

#NOTFINANCIALADVICE: EMPOWERING THE FEDERAL TRADE COMMISSION TO REGULATE CRYPTOCURRENCY SOCIAL MEDIA INFLUENCERS

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Abstract: The proliferation of digital currency has only accelerated due to the retail investor revolution at the advent of COVID-19.¹ This year alone, the number of available cryptocurrency coins has nearly doubled to 10,000.² The massive influx of interested investors within the nascent cryptocurrency space has inspired bad actors to take advantage of people's goodwill. Specifically, "social media influencers" are using their sway to convince their fans to invest in crypto coins that they own. Thus, when their fans purchase the coin, the value of the cryptocurrency increases, and the influencers can sell for a profit. Further, in certain circumstances, creators of digital coins provide these influencers a large percentage of these coins within the "pre-sale" as payment for their endorsement. Various regulatory agencies are in dispute as to the classification of cryptocurrency. Also, no applicable statutes or regulations specifically regulate these influencers. Therefore, content creators can act with impunity. This work examines the cryptocurrency market and the current regulatory patchwork developed by the various relevant federal agencies. Moreover, it proposes a temporary solution to prevent social media influencers from maliciously benefiting at the expense of their followers. The Security Exchange Commission (SEC) and Commodity Futures Trade Commission (CFTC) are currently jockeying to be the agency that regulates the cryptocurrency space. However, the Federal Trade Commission (FTC) should oversee social media influencer endorsements of digital currencies. Thus, this Note proposes that the FTC expand its disclosure rules' purview to require social media influencers to disclose if they have received payment for their endorsement of a cryptocurrency. This change would allow consumers to know social media influencers' stake in an endorsement. Additionally, knowing they would need to disclose this information may have a chilling effect on influencers endorsing risky or potentially malicious alternative cryptocurrency coins.

¹ Bianca Britton, *Inside the "Wild West" of Cryptocurrencies and Social Media Influencers*, NBC NEWS: TECH NEWS, (July 21, 2021, 5:00 AM), <https://www.nbcnews.com/tech/tech-news/wild-west-cryptocurrencies-social-media-influencers-rcna1469> [<https://perma.cc/AZ5V-TRTJ>].

² *Id.*

I. INTRODUCTION

A. The New Digital Wild, Wild West; Scams and Schemes in the Cryptocurrency Space

As the world shut down to contain the outbreak of the novel coronavirus COVID-19, people trapped in their homes with extra time on their hands began to use retail trading apps such as Robinhood and Coinbase.³ The year 2020 saw a record-breaking amount of new brokerage accounts, and in January of 2021 alone, six million Americans downloaded a retail investment trading app.⁴ Simultaneously, as a result of curiosity and speculation, interest in digital assets such as cryptocurrencies and non-fungible tokens, commonly called NFTs, surged to all-time highs.⁵ In response, coin creators minted 6000 new cryptocurrencies in 2021 alone, effectively doubling the number of available cryptocurrencies for individuals to invest in and trade.⁶ As expected, this massive increase in

³ *See id.*

⁴ VAL SRINIVAS & JILL GREGORIE, THE RISE OF NEWLY EMPOWERED RETAIL INVESTORS: HOW THEY'RE CHANGING CUSTOMER EXPECTATIONS AND INVESTING DYNAMICS 3 (Deloitte 2021).

⁵ Vildana Hajric & Joanna Ossigner, *Bitcoin Surges to All-Time High in Crypto's 'Validating Moment*, BLOOMBERG: MKTS. (Oct. 20, 2021, 5:08 PM), <https://www.bloomberg.com/news/articles/2021-10-20/bitcoin-climbs-to-record-high-after-futures-based-etf-debut> [<https://perma.cc/UD63-2S5F>] (noting that Bitcoin rose to all-time highs and the launch of a crypto-specific ETF was “the second-most heavily traded fund on record”).

