, or Using Virtual Currencies, FinCEN, (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf> [<https://perma.cc/KEZ8-SJGD>].

90. Kim, *supra* note 89, at 348.

91. John Hyatt, *Decoding Crypto: Are There Regulations in the U.S. for Cryptocurrency?*, NASDAQ (Aug. 19, 2021), [<https://www.nasdaq.com/articles/decoding-crypto%3A-are-there-regulations-in-the-u.s.-for-cryptocurrency-2021-08-19>] [<https://perma.cc/B64L-G5NU>].

92. Kim, *supra* note 89, at 347-48.

93. *Id.* at 348.

94. *Id.*; Bank Secrecy Act, 31 U.S.C. § 5311.

95. See Kim, *supra* note 89, at 347-48.

to implement anti-money laundering and know-your-customer (KYC) protocols.⁹⁶

KYC protocols require cryptocurrency exchanges to keep in mind who they are transacting with, to continuously monitor whether those individuals are who they originally claimed to be, and to document how patrons are using the cryptocurrency they purchase.⁹⁷ To conform with KYC protocols, financial institutions, including cryptocurrency platforms, are required to vet customers by obtaining the name, date of birth, address, and identification number of every person who transacts with them.⁹⁸ This requirement is typically satisfied by asking customers to provide government issued identification such as a driver's license or passport.⁹⁹ KYC protocols also impose requirements that crypto exchanges continue this vetting process by maintaining due diligence with their customers to ensure they continue to be who they claimed upon initially joining the exchange.¹⁰⁰ This practice, known as "Customer Due Diligence," ensures that cryptocurrency institutions will act with a heightened level of diligence throughout their relationships with their customers, ideally legitimizing the industry, at least to some degree, and reducing the chances that cryptocurrency will be used for illegal activities.¹⁰¹

KYC protocols effectively help exchanges identify when a particular customer may be conducting abusive or illegal transactions with their crypto and create ongoing monitoring over crypto holders' transactions and accounts.¹⁰² While these protocols appear to protect cryptocurrency exchanges and mitigate some of the risks associated with cryptocurrency, such as terrorism funding and criminal enterprise, they also impose burdens on cryptocurrency institutions.¹⁰³ Indeed, KYC protocols, as applied in the United States, have caused many problems for cryptocurrency exchanges and financial institutions alike.¹⁰⁴ A 2017 survey conducted by Thomson Reuters revealed that, due to these protocols, customer onboarding time increased approximately twenty-two percent from 2016 levels, and was expected to increase an additional eighteen percent in 2017.¹⁰⁵ Furthermore, a 2018 study revealed that sixty-one percent of financial institutions had increased their KYC compliance budget, compared to only fifty-three percent in the year prior.¹⁰⁶ This study also found that these institutions were taking an average of twenty-four days to complete KYC onboarding.¹⁰⁷ What is more—the cost of compliance with KYC protocols has imposed increasing

96. *Id.* at 347; Shulman, *supra* note 17, at 83006.

97. Shulman, *supra* note 17, at 852.

98. *Id.* at 853.

99. *Id.*

100. *Id.* at 853-54.

101. *Id.* at 854.

102. *See id.*

103. *Id.*

104. *See id.* at 854-55.

105. *Id.* at 855.

106. *Id.*

107. *Id.*

annual costs on financial institutions and exchanges.¹⁰⁸ The average institution spends around \$48 million a year on KYC compliance alone.¹⁰⁹ However, KYC can be significantly costlier for larger institutions; in 2015, Citibank spent \$3.4 billion on KYC compliance, while JPMorgan Chase employed an additional 5,000 employees and spent an extra \$1 billion in order to comply with these protocols.¹¹⁰

C. The CFTC

The CFTC has defined virtual currencies as a commodity, which the agency defines as “all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.”¹¹¹ The CFTC has been active in promulgating and enforcing cryptocurrency regulations, and specifically aims to regulate exchanges that offer cryptocurrency derivatives contracts.¹¹² This regulation is triggered primarily in the context of leveraged trading and futures contracts on Bitcoin.¹¹³ Further, under CFTC regulations, American retail investors are permitted to purchase leveraged or margined derivative products on regulated exchanges only and prohibited from purchasing them elsewhere.¹¹⁴

The CFTC began regulating cryptocurrency after TerraExchange announced plans to issue a swap product based on Bitcoin in 2013.¹¹⁵ The CFTC gave temporary approval to TerraExchange to do this, but subsequently issued a cease-and-desist letter to the exchange when it was determined that their swap market had prearranged “wash” trades, which inaccurately portrayed the liquidity of the exchange.¹¹⁶ Similarly, in 2015, the CFTC used its regulatory powers to prevent Coinflip Incorporated from improperly offering commodity option transactions on cryptocurrency on the company CEO’s personal platform, Derivabit.¹¹⁷

In 2016, the CFTC exercised its regulatory powers once again, this time

108. *Id.* at 854.

109. *Id.* at 855 (“[T]he costs of keeping up with these [KYC] protocols increase year by year. Ten percent of the top financial institutions in the world are spending more than \$100 million per year, with the average institution spending around \$48 million a year, including labor and third-party costs.”).

110. *Id.* at 855-56.

111. Scott D. Hughes, *Cryptocurrency Regulations and Enforcement in the U.S.*, 45 W. ST. L. REV. 1, 7 (2017).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*; *About, TERRASWAP*, (Dec. 7, 2021), <https://docs.terraswap.io/#:~:text=Terraswap%20is%20a%20Uniswap%2Dinspired,assets%20involved%20in%20Terra%20ecosystem> [<https://perma.cc/P9NY-MXBM>] (explaining that TerraSwap, or TerraExchange, is an “automated market-maker (AMM) protocol implemented with smart contracts on the Terra blockchain”).

116. *In re TerraExchange LLC*, CFTC No. 15-33, 2015 WL 5658082 (Sep. 24, 2015).

117. *In re Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan*, CFTC No. 15-29, 2015 WL 5535736 (Sep. 17, 2015).

charging Bitfinex for failing to register with the CFTC despite allowing customers to trade Bitcoin.¹¹⁸ This regulatory action drew contention from exchanges that believed the CFTC was misusing its power.¹¹⁹ Critics of this action claimed that Bitfinex’s sale of Bitcoin was not subject to regulation by the CFTC because traders were “making and taking delivery” by buying Bitcoin from the exchange and transferring it into their personal Bitcoin wallets.¹²⁰ Thus, this regulatory action drew ire from those who pointed to the fact that the CFTC’s authority only applies to private trades that involve a delivery taking place twenty-eight days or more from the time of agreement.¹²¹ However, the CFTC clarified, exchanges do not make a full delivery to traders because of the technological specifications of Bitcoin wallets—in this case, Bitfinex controlled the private keys of the Bitcoin wallets, and therefore had not fully delivered the coins to the traders who had purchased them.¹²² To further clarify the expansiveness of their regulatory powers, the CFTC stated that “any financed retail transaction” is grounds for CFTC supervision.¹²³ Therefore, any margined or leveraged spot trade of cryptocurrency is subject to regulation by the CFTC.

D. State Approaches

To muddy the waters even further, the United States has yet to exercise its federal preemptive powers to exclude states from regulating cryptocurrency. As of 2019, thirty-two out of fifty states had proposed legislation concerning cryptocurrency regulation.¹²⁴ One such state regulatory scheme was promulgated by the New York Department of Financial Services in 2015.¹²⁵ This state regulation intends to provide licensing, regulations, and consumer protection for cryptocurrency market participants.¹²⁶ Under this regulatory scheme, New York views cryptocurrency as “virtual currency,” which it defines as “any type of digital unit that is used as a medium of exchange or a form of digitally stored value.”¹²⁷ These rules require any New Yorker whom the state deems to be a participant in “virtual currency business activity” to not only obtain a license, which they dub a “BitLicense,” but also to file financial reports on their crypto

118. Hughes, *supra* note 111, at 8; *Bitfinex*, CRYPTOCURRENCY FACTS, <https://cryptocurrencyfacts.com/exchanges/bitfinex/> [<https://perma.cc/VL98-JHDQ>] (explaining that BitFinex is “leading an important cryptocurrency exchange that offers the major cryptocurrencies for trade”).

119. Hughes, *supra* note 111, at 8.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *How the Laws & Regulations Affecting Blockchain Technology and Cryptocurrencies, Like Bitcoin, Can Impact its Adoption*, BUS. INSIDER (Jan 27, 2021, 3:36 PM), <https://www.businessinsider.com/blockchain-cryptocurrency-regulations-us-global> [<https://perma.cc/H7C3-SDLD>].

125. Kim, *supra* note 89, at 349.

126. *Id.*

127. *Id.*

activity, thus subjecting themselves to potential audits.¹²⁸ Further, exchanges and businesses who engage in the cryptocurrency business are

required to safeguard their customers' interests by: (a) maintaining sufficient capital to ensure the financial integrity of the licensee; (b) preserving a surety bond or trust account for the customer's benefit; and (c) refraining from selling, transferring, or otherwise using assets on behalf of another unless at that person's direction.¹²⁹

Although New York's regulatory framework alone does not appear overly confusing on its face, when taken in conjunction with the varying federal regulations and state proposals, the regulatory landscape becomes significantly less clear.

E. The Need for Blanket Regulation

When pieced together, the varying and conflicting regulations of the states and federal agencies fall short of offering any sort of substantive guidance. Although some measures have been implemented to protect crypto holders, they are ineffective, as they are in conflict with measures put in place by other governing bodies. Since the United States has not preempted states from regulating cryptocurrency, nor named an exclusive regulatory authority, a plethora of agencies and states have thrown their hats in the regulatory ring, thus creating an unintelligible regulatory framework that is inefficient, conflicting, and rife with chaos.

F. Cryptocurrency: The Future on the Horizon

On November 15, 2021, President Biden signed HR 3684 into law.¹³⁰ This bill expanded the definition of "broker" to include cryptocurrency exchanges.¹³¹ However, almost immediately, concerns arose that this bill and the expansion of the term "broker" created too broad of a definition, thus implicating entities that do not facilitate securities transactions, such as cryptocurrency miners.¹³² The problems with this enactment do not stop there, however. This bill also applies Tax Code 6050I to crypto transactions.¹³³ This Code, when enacted, was intended

128. *Id.*

129. *Id.* at 350.

130. Ashlie Beringer et. al, *Infrastructure Bill's New Reporting Requirements May Have Sweeping Implications for Cryptocurrency Ecosystem*, GIBSON DUNN (Nov. 18, 2021), <https://www.gibsondunn.com/infrastructure-bills-new-reporting-requirements-may-have-sweeping-implications-for-cryptocurrency-ecosystem/> [<https://perma.cc/WJY4-Z2B7>].

131. *Id.*

132. Nikhilesh De, *House Sends Infrastructure Bill with Crypto Tax Provision to US President*, COINDESK (Nov. 8, 2021, 2:45 PM) <https://www.coindesk.com/business/2021/11/06/house-sends-infrastructure-bill-with-crypto-tax-provision-to-us-president/> [<https://perma.cc/8ZES-6VZP>].

133. *Id.*

to apply only to in-person cash transactions and requires recipients of over \$10,000 to “verify the sender’s personal information and record his or her Social Security number, the nature of the transaction and other information, and report the transaction to the government within 15 days.”¹³⁴ While the application of Tax Code 60501 to cryptocurrency is well meaning, it is exceedingly difficult, problematic, and almost impossible to comply with in the context of cryptocurrency, given the decentralized and sometimes anonymous nature of blockchain technology.¹³⁵

The United States has asserted a definitive interest in establishing a more successful federal regulatory scheme regarding cryptocurrency. In January 2022, the Biden administration published a statement declaring that it was preparing to release a government-wide strategy to regulate cryptocurrencies as early as February 2022.¹³⁶ This statement asserted that a National Security Council memorandum would soon be issued, which would require federal agencies to explore the development of a central bank digital currency and evaluate the risks and opportunities associated with the broader cryptocurrency market as a whole.¹³⁷

Then, on March 9, 2022, President Biden signed an executive order to ensure the responsible development of digital assets.¹³⁸ This order details the risks of cryptocurrency, including threats to financial stability, national security, the global climate, and consumers.¹³⁹ In addressing these issues, President Biden expressed that the United States must “maintain technological leadership in this rapidly growing space, supporting innovation while mitigating the risks for consumers, businesses, the broader financial system, and the climate.”¹⁴⁰ This order calls on various governmental entities, including the Department of Commerce, the Department of the Treasury, and the Federal Reserve, to coordinate their work on digital currencies in an attempt to effectuate something that resembles, at least to a more significant degree, an authoritative blanket regulation.¹⁴¹ The order also tasks agencies with examining relevant topics within the cryptocurrency sphere, such as the creation of a U.S. Central Bank Digital Currency and ways to mitigate the use of crypto in the context of illicit finance, and further requires them to report their findings back to the executive branch.¹⁴² While this order does seem to be a step in the right direction, it is a small step, as it mandates only that these agencies collaborate to conduct initial research and

134. *Id.*

135. *Id.*

136. Jennifer Schonberger, *White House to Enter Crypto Regulation Fray, With Eye on Financial Stability*, YAHOO (Jan. 25, 2022), <https://news.yahoo.com/white-house-to-enter-the-fray-on-crypto-regulation-with-an-eye-on-illicit-flows-080056833.html> [https://perma.cc/8YFY-6LRJ].