⁶ Emma Newbery, *The 5 Most Exciting Cryptos That Launched in 2021*, MOTELY FOOL (Jan. 9, 2022), <https://www.fool.com/the-ascent/cryptocurrency/articles/the-5-most-exciting-cryptos-that-launched-in-2021/> [<https://perma.cc/GXW6-96HC>].

attention towards cryptocurrency coupled with the lack of oversight from regulators encouraged opportunists to trick new investors.⁷

From October 2020 to May 2021, 7000 people reported losing a combined \$80 million from cryptocurrency schemes.⁸ One such typical plot has individuals create a cryptocurrency coin and give a percentage of the newly created tokens to those with a large social media following on social media platforms such as Instagram, Twitter, or YouTube, known as social media influencers.⁹ Social media influencers publicly endorse and advertise the currency to their followers in exchange for digital coins.¹⁰ Following the influencers' advice, fans purchase these coins, which "pump" their value.¹¹ When the coin peaks in value, the social media influencer and coin creator "dump" their currency ownership.¹² Subsequently, the cryptocurrency plummets in value, harming those tricked into purchasing the coin.¹³ Due to their massive followings, some influencers forgo coordinating with coin creators and, on their own, buy large portions of a particular alternative

⁷ *See id.*

⁸ Emma Fletcher, *Cryptocurrency Buzz Drives Record Investment Scam Losses*, FTC: CONSUMER PROT. DATA SPOTLIGHT (May 17, 2021, 10:29 AM), <https://www.ftc.gov/news-events/blogs/data-spotlight/2021/05/cryptocurrency-buzz-drives-record-investment-scam-losses> [<https://perma.cc/HV3T-ZK4F>].

⁹ Britton, *supra* note 1; *Social Media Overview*, TUFTS U.: COMM'C'N & MKTG., <https://communications.tufts.edu/marketing-and-branding/social-media-overview/> (explaining that social media platforms are the "means of interactions among people in which they create, share, and/or exchange information and ideas in virtual communities and networks.").

¹⁰ Britton, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

currency, colloquially known as “altcoins.”¹⁴ After that, they continuously advertise and sell their stake once the coin surges in value.¹⁵ This work seeks to examine potential regulations to prevent and or police these social media influencers’ “pump-and-dump” schemes by requiring those with a large following to publicly disclose their “material connection” to a particular coin before their endorsement.

The following examples illustrate the massive impact these schemes can have on both the perpetrators and the victims. First, multiple large Tik Tok and YouTube Influencers promoted a cryptocurrency known as “Save The Kids,” a supposed charity coin that claimed to donate a percentage of the proceeds to various charities.¹⁶ To assuage consumer fear, the creators of currency touted an “anti-whale” code embedded within “Save The Kids” to prevent individuals with significant positions in the coin from selling the entirety of their stake all at once.¹⁷ Immediately after the advertisement campaign, the currency shot up in value but shortly after fell by 150%.¹⁸ Subsequently, an investigative report determined that the influencers received payments to promote the coin in cash and a percentage of the “pre-

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Coffeezilla, *Save The Kids - The Final Chapter*, YOUTUBE (July 27, 2021), <https://www.youtube.com/watch?v=3Xw9rWmTQfc> [<https://perma.cc/62AR-QNQJ>].

¹⁸ Matt Eng, *FaZe Clan Scammed Their Own Fans with “Save the Kids” Crypto Token*, MEDIUM (June 28, 2021), <https://medium.com/boil-it-down-gaming/faze-clan-scammed-their-own-fans-with-save-the-kids-crypto-token-6bec8973d98f> [<https://perma.cc/X66Q-RMKB>].

sale” coin.¹⁹ Even more maliciously, the investigation also determined that one of the social media influencers involved bullied the team behind the coin’s creation to remove the “anti-whale code,” which allowed the influencers to sell their position all at once.²⁰ Thousands of fans lost money in this pump-and-dump scheme.²¹ Although journalists discovered this conspiracy and at least some of those who participated in it faced consequences, fans who purchased the “Save The Kids” token could not recoup their losses.²² There needs to be a mechanism to ensure that those who perpetrate these “pump-and-dump” schemes receive appropriate punishment and that victims have some means of recovering their money.