137. *Id.*

138. Exec. Order No. 14067, 3 C.F.R. 14143 (2022).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

does not constitute any substantive change in the American regulatory framework.¹⁴³ Nonetheless, this order makes it clear that the Biden administration prioritizes the establishment of adequate cryptocurrency regulation in order to quell the financial instability, national security, and illicit finance issues that have arisen from the current lack of federal regulation.¹⁴⁴

The governmental interest in cryptocurrency does not stop at the White House. On June 7, 2022, Kirsten Gillibrand, a democratic Senator from New York, and Cynthia Lummis, a republican Senator from Wyoming, introduced the *Responsible Financial Innovation Act*.¹⁴⁵ This bipartisan legislation, if passed, would aim to create a more complete regulatory cryptocurrency framework that would encourage “responsible financial innovation, flexibility, transparency, and robust consumer protections while integrating digital assets into existing law.”¹⁴⁶ This proposed act addresses a plethora of problems within the cryptocurrency space and, among other objectives, seeks to more clearly define what a cryptocurrency is, mandate ongoing cryptocurrency research, create a workable structure for the taxation of digital assets, and develop a regulatory sandbox for state and federal regulators to collaborate on financial technologies.¹⁴⁷ If passed, this act would delegate regulatory authority to both the Commodities Future Trading Commission and the Securities and Exchange Commission, tasking the agencies to jointly create a self-regulatory organization to aid their efforts.¹⁴⁸ At this juncture, this act is only a proposal—however, it is clear that in drafting it, Senators Lummis and Gillibrand recognized the glaring need for a more effective scheme to regulate cryptocurrency in America.¹⁴⁹

Further, even non-governmental entities have recognized the need for effective cryptocurrency regulation within the United States. Coinbase, a massively popular cryptocurrency exchange, released a policy paper in October 2021, stating that the United States is in desperate need of regulation and laying out its vision for how the United States should regulate cryptocurrency.¹⁵⁰ This proposal was crafted on the premise that by failing to implement uniform regulation, the United States has already fallen behind and risks falling even further behind other governments that have implemented regulation.¹⁵¹ Coinbase

143. *See id.*

144. *See id.*

145. Press Release, Kirsten Gillibrand, Lummis, Gillibrand Introduce Landmark Legislation To Create Regulatory Framework For Digital Assets (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/HY97-8KZL>].

146. *Id.*

147. *Id.*

148. *Id.*

149. *See Id.*

150. Lauren Feiner, *Coinbase Says U.S. Should Create a New Cryptocurrency Regulator*, CNBC (Oct. 14, 2021), <https://www.cnbc.com/2021/10/14/coinbase-says-us-should-create-a-new-cryptocurrency-regulator.html> [<https://perma.cc/CD5N-6RFB>].

151. *See* COINBASE, DIGITAL ASSET POLICY PROPOSAL 7 (2021), <https://assets.ctfassets.net/>

called for the United States to abandon its agency approach and appoint only one regulator of digital assets.¹⁵² Intriguingly, the report argues that cryptocurrency should not be regulated under existing law, but under a new regulatory scheme promulgated strictly for the purpose of regulating cryptocurrency.¹⁵³ According to Coinbase, it would be easier to start from scratch than it would be to try and adapt crypto to the existing market structure for regulating fiat and other types of currency.¹⁵⁴ Coinbase has met with, discussed, and received positive reactions to this proposal from several lawmakers and various agencies.¹⁵⁵ The policy report explains that the exchange wants a “clear and comprehensive approach to regulating digital assets” and “regulation that is fit for purpose.”¹⁵⁶ The United States, the report alleges, is at risk of becoming a “taker” of regulation, rather than a “shaper” of modern financial services—a position, Coinbase opines, that the United States has long held.¹⁵⁷ The report advocates for four major recommendations: (1) that the United States create a new framework for regulating cryptocurrency that is separate from its current financial system, (2) that the responsibility of regulating crypto markets is given to a single federal authority in addition to a non-governmental self-regulatory organization, (3) that the United States take measures to protect digital currency holders from fraud and market manipulation and that the government require disclosures to ensure transparency, and (4) that the United States promotes fair competition and interoperability between cryptocurrency products.¹⁵⁸

The United States’ current approach to cryptocurrency regulation has caused a litany of issues, concerns, and confusion. Allowing multiple governmental agencies to each promulgate its own rules and regulations concerning cryptocurrency has effectively led to a lack of any controlling, effective regulation, and thus, has caused the United States to fall behind in the cryptocurrency space.¹⁵⁹ The issues associated with the current unsuccessful regulatory framework have been recognized by many, from the President, to the legislature, to exchanges themselves. Undoubtedly, the United States must reform its regulatory approach to cryptocurrency; or else, it risks falling behind even further than it already has in this massively lucrative and continuously growing industry.

c5bd0wqjc7v0/7FhSemtQvq4P4yS7sJCKMj/a98939d651d7ee24a56a897e2d37ef30/coinbase-digital-asset-policy-proposal.pdf [https://perma.cc/247W-JV3U].

152. *Id.* at 8.

153. *See id.*

154. Feiner, *supra* note 150.

155. *Id.*

156. COINBASE, *supra* note 151, at 7.

157. *Id.*

158. *Id.*

159. *See generally id.*

III. THE SINGAPOREAN APPROACH: REGULATION WITHOUT STIFLING INNOVATION

Singapore is commonly referred to as one of the world's "cryptohavens" due to its balanced regulatory scheme.¹⁶⁰ Singapore's regulatory system focuses on both the regulatory and the legal environment of cryptocurrencies. The Monetary Authority of Singapore (MAS) regulates crypto within the country and takes an approach to the cryptocurrency ecosystem that aims to monitor risks while ensuring that it does not stifle technological innovation.¹⁶¹ This Singaporean approach is "pragmatic, practical and tailored," and, further, seeks to foster a regulatory environment while still exercising caution in an attempt to mitigate risk.¹⁶² According to Ravi Menon, the managing director of the MAS, Singapore strives to put strong regulations in place so legitimate firms that meet these strict criteria can operate within the country.¹⁶³ To this point, Singapore's approach to cryptocurrency regulation has been successful, as the Country has managed to attract major cryptocurrency firms such as Gemini.¹⁶⁴

Singapore has established that it does not view cryptocurrency as legal tender or a store of value.¹⁶⁵ Despite this, Singapore has encouraged the use of cryptocurrency as a means of payment to those who are willing to accept it.¹⁶⁶ To settle some confusion, Singaporean courts have clarified that the Country views cryptocurrency as personal property.¹⁶⁷ This classification of cryptocurrency as a property, rather than legal tender, is one that has withstood legal scrutiny. In the landmark judgment handed down in *B2C2 Ltd. v. Quoine Pte Ltd.*, the Singapore International Commercial Court confirmed that cryptocurrency should be regulated as a property.¹⁶⁸ In reaching this decision, the court held that cryptocurrency is not legal tender because it is not a currency issued by a government, but that it "(does) have the fundamental characteristic of intangible property as being an identifiable thing of value."¹⁶⁹ The court further opined that, in Singapore, property must be "definable, identifiable by third parties, capable

160. Franca Ciambella, En-Lai Chong & Lin YingXin, *Singapore*, in *BLOCKCHAIN & CRYPTOCURRENCY REGULATION* 2019 420 (Josias Dewey ed., 1st ed. 2019).

161. See Kim, *supra* note 89, at 364.

162. Kenneth Pereire & Lin YingXin, *Singapore*, in *BLOCKCHAIN & CRYPTOCURRENCY LAWS AND REGULATIONS* 2022 1 (4th ed. 2022), <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/singapore> [<https://perma.cc/LCD4-M92H>].

163. Chanyaporn Chanjaroen, Haslinda Amin & Joanna Ossinger, *Singapore Has Grand Ambitions to Become a Global Crypto Hub*, *BLOOMBERG L.* (Nov. 2, 2021), <https://www.bloomberg.com/news/articles/2021-11-01/singapore-has-grand-ambitions-to-become-a-global-crypto-hub?leadSource=verify%20wall> [<https://perma.cc/GM6V-QD3E>].

164. See generally *id.*

165. Ciambella, Chong & YingXin, *supra* note 160, at 420.

166. *Id.*

167. See *B2C2 Ltd. v. Quoine Pte Ltd.* [2019] SGHC(I) 03 at 56 (Sing.).

168. See generally *id.*

169. *Id.* at 56-57.

in its nature of assumption by third parties, and have some degree of permanence or stability.”¹⁷⁰ Before moving on to other matters, the court solidified their ruling that cryptocurrency is a property by stating that “[c]ryptocurrencies meet all these requirements.”¹⁷¹

The Singaporean regulatory scheme emerges from two major pieces of legislation: The Payment Services Act of 2019 (PSA) and the Securities and Futures Act (SFA).¹⁷² Further, to address money laundering and counterterrorism measures, Singapore introduced the MAS Notice on Prevention of Money Laundering and Countering the Financing of Terrorism—Holders of Payment Services License (Digital Payment Token Service) (PSN02).¹⁷³

A. The PSA—Regulating Cryptocurrency Exchanges

The Payment Services Act, which took effect in January 2020, regulates the payment and exchange of cryptocurrency in Singapore.¹⁷⁴ The intent behind this Act is to streamline the regulation of payment services into a single piece of legislation and to create more dynamic regulations to address the risks associated with cryptocurrency.¹⁷⁵

The PSA governs those who deal in digital payment tokens—PSA parlance for virtual currencies—and those who facilitate the exchange of “digital payment tokens.”¹⁷⁶ It defines a “digital payment token” as any digital representation of value that:

is expressed as a unit; is not denominated in any currency, and is not pegged by its issuer to any currency; is, or is intended to be a medium of exchange accepted the public, or a section of the public, as payment for goods or services or for the discharge of a debt; can be transferred, stored, or traded electronically; and satisfies such other characteristics as the Authority may prescribe.¹⁷⁷

Thus, under this broad and sweeping definition, the majority of cryptocurrencies are regulated as digital payment tokens under the Act.¹⁷⁸

The PSA requires any person who carries out a digital payment token service—or any transaction “dealing in” or “facilitating the exchange of” digital

170. *Id.* at 57 (quoting *National Provincial Bank v. Ainsworth*, 1 AC 1175 (1965) (Sing.)).

171. *Id.*

172. *Cryptocurrency Regulation in Singapore: Challenges and Opportunities Ahead*, IKIGAI L., (Nov. 11, 2020), https://www.ikigailaw.com/cryptocurrency-regulation-in-singapore-challenges-and-opportunities-ahead/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration#acceptLicense [<https://perma.cc/M3QS-S25Y>].

173. Pereire & YingXin, *supra* note 162.

174. IKIGAI L., *supra* note 172.

175. *Id.*

176. *Id.*

177. Payment Services Act, 2019 (Act No. 7/2019) (Sing.) [hereinafter PSA].

178. *See* IKIGAI L., *supra* note 172.

payment tokens—to obtain a payment institution license.¹⁷⁹ In an effort to ensure customer protection, Singapore has been very selective in granting requests for licensure.¹⁸⁰ There are two types of licenses that apply to digital payment services, a standard payment institution license and a major payment institution license.¹⁸¹ The deciding factor in determining which license an exchange must obtain is monthly transaction volume—companies whose cryptocurrency transactions exceed \$3 million USD monthly are required to obtain a major payment institution license, while those that do not reach this volume in cryptocurrency trades are only required to obtain a standard payment institution license.¹⁸² This licensing requirement imposes fines for non-compliant digital payment service providers, namely an initial fine not exceeding \$250,000 and an additional daily fine of no more than \$25,000 per day.¹⁸³

The PSA prescribes requirements that must be met by a license applicant in order to be considered for licensure.¹⁸⁴ An applicant must maintain a minimum base capital of \$100,000 if applying for a standard payment institution license, or \$250,000 if applying for a major payment institution license.¹⁸⁵ Further, an applicant shall not be licensed unless it maintains either a permanent place of business, or a registered office in Singapore.¹⁸⁶ The licensee must also appoint at least one employee to be present at this registered office or permanent place of business at any such hours prescribed by the MAS.¹⁸⁷ The MAS's intention in imposing this presence requirement is to assure that cryptocurrency exchanges are available to answer any queries or address any complaints that its customers may lodge.¹⁸⁸ The licensee is further required to keep records of all of its transactions available for review at its place of business.¹⁸⁹

Once exchanges are granted licensure under the PSA, they are tasked with certain notification requirements, obligating them to put the MAS on notice in case of the occurrence of certain events.¹⁹⁰ These notification requirements, it seems, were promulgated with the goal of forcing digital payment token providers

179. *Id.* at 182.

180. Selva Ozelli, *Why Singapore is One of the Most Crypto-Friendly Countries*, COINTELEGRAPH (Feb. 12, 2022), <https://cointelegraph.com/news/why-singapore-is-one-of-the-most-crypto-friendly-countries> [<https://perma.cc/KP2F-SYLH>].

181. *See* PSA, *supra* note 177, at 22-23.

182. IKIGAI L., *supra* note 172.

183. PSA, *supra* note 177, at 22.

184. *See id.*

185. *Standard Payment Institution Licence*, MONETARY AUTH. OF SING., <https://www.mas.gov.sg/regulation/payments/standard-payment-institution-licence> [<https://perma.cc/MF64-KGXA>]; *Major Payment Institution Licence*, MONETARY AUTH. OF SING., <https://www.mas.gov.sg/regulation/payments/major-payment-institution-licence> [<https://perma.cc/45P8-C4S8>].