Second, throughout 2020 and 2021, Elon Musk, CEO of Tesla and SpaceX, continuously and cyclically tweeted praise and admonishment for Bitcoin and Dogecoin.²³ In February of 2021, Tesla revealed in an SEC filing that it held \$1.5 billion worth of Bitcoin.²⁴ As a result, the price of Bitcoin skyrocketed to \$50,000 for the first time.²⁵ After Musk announced on Twitter that Tesla would immediately accept Bitcoin as payment for products and services, the price of Bitcoin again rose to more than

¹⁹ Coffeezilla, *supra* note 17.

²⁰ *Id.*

²¹ Britton, *supra* note 1.

²² *Id.*

²³ David Z. Morris, *Musk Has Doge on a Leash. Is He a Manipulator?*,

COINDESK (May 14, 2021, 2:40

PM), <https://www.coindesk.com/markets/2021/05/14/musk-has-doge-on-a-leash-is-he-a-manipulator/>.

²⁴ Tesla, Inc., Annual Report, (Form 10-K), 22 (Feb. 8, 2020).

²⁵ Morris, *supra* note 23.

\$58,000.²⁶ A few months later, in May of 2021, Musk announced that Tesla would no longer accept Bitcoin as payment.²⁷ Shortly after, the value of Bitcoin dropped.²⁸ It is clear that Musk knows the impact of his tweets, as evident by his tweet on June 4th, 2021, which was simply “‘#Bitcoin’ with an emoji of a broken heart and a picture of a couple discussing a break.”²⁹ Again, the value of Bitcoin dropped by seven percent.³⁰ In their subsequent 10Q SEC quarterly report, Tesla highlighted \$101 million of profit from selling ten percent of their Bitcoin.³¹ Thus, Musk has a clear incentive to speak publicly about Bitcoin, knowing that his supporters will respond in kind, providing him and his company a windfall of profits.

Finally, Musk has tweeted consistently about the “meme coin” known as Dogecoin.³² Dogecoin was created purely as a joke.³³ The coin is

²⁶ *Id.*

²⁷ Elon Musk (@elonmusk), TWITTER, (May 12, 2021, 5:54 AM), <https://twitter.com/elonmusk/status/1392780304138473473> [<https://perma.cc/3DE8-6MCV>].

²⁸ *How Tweets by Tesla’s Elon Musk Have Moved Markets*, REUTERS: FIN. (Nov. 8, 2021, 12:47 PM), <https://www.reuters.com/business/finance/how-tweets-by-teslas-elon-musk-have-moved-markets-2021-11-08/> [hereinafter *Elon Musk Tweets*].

²⁹ Elon Musk (@elonmusk), TWITTER (June 3, 2021, 9:07 PM), <https://twitter.com/elonmusk/status/1400620080090730501> [<https://perma.cc/6G2F-HFVA>].

³⁰ *Elon Musk Tweets*, *supra* note 28.

³¹ *Q1 2021 Update*, TESLA, INC. (Apr. 26, 2021), https://tesla-cdn.thron.com/static/R3GJMT_TSLA_Q1_2021_Update_5KJWZA.pdf [<https://perma.cc/GN2Q-HC66>], [hereinafter *Tesla Quarterly Report*] (highlighting that Tesla sale of Bitcoin had a “\$101M positive impact”).

³² *Elon Musk Tweets*, *supra* note 28.