186. PSA, *supra* note 177, at 25.

187. *Id.* at 42.

188. *Id.* at 85.

189. *Id.* at 41.

190. *Id.* at 42.

to maintain a minimum level of transparency with the MAS. The PSA enumerates some of the events that will trigger this reporting requirement, including legal proceedings brought against the licensee, any event that impedes the operations of the licensee, and the licensee's becoming insolvent or unable to meet its obligations.¹⁹¹ Further, licensees are required to report any disciplinary action taken against it by any regulatory authority and any significant change to the regulatory requirements imposed on it by any regulatory authority.¹⁹² The MAS also retains the authority to require disclosure of any other event, prescribed by notice in writing.¹⁹³ Further, licensees are required to notify the MAS, within two weeks, of particular changes in leadership of the company.¹⁹⁴

In order to ensure transparency, the PSA includes something of a catch-all provision. According to PSA Article 16, the MAS may require a licensee to provide any information relating to its operation of payment services as it may prescribe.¹⁹⁵ Although this transparency obligation extends to all matters, payment service providers are frequently required to disclose information to the MAS relating to payment service operations and the pricing of any payment services that are offered.¹⁹⁶ These obligations are enforceable despite any potential privileges or secrecy requirements.¹⁹⁷

As an additional consumer protection precaution, major payment institutions are required to maintain a prescribed monetary security amount with the MAS, or its equivalent in a foreign currency, for the performance of its obligations to its users.¹⁹⁸ By imposing this security obligation and giving itself custody over these securities, the MAS effectively allows exchanges to repay customers who lose their cryptocurrencies in the event that the exchange either surrenders its license or has it revoked.¹⁹⁹ If a hypothetical loss of licensure were to occur, the MAS would release the security to the major payment institution, which would use this money to pay back any outstanding claims from customers that might exist.²⁰⁰ In the event of a loss in licensure, an exchange has forty-five days to release this security amount to its customers, and it must supply an audit certificate to the MAS indicating that security was used for this purpose.²⁰¹

These requirements imposed by the PSA effectively force cryptocurrency exchanges to maintain a minimum level of transparency with both its customers and the MAS. In doing so, the MAS maintains a regulatory oversight and imposes minimum safety requirements that exchanges are required to comply with in order

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 43.

196. *Id.*

197. *Id.*

198. *Id.* at 48.

199. *See id.* at 48-49.

200. *Id.*

201. *Id.* at 49.

to operate in the Singaporean market. These PSA requirements are effective, as they give Singaporean cryptocurrency holders a level of protection and act as a means of mitigating some of the risks that have come to be associated with cryptocurrency.

B. The Securities and Futures Act: Offering Protections Against Fraudulent Initial Coin Offerings

The SFA governs capital market products, defined therein as securities, units in a collective investment scheme, derivatives contracts, or exchange contracts executed for purposes of leveraged foreign exchange trading.²⁰² The MAS had rendered the SFA applicable to cryptocurrencies that are classified as securities or, in layman's terms, cryptocurrencies that are offered for the purpose of economic benefit.²⁰³

The MAS frequently applies the SFA in the context of ICOs.²⁰⁴ In determining whether an ICO is a securities offering, the MAS considers whether (1) the coins were purchased and received on or around the date of the ICO, as opposed to being receivable at specified future dates; (2) discrepancies are found between the issuer and buyer in regards to the values of coins at different times; (3) the possible profits or losses that ICO investors realize financially affect the coin issuer; and (4) coins are a stake against the issuer that might be collected at a future date.²⁰⁵ If these considerations indicate that an ICO is a securities offering, the MAS can exercise its powers under the SFA to regulate it.²⁰⁶

In May 2020, the MAS released the "Guide to Digital Token Offerings" (GDTO) to illustrate the applicability of the SFA to initial coin offerings.²⁰⁷ This release states that offers of digital tokens to the public are to be regulated by the MAS, and under the SFA, if the digital tokens are classified as "capital market products."²⁰⁸ According to the GDTO, "(c)apital market products include securities, units in a collective scheme, derivatives contracts, and foreign exchange contracts for the purposes of leveraged foreign exchange trading."²⁰⁹

The SFA requires these "capital market product" digital tokens that fall under its regulatory scope be accompanied by a prospectus lodged and registered with the MAS.²¹⁰ A prospectus is essentially a long document that includes "any notice, circular, material, advertisement, publication, or other document used to

202. § 2(1)(f), SECURITIES AND FUTURES ACT OF 2001 (Sing.) [hereinafter SFA].

203. Song, *supra* note 53, at 15-16.

204. See IKIGAI L., *supra* note 172.

205. *Singapore Cryptocurrency Regulations*, COINFIRM, (Jan. 14, 2021) <https://www.coinfirm.com/blog/singapore-cryptocurrency-regulations/> [https://perma.cc/JTK3-YVVG].

206. *See id.*

207. *See generally* MONETARY AUTH. OF SING., A GUIDE TO DIGITAL TOKEN OFFERINGS [hereinafter GDTO].

208. *Id.* at 2.

209. *Id.*

210. SFA, *supra* note 202, at 734-35.

make an offer of securities.”²¹¹ The MAS retains the authority to refuse to register a prospectus and is required to exercise this authority of refusal in a variety of situations.²¹² The SFA will refuse to register a prospectus if it finds that the prospectus contains false or misleading information, that there is an omission from the prospectus, that the copy of the prospectus that is lodged with the MAS is not properly signed according to other requirements, that the prospectus does not comply with application requirements of the SFA, that the written consent of any necessary expert, issue manager, or underwriter is not properly lodged with the MAS, or simply that it is not in the public interest to register the prospectus.²¹³

Further, only approved exchanges or recognized market operators can establish or operate a cryptocurrency market in Singapore.²¹⁴ In order for an exchange to become an approved exchange under the SFA, it must obtain a capital market services license.²¹⁵ In order to qualify for such a license, a coin offeror must meet minimum financial requirements, in addition to any other requirements prescribed by the MAS.²¹⁶ The MAS may refuse to grant a capital market services license if it reaches any finding that would justify denying the application.²¹⁷ Among the many potential reasons that the MAS may refuse to issue capital market services license, it may deny licensure upon a finding that the applicant has not provided the appropriate documents, or that the documents provided by the applicant contain information that is false or misleading.²¹⁸

Additionally, the MAS can deny licensure if an applicant is a substantial shareholder in the course of being “wound up or otherwise dissolved,” is a substantial shareholder that has entered into a scheme with its creditors, or is a substantial shareholder that has been convicted of an offense involving fraud, dishonesty, or any other offense under the SFA.²¹⁹ The SFA goes on to list additional grounds for denying licensure, including dissatisfaction with the educational or other qualifications or experiences of the officers or employees of the applicant, reason to believe that the applicant will be unable to act in the best interests of its subscribers, dissatisfaction with the financial standing of the applicant, and the likelihood of an applicant to act with improper conduct in regard to business.²²⁰ The MAS retains ultimate control of SFA licensure and is not required to grant a license if it feels doing so would be contrary to the public

211. *Id.* at 863.

212. *Id.* at 736. Generally, the MAS must refuse to register a prospectus if it believes the prospectus to contain false or misleading information, if all applicable registration requirements are not met, or if the MAS does not believe it to be in the public interest to do so. *Id.*

213. *Id.* at 739-40.

214. IKIGAI L., *supra* note 172.

215. SFA, *supra* note 202, at 341.

216. *Id.* at 343.

217. *Id.* at 343-46.

218. *Id.* at 343.

219. *Id.* at 344.

220. *Id.* at 343-46.

interest.²²¹

The preceding list of reasons that the MAS may deny licensure is illustrative of the principle that is laid out in Article 88 of the SFA, which states that the MAS may deny capital market services licensing for any reason that it sees fit.²²² Thus, through the SFA, the MAS can regulate ICOs by offering oversight and controlling who can offer digital payment tokens. By maintaining this type of control over who can offer cryptocurrencies within Singapore, the MAS is able to offer a degree of investor protection, while preventing fraud and market manipulation via government licensure.

C. Prevention of Money Laundering and Countering the Financing of Terrorism

As is the case in the United States and some other countries, Singapore has general anti-money laundering and counterterrorism funding statutes. Both the Corruption, Drug Trafficking and Other Serious Crimes Act (CDSA) and the Terrorism Suppression of Financing Act (TSFA) obligate exchanges to report suspicious transactions with the Singaporean police as soon as is reasonably practicable, with failure to do so being a criminal offense under the CDSA.²²³

However, the MAS has issued a notice on counterterrorism funding and anti-money laundering that applies to all cryptocurrency exchanges falling under the PSA's regulatory scope.²²⁴ Notice PSN02, also known as the "Prevention of Money Laundering and Countering the Financing of Terrorism—Holders of Payment Service License (Digital Payment Token Service)," applies directly to cryptocurrency exchanges operating within Singapore.²²⁵ The PSN02 requires payment service providers who are regulated under the PSA, including cryptocurrency exchanges, to exercise due diligence when transacting with customers.²²⁶ Further, exchanges are required to conduct business in conformity with certain ethical standards and to refrain from establishing a business relationship or undertaking transactions connected with, or that may facilitate, terrorism funding or money laundering.²²⁷ If concerns about money laundering or terrorism funding arise, the PSN02 requires cryptocurrency exchanges to cooperate with law enforcement authorities.²²⁸ Additionally, the PSN02 requires continuous risk assessment and mitigation measures in order to prevent the use

221. *Id.* at 345.

222. *See id.* at 346.

223. Pereire & YingXin, *supra* note 162.

224. *Id.*

225. *Id.*

226. Notice to Holders of Payment Services Licence (Digital Payment Token Service), MAS Notice PSN02, (2019) (Sing.), <https://www.mas.gov.sg/-/media/MAS-Media-Library/regulation/notices/AML/psn02-aml-cft-notice---digital-payment-token-service/MAS-Notice-PSN02--DPT-Tracked.pdf> [<https://perma.cc/U68Y-MM9P>] [hereinafter PSN02].

227. *Id.* at 6.

228. *Id.*

of cryptocurrency for criminal enterprise.²²⁹

The PSN02 also imposes customer due diligence protocols, which are intended to prevent customers from opening anonymous accounts or managing accounts under an alias.²³⁰ Cryptocurrency exchanges must comply with these due diligence procedures to prevent the use of their platform for illegal activities often conducted on such anonymous or pseudonymous accounts.²³¹ Perhaps the most basic of these requirements is that the exchanges must positively identify all customers using reliable, independent data.²³² This identification requirement includes the collection of the customer's full name, any aliases, unique identification number, such as a driver's license or passport number, residential address or registered business address, date of birth, and nationality.²³³ Further, when a customer appoints a natural person to act on their behalf in establishing relations with an exchange, or where a customer is not a natural person, the exchange is required to verify the identity of each natural person involved by collecting the same information required for a typical customer.²³⁴ When an exchange has reasonable notice of grounds for believing that a particular account is being, or will be, used for illegal activity, it is prohibited from transacting with the customer or, if an existing business relationship exists, it must report the account to the MAS.²³⁵ Exchanges also must locate and verify the identity of any beneficial owners in relation to their customers.²³⁶ As part of these procedures, cryptocurrency exchanges must collect information regarding the purpose of transactions that are conducted without an account being opened, review all transactions undertaken without an account being opened, and continuously monitor all business relations with its customers.²³⁷

Article 6.3 of the PSN02 provides that exchanges must perform customer due diligence at various junctures.²³⁸ Specific suspicious activities that are required to be investigated due to their potential connection to criminal enterprise include (1) recurring and cumulatively large transactions without a "real" basis, (2) repetitive transfers of digital payment tokens to a single beneficiary, (3) recurring transactions for the sale or purchase of digital payment tokens within a short period of time, and (4) the execution of many smaller transactions of digital payment tokens, with each one being small enough to avoid raising red flags, but that when looked at in aggregate would equal a large enough sum to trigger suspicions.²³⁹ Article 6.3 of the PSN02 requires customer due diligence when:

229. *Id.* at 6-7.

230. *Id.* at 7-15.

231. *Id.* at 8-13.

232. *Id.* at 8, 10.

233. *Id.* at 8-9.

234. *Id.* at 9-11.

235. *Id.* at 7-8.

236. *Id.* at 11-12.

237. *Id.* at 13-15.

238. *Id.* art. 6.3.

239. *Singapore Cryptocurrency Regulations 2021*, COINFIRM, <https://www.coinfirm.com/>

(a) the payment service provider establishes business relations with any customer; (b) the payment service provider undertakes any transaction for any customer who has not otherwise established business relations with the payment service provider; (c) the payment service provider effects or receives digital payment tokens by value transfer, for any customer who has not otherwise established business relations with the payment service provider; (d) there is a suspicion of money laundering or terrorism financing, notwithstanding that the payment service provider would not otherwise be required by this Notice to perform the measures as required by paragraphs 6, 7 and 8; or (e) the payment service provider has doubts about the veracity or adequacy of any information previously obtained.²⁴⁰

If, for whatever reason, a token provider is unable to complete any of these customer and transaction verification measures, it is prohibited from continuing or beginning business with a customer, and the provider must report that customer to the MAS if the circumstances surrounding the transaction are suspicious.²⁴¹

IV. RECOMMENDATION

It is important to note that there are arguments to be made against the regulation of cryptocurrency. Elon Musk—billionaire, crypto enthusiast, and Chief Executive Officer of both Tesla and SpaceX—has spoken out against the governmental regulation of cryptocurrency.²⁴² Says Musk, “(i)t is not possible to, I think, to destroy crypto, but it is possible for governments to slow down its advancement.”²⁴³ Musk’s school of thought is based on the belief that governmental oversight will destroy the decentralized nature of cryptocurrency.²⁴⁴

However, the reality is that cryptocurrency must be regulated in order to protect cryptocurrency investors, prevent the use of cryptocurrency in criminal enterprise, and stifle market manipulation.²⁴⁵ There is no doubt that market manipulation and price volatility have run rampant in cryptocurrency.²⁴⁶

blog/singapore-cryptocurrency-regulations/ [https://perma.cc/GFN6-7PDP].