³³ Brandon Kochkodin, *Dogecoin’s Creator Is Baffled by Meteoric Rise to \$9 Billion*, BLOOMBERG: MKTS. CRYPTO (Feb. 11, 2021, 2:12 PM), <https://www.bloomberg.com/news/articles/2021-02-11/dogecoin-s-creator-is-just-as-baffled-as-you-are-about-its-rise> [<https://perma.cc/E2BU-3K4J>].

effectively valueless, baring consumer speculation.³⁴ Despite this fact and seemingly because of it, Musk has continually tweeted his endorsement of the digital currency leading to its increase in value.³⁵ The beginning of the meteoric rise of Dogecoin began with a December 20th, 2020, tweet from Musk stating, “One word: Doge.”³⁶ That day, the value of Dogecoin increased by twelve percent, from \$0.003987 to \$0.004569.³⁷ On February 4th, 2021, Musk tweets multiple times about Dogecoin declaring Dogecoin to be “the people’s crypto.”³⁸ As a result, the value of Dogecoin surged by more than sixty percent that day.³⁹

However, Musk is not content with demonstrating his control over the cryptocurrency markets by merely increasing the value of Dogecoin. On May 8th, Musk made an appearance on *Saturday Night Live*.⁴⁰ During a segment on the show, he described Dogecoin as a “hustle,” causing the coin price to drop from its peak of seventy cents to twenty cents in a matter of

³⁴ *What is DogeCoin?*, COINBASE, <https://www.coinbase.com/learn/crypto-basics/what-is-dogecoin> [<https://perma.cc/J53U-E68G>] (noting that that Dogecoin’s defining feature is abundance and that “[g]iven the vast and ever-growing supply, demand has had to surge enormously to drive values as high as they’ve been recently.”).

³⁵ *See id.*

³⁶ Elon Musk (@elonmusk), TWITTER (Dec. 20, 2020, 4:30 PM), <https://twitter.com/elonmusk/status/1340590280848908288> [<https://perma.cc/DY7T-8ZKF>].

³⁷ *Price of DogeCoin*, COINDESK, <https://www.coindesk.com/price/dogecoin/> [<https://perma.cc/GB8W-PSWB>].

³⁸ Elon Musk (@elonmusk), TWITTER (Feb. 4, 2021, 3:15 AM), <https://twitter.com/elonmusk/status/1357241340313141249> [<https://perma.cc/7YT7-9ZQAQ>].

³⁹ *Elon Musk Tweets*, *supra* note 28.

⁴⁰ *Morris*, *supra* note 23.

hours.⁴¹ The fact that he incessantly tweets about a digital coin whose sole purpose is to showcase the absurdity of cryptocurrencies in conjunction with tweets like “I am become meme, Destroyer of shorts,” it is clear that Musk not only understands that he can control cryptocurrency markets but actively revels in it.⁴²

The common thread behind these three examples is that real people lost real money. In all three instances, either social media influencers or mainstream public figures took advantage of their public goodwill to pitch an asset they held purely and exclusively to benefit themselves. With respect to the first example, adoring fans “pumped” the asset's value. Subsequently, these influencers “dumped” their substantial shares at the peak, ensuring they reaped the most significant benefit and their fans suffered a considerable loss. The following two examples concerning Musk underscore how particular well-known individuals relish their control over the digital asset markets and chaotically attempt to push the value of cryptocurrencies up and down, sometimes with no clear indication of the benefit to themselves as seen with Dogecoin. Conclusively, these examples demonstrate the need for regulation that holds influencers accountable and provides a mechanism in which victims receive reparation.

In Part II, this Note will initially provide contextual information on cryptocurrencies and how various regulatory agencies have viewed

⁴¹ *Id.*

⁴² Elon Musk (@elonmusk), TWITTER (Feb. 4, 2021, 5:08 AM), <https://twitter.com/elonmusk/status/1357269755112148993> [<https://perma.cc/7YT7-9ZAQ>].

regulating this new asset class. Then in Part III, it looks to the FTC, which has yet to take a formal regulatory position concerning cryptocurrencies. In particular, it will examine how the Federal Trade Commission's disclosure regulation for paid endorsement operates in practice. Part IV will describe two potential proposals to enhance the scope of the FTC's disclosure rules to (1) inhibit social media influencers from coordinating pump-and-dump schemes with coin creators and (2) limit the ability of public figures from using their sway for their gain. Finally, this Note will discuss why the FTC is better suited to regulate social media influencer cryptocurrency endorsements instead of the SEC or CFTC.

B. Agencies Jockeying for Supremacy Over Cryptocurrency

Various regulatory entities have attempted to assert their respective authority over the cryptocurrency markets.⁴³ As of March 2021, the Commodity Futures Trading Commission (CFTC) has brought suit against several actors involved with anti-virus software developer John McAfee for an alleged pump-and-dump scheme wherein John McAfee, through a third party, would secure positions in various altcoin and subsequently “pump”

⁴³ Carla Mozée, *Head of Consumer Protection Watchdog Signals Stance on Digital Assets with Warning on Stablecoins*, MKT. INSIDER (Oct. 27, 2021, 4:49 PM), <https://markets.businessinsider.com/news/currencies/stablecoins-risk-financial-system-consumer-protection-warning-cryptocurrency-chopra-2021-10> [<https://perma.cc/3QFD-FRWZ>] (discussing how the Consumer Financial Protection Bureau, Securities and Exchange Commission, and Commodity Futures Trading Commission all believe that they should be the “main agency to oversee cryptocurrencies”).

the value of said coins through tweets.⁴⁴ The success of the CFTC, in this case, would determine the viability of its enforcement of social media influencers within the cryptocurrency market.⁴⁵

Simultaneously, the Security and Exchange Commission (SEC) has additionally filed similar charges against the agents of McAfee, and therefore a ruling in their favor would also strengthen their claim.⁴⁶ Moreover, the SEC has publicly stated that the agency has limited authority over cryptocurrencies, particularly tokens provided through a process known as an Initial Coin Offering.⁴⁷ The SEC has recently brought suit against a digital currency organization known as Ripple Labs to assert this authority.⁴⁸ The main dispute between the parties is whether the digital coin, known as XRP, is considered a security. Thus, the court may find that the SEC has authority over cryptocurrencies.⁴⁹

⁴⁴ Complaint at 1, U.S. Commodity Futures Trading Comm'n v. McAfee, No. 21-CV-1919 (S.D.N.Y. Mar. 5, 2021); *see also John David McAfee and Executive Adviser of His Cryptocurrency Team Indicted in Manhattan Federal Court for Fraud and Money Laundering Conspiracy Crimes*, DEP'T OF JUSTICE (Mar. 5, 2021), <https://www.justice.gov/usao-sdny/pr/john-david-mcafee-and-executive-adviser-his-cryptocurrency-team-indicted-manhattan> [<https://perma.cc/G8B6-LP77>].

⁴⁵ Press Release, *CFTC Charges Two Individuals with Multi-Million Dollar Digital Asset Pump-and-Dump Scheme*, CFTC (March 5, 2021), <https://www.cftc.gov/PressRoom/PressReleases/8366-2> (noting that it is the first case brought by the CFTC for a manipulation of a digital asset).

⁴⁶ *See id.*

⁴⁷ Bob Pisani, *Bitcoin and Ether Are Not Securities but Some Initial Coin Offerings May Be*, *Official Says*, CNBC: TRADER TALK (June 14, 2018, 12:27 PM), <https://www.cnbc.com/2018/06/14/bitcoin-and-ethereum-are-not-securities-but-some-cryptocurrencies-may-be-sec-official-says.html> [<https://perma.cc/V6K5-P7Q7>].

⁴⁸ *See* Complaint, SEC v. Ripple Labs, Inc., No. 20-cv-10832 (S.D.N.Y. 2020), <https://www.sec.gov/litigation/complaints/2020/comp-pr2020-338.pdf>.