240. PSN02, *supra* note 226, at 9.

241. *Id.* at 17-18.

242. MacKenzie Sigalos, *Tesla CEO Elon Musk Says U.S. Government Should Avoid Regulating Crypto*, CNBC (Sep. 28, 2021), <https://www.cnbc.com/2021/09/28/tesla-ceo-elon-musk-says-us-government-should-avoid-regulating-crypto.html> [https://perma.cc/J5E4-9DKT].

243. *Id.*

244. *Id.*

245. *See generally* Felix Eigelshoven, Douglas Perry & André Ullrich, *Cryptocurrency Market Manipulation: A Systematic Literature Review* (International Conference on Information Systems, 2021).

246. *Id.* at 1 (asserting that in its current state, the cryptocurrency market is rife with manipulative schemes that often result in a loss of investor monies); *See* Paraskevi Katsiampa,

Regulation could correct this by effectively allowing the United States government to prevent illegitimate coins from being made available to its populace.²⁴⁷ While there are thousands of cryptocurrencies in existence, only some, such as Bitcoin and Ethereum, are well known and established enough to give investors any real sense of security.²⁴⁸ Thus, regulation would especially protect investors who choose to purchase other, lesser known coins by giving them assurances that governmental regulatory bodies control the market and exercise some degree of control over those coins before allowing them to be sold on exchanges.²⁴⁹ Similarly, governmental oversight would decrease instances of fraudulent ICOs and the use of cryptocurrency in criminal enterprise.²⁵⁰ Essentially, through regulation, the government would be able to assure the legitimacy of cryptocurrency transactions and maximize transparency and safety within the American crypto industry.

Cryptocurrency regulation has been, and will continue to be, a pressing issue not only for the American government, but for the government of any nation that has yet to effectively address it. The cryptocurrency industry as a whole is still in its preliminary stages. Further, the dawn of the metaverse is quickly approaching. World famous companies like Facebook and Nike have recently begun to take measures to enter the virtual world, which is, and will continue to be, heavily reliant on cryptocurrency.²⁵¹ In this global business climate where digital products and currencies are becoming ever more important, nations that refuse to acknowledge their importance will risk falling behind in the international economy.²⁵²

The current American regulatory approach to cryptocurrency lacks any real teeth, is convoluted, does not preempt states, and is wholly underdeveloped. In failing to adequately regulate cryptocurrency, the United States has left American cryptocurrency holders vulnerable to dangers and allowed an avenue for crime financing. Although cryptocurrency is an asset that is still in its infancy, it has garnered significant attention in other parts of the world.²⁵³ Indeed, the mass

Konstantinos Gkillas, & Francois Longin, *Cryptocurrency Market Activity During Extremely Volatile Periods* (2018).

247. See Timothy G. Massad, *It's Time to Strengthen the Regulation of Crypto-Assets*, ECON. STUD. AT BROOKINGS 2 (2019).

248. *Why Cryptocurrencies Need to Be Regulated? Here Are 5 Reasons*, NDTV (Dec. 6, 2021, 4:38 PM), <https://www.ndtv.com/business/5-reasons-why-cryptocurrency-regulation-is-important-2637741> [<https://perma.cc/54HN-BVE4>].

249. *Id.*

250. See Massad, *supra* note 247, at 3.

251. Kimberlee Speakman, *Virtual Nikes: Shoe Giant Follows Facebook into the Metaverse*, FORBES (Nov. 2, 2021, 3:38 PM) <https://www.forbes.com/sites/kimberleespeakman/2021/11/02/virtual-nikes-shoe-giant-follows-facebook-into-the-metaverse/?sh=3e7b34b04819> [<https://perma.cc/N8AS-ZUXP>].

252. COINBASE, *supra* note 151.

253. See Chaitra Anand, *Global Crypto Awareness: Singapore Beats Canada and Hong Kong*, YAHOO FINANCE (Oct. 14, 2021), <https://finance.yahoo.com/news/singapore-beats-canada-hk-in->

adoption of cryptocurrency appears imminent.²⁵⁴ If the United States fails to take regulatory action, it risks falling behind in the global financial scheme and missing out on being an early adopter of crypto assets that seem poised to grow exponentially not only in value, but in use and utility as well.²⁵⁵

Singapore, on the other hand, has established an effective regulatory scheme by classifying cryptocurrency as property. In doing so, it has implemented a variety of licensure requirements, customer protection measures, and crime prevention measures that allow safe use and growth of the cryptocurrency industry within the Country. Since implementing cryptocurrency regulation, Singapore has quickly attracted the attention of the cryptocurrency and financial technology world.²⁵⁶ Singapore has consistently been ranked highly amongst the top cryptocurrency regulators in the world.²⁵⁷ In fact, 43% of Singaporeans own cryptocurrency, whereas the average nation has a cryptocurrency ownership rate of only 15.4%.²⁵⁸ Indeed, Singaporean citizens have taken advantage of consumer-friendly crypto regulations, as is evidenced by the fact that the Singaporean cryptocurrency ownership rate is nearly three times higher than that of average nation.²⁵⁹ However, the interest in the Singaporean crypto market has not been confined to its citizens—cryptocurrency exchanges, too, have taken an interest in Singapore due to their regulatory scheme.²⁶⁰ In 2020 alone, 170 exchanges applied for MAS licensure to operate in Singapore.²⁶¹ However, the City-State exercised its selective authority in electing to grant licensure to only three of these applicants.²⁶² In doing so, Singapore shed some light on its approach to its crypto economy, which is best illustrated by a quote from Ravi Menon, the managing director of the MAS, who stated, “We don’t need 160

the-global-crypto-awareness-race-062700267.html [https://perma.cc/7532-BBKW].

254. Alex Sirois, *7 Most Crypto-Friendly Countries for Bitcoin Investors*, NASDAQ (June 30, 2021, 12:09 PM), <https://www.nasdaq.com/articles/7-most-crypto-friendly-countries-for-bitcoin-investors-2021-06-30> [https://perma.cc/6UV8-3WUV].

255. *It’s Time to Regulate Cryptocurrency—Here’s What’s Brewing*, A.B.A., (Aug. 16, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/08/it-s-time-to-regulate-cryptocurrency---here-s-what-s-brewing/> [https://perma.cc/GHV3-SJS6] (asserting that the United States “lags sorely behind its peers” and is “losing ‘amazing, innovative’ companies to other countries that offer ETFs and have clearer regulations”).

256. Ozelli, *supra* note 180.

257. Anand, *supra* note 253; Sirois, *supra* note 254.

258. Ozelli, *supra* note 180.

259. This is an approximated number, as approximately 43% of Singaporean citizens own cryptocurrency, while the global average cryptocurrency ownership within a single nation is 15.4%. See Ozelli, *supra* note 180.

260. Chanyaporn Chanjaroen, *Coinbase and Binance Among 70 Seeking Singapore and Crypto Permits*, BLOOMBERG (Nov. 11, 2021, 2:24 AM), <https://www.bloomberg.com/news/articles/2021-11-11/coinbase-and-binance-among-70-seeking-singapore-crypto-permits> [https://perma.cc/CWB9-NCSY].

261. *Id.*

262. *Id.*

[exchanges] to set up shop in Singapore. Half of them can do so, but with very high standards, that I think is a better outcome.”²⁶³

Exchanges also reap the benefits from this Singaporean framework. DBS Digital Exchange, a cryptocurrency platform, was granted licensure to operate in Singapore in August of 2021, and in the subsequent two months surpassed its combined trading volume for the previous eight months by forty percent.²⁶⁴ Indeed, Singapore’s goal of striking a balance between making itself attractive to cryptocurrency firms and maintaining strict regulatory measures to protect its citizens has been wholly successful and thus, has lent itself to Singapore becoming known as a crypto haven.

The United States should look to Singapore for guidance in regulating cryptocurrency. In doing so, the United States needs to follow Singapore’s lead in establishing a clear regulatory scheme. First, the states should be preempted from regulating crypto assets. Next, in order to eliminate confusion and create a streamlined regulatory process, it must be made clear that only one governing body may regulate cryptocurrency, just as Singapore has done with the MAS. Some have suggested that the United States create a new agency tasked with the sole purpose of regulating cryptocurrency.²⁶⁵ This suggestion, though, seems a little far-fetched and unlikely. Outside of an entirely new agency, the best candidate for this role is the SEC, which presently seems to be the strongest regulator of cryptocurrencies.²⁶⁶ Ultimately, however, it is of no consequence which agency regulates crypto, as long as there is only one, authoritative regulating body.

Next, the United States should pass legislation, similar to that of Singapore’s, to assure the safety and legitimacy of cryptocurrency. Specifically, the United States should adopt licensure requirements, similar to those of the PSA and the SFA. The goal of this licensure, like that of Singapore’s, should be to establish clear, authoritative, easy to follow rules that require transparency and customer protection for a Nation that is becoming increasingly interested in cryptocurrencies.²⁶⁷ Further, the United States must implement clear, authoritative crime prevention measures. Due to its unique and decentralized nature, cryptocurrency lends itself to being used for crime and thus requires separate guidance as it relates to the criminal realm. It follows that the United States must issue special regulations, similar to Singapore’s PSN02, and impose reporting,

263. *Id.*

264. *Id.*

265. Feiner, *supra* note 150.

266. Stephen J. Obie & Mark W. Rasmussen, *How Regulation Could Help Cryptocurrencies Grow*, HARV. BUS. REV. (July 17, 2018), <https://hbr.org/2018/07/how-regulation-could-help-cryptocurrencies-grow> [<https://perma.cc/Y97R-9Q9E>] (suggesting that the SEC regulate cryptocurrency in order to clear the confusion caused by the overlapping of various federal regulatory schemes); Minor, *supra* note 40, at 1177.

267. Ryan Haar, *The Future of Cryptocurrency: 5 Experts’ Predictions After a ‘Breakthrough’ 2021*, TIME (Oct. 31, 2022), <https://time.com/nextadvisor/investing/cryptocurrency/future-of-cryptocurrency/> [<https://perma.cc/7CYG-YVBY>].

monitoring, and KYC requirements on exchanges to prohibit and prevent the use of cryptocurrency for the funding of criminal enterprise.²⁶⁸ In implementing these proposed regulations, the United States could alleviate some of the dangers and risks associated with cryptocurrency while simultaneously promoting the growth and use of the cryptocurrency industry.

V. CONCLUSION

The comparison between the American Wild West of the past and the American cryptocurrency market of the present is especially veracious. The wild west allured people with its promises of riches and opportunity in the form of a gold rush. The result, however, was a land that ran rampant with crime and lawlessness due to an enormous migration of people and a lack of protectionist measures and infrastructure. Cryptocurrency, too, offers coin holders a “gold rush” opportunity to make huge returns on their investments and, thus, to improve their quality of life. As a result, it has drawn millions of people despite the fact that it is in its nascent stages as a market.²⁶⁹ American cryptocurrency holders have found themselves in a space that appears to be lawless and unregulated—just like the gold rush era American West. A variety of consumer protection and national security issues have arisen, as the industry has seen more than its fair share of theft, hackers, scammers, and fraudsters. What is more, the anonymous and decentralized nature of crypto, combined with its current lack of regulation has made it a hub for crime; specifically, terrorism funding and money laundering.

The United States’ current approach to regulation delegates power to several federal agencies and does not preempt states from throwing their hats into the regulatory ring. As a result, the framework is muddled, confusing, and ineffective to say the least. Singapore, on the other hand, has managed to implement a regulatory approach that drastically reduces these risks while also encouraging the growth of the cryptocurrency industry within the nation. This approach delegates regulatory authority over cryptocurrency to one authoritative, central agency—the MAS. In implementing this regulation, Singapore has established a singular authority charged with the regulation of cryptocurrency assets. This has allowed Singapore to apply laws that put into place effective consumer protection and anti-crime measures. If the United States wants to avoid falling behind in the

268. Tom Sadon, *5 Reasons Why Criminals & Terrorists Turn to Cryptocurrencies*, COGNYTE (Nov. 2, 2021), <https://www.cognyte.com/blog/5-reasons-why-criminals-are-turning-to-cryptocurrencies/#:~:text=Just%20as%20cryptocurrencies%20are%20gaining,in%20illicit%20activities%20in%202020> [https://perma.cc/P9SZ-6EPG] (stating that criminals use cryptocurrency for illegal activities due to its “promise of anonymity,” “no strings attached” nature, accessibility and speed, easy storage and transferability, and borderless nature).

269. Haar, *supra* note 267.

burgeoning age of digital currency, it should follow Singapore's lead by appointing a single governing agency over cryptocurrency and promulgating regulations—similar to the PSA, SFA, and PSN02—that offer cryptocurrency holders protection against the industry's many dangers, prevent the use of cryptocurrency for crime, and encourage the use and adoption of cryptocurrency in America.