⁴⁹ *Id.*

The very essence of cryptocurrencies is decentralization.⁵⁰ The coins have no fiat, no government ensuring their value.⁵¹ As a result, it is challenging to regulate and protect consumers from bad actors. Social media influencers are increasingly endorsing valueless coins whose sole purpose is to propagate a “pump-and-dump” scheme for its creators and insiders.⁵² This development is alarming because nearly forty-five percent of crypto owners would hold a particular digital currency if it were recommended to them by a celebrity or an influencer.⁵³ Exacerbating this effect is that crypto investors are more likely to seek investment advice from social media than typical stock investors.⁵⁴ By regulating these influencers to disclose their “material connection” to the coin, the United States can signal to these content creators that it is unacceptable to scam their followers. Further, due to the experience and the authority granted to it, the Federal Trade Commission (FTC) is the best regulatory agency to deal with these pump-and-dump schemes.

⁵⁰ James Royal, Ph.D. & Kevin Voigt, *What is Cryptocurrency?; Here's What You Should Know*, NERDWALLET (Jan. 3, 2022), <https://www.nerdwallet.com/article/investing/cryptocurrency-7-things-to-know> [<https://perma.cc/LR2B-R36J>].

⁵¹ *Id.*

⁵² Britton, *supra* note 1.

⁵³ Charlotte Principato, *Kim Kardashian, Cryptocurrency and Celebrity Clout*, MORNING CONSULT (Sept. 21, 2021, 3:00 PM), <https://morningconsult.com/2021/09/21/kim-kardashian-crypto-celebrity/> [<https://perma.cc/R95H-UBH7>].

⁵⁴ *Id.*

II. UNDERSTANDING THE CRYPTOCURRENCIES AND HOW REGULATORS VIEW THE ASSET

For one to understand the complexities in attempting to regulate cryptocurrencies, the proper context is necessary, first, with respect to the mechanisms underlying the creation, function, and exchange of digital currencies. Secondly, a brief overview of how various federal agencies view this new digital asset class as well as the intended purpose of cryptocurrencies to be decentralized demonstrates the difficulties of classifying and regulating cryptocurrencies compared to traditional asset classes.

A. *Understanding the Unique Mechanisms and Characteristics of a Digital Coin*

In 2009, a whitepaper circulated the internet describing the creation of a digital currency, known as Bitcoin, not backed by any government.⁵⁵ Instead, the digital currency relied on a public digital ledger facilitated and verified by peer-to-peer blockchain technology.⁵⁶ Bitcoin first became popular in 2011 when criminals began using the digital currency to exchange illegal property and services on the dark web website known as *Silk Road*.⁵⁷

⁵⁵ See Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN.ORG (2018), <https://bitcoin.org/bitcoin.pdf>.

⁵⁶ *Id.* at 2.

⁵⁷ Nathaniel Popper, *What Is Bitcoin, and How Does It Work?*, N.Y. TIMES (Oct. 1, 2017), https://www.nytimes.com/2017/10/01/technology/what-is-bitcoin-price.html?mc=aud_dev&ad-

First pioneered by Bitcoin, cryptocurrencies rely on blockchain technology to record, verify, and track transactions of the currency.⁵⁸ Initially, each transaction is “timestamped and incorporate[ed into a block] . . . in time order into a chain of larger of all of the blocks in the ledger.”⁵⁹ To verify the transaction and publish it within the public digital ledger, a computer known as a “mining computer” must solve a complex puzzle.⁶⁰ This process is known as the “proof-of-work” protocol.⁶¹ The “mining computer” owner receives a Bitcoin in exchange for authenticating the transactions.⁶² Once the “mining computer” verifies the transaction on the blockchain, any user can view the transaction on the public ledger if they know either the buyer's or seller's “public key.”⁶³ A “public key” is merely a series of randomized numbers associated with each user.⁶⁴ The public recording and the use of “mining computers” to verify each transaction eliminates the need for a government backing of the currency.⁶⁵ That is, the novelty and importance of Bitcoin and its progeny are that it removes the

keywords=auddevgate&gclid=Cj0KCQjwnoqLBhD4ARIsAL5JedJ0jHR3l74axiMr l3gSNQCKR3BPswrpcDHK65DJxoyNmxApCXuQ8_8aAtSFEALw_wcB&gclsrc =aw.ds [https://perma.cc/Q5XA-WDM8].

⁵⁸ Josephine Shawver, *Commodity or Currency: Cryptocurrency Valuation in Bankruptcy and Trustee's Recovery Powers*, 62 B.C. L. REV. 2013, 2013–14 (2021).

⁵⁹ *Id.* at 2021–22

⁶⁰ *Id.* at 2022.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

need for a third-party intermediary to verify and secure the value of the currency.⁶⁶

An added way that cryptocurrencies remove the need for a governmental intermediary is the novel way they handle private ownership.⁶⁷ To establish ownership over individual coins, “private keys” are provided to users to access the blockchain ledger.⁶⁸ Similar to the “public key,” a “private key” is a series of randomly generated numbers unique to each user.⁶⁹ Typically, individuals store “private keys” in “wallets,” which can be paper or digital with two-step authentication.⁷⁰ Without the key, individuals are unable to access or transact their coins.⁷¹ Therefore, one drawback of the blockchain is that if individuals lose their “private keys,” their currencies are effectively lost.⁷²

A recent trend within the cryptocurrency space is the issuance of Initial Coin Offerings (ICOs).⁷³ Similar to an Initial Public Offering, companies offer an ICO to investors to raise capital for new projects and opportunities.⁷⁴ In an ICO, companies provide investors with a

⁶⁶ *Id.* at 2019.

⁶⁷ *Id.* at 2023.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² COINBASE, *What Is a Crypto Wallet?*, <https://www.coinbase.com/learn/crypto-basics/what-is-a-crypto-wallet> [<https://perma.cc/PX9R-SQSM>].

⁷³ *Spotlight on Initial Coin Offerings (ICOs)*, SEC, <https://www.sec.gov/ICO> [<https://perma.cc/7E3G-XQUV>] (last modified July 14, 2021).

⁷⁴ Lyle Daly, *What Is an Initial Coin Offering (ICO)?*, MOTLEY FOOL, <https://www.fool.com/investing/stock-market/market->

cryptocurrency token in exchange for an established cryptocurrency such as Ethereum or Bitcoin as well as fiat currencies.⁷⁵ Investors typically send these payments to the ICO issuer's cryptocurrency wallet while providing their wallet to the issuer to receive their digital currency.⁷⁶ For a while, ICOs were a straightforward, lucrative, and unregulated means of raising capital for projects.⁷⁷ In 2018, investors purchased \$14 billion of cryptocurrencies through ICOs.⁷⁸ However, many of the projects and coins offered in an ICO became valueless within a year.⁷⁹ Further, the SEC has recently stepped in to regulate certain ICOs.⁸⁰

Depending on the circumstances, individuals may have to register ICOs with the SEC should the token be classified as a security.⁸¹ For example, in June of 2020, the SEC successfully brought charges against Telegram Group Inc. and its wholly-owned subsidiary TON Issuers Inc. alleging that the company's ICO of a digital currency called "Grams" constituted an

sectors/financials/cryptocurrency-stocks/initial-coin-offering/
[<https://perma.cc/W2UF-4HN9>] (last updated Jan. 21, 2022, 5:56 PM).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (This is not to say that all ICO projects are scams or bad investments. In fact, some of the biggest competitors within the cryptocurrency space such as Ethereum or Cardano began as ICO opportunities for investors. However, the vast majority of ICO projects and tokens fail to realize profits for investors).

⁷⁸ Mathias Fromberger & Lars Haffke, *ICO Market Report 2018/2019 – Performance Analysis of 2018's Initial Coin Offerings*, DIPLOM-JURIST (UNVI.) (December 31, 2019),

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512125

[<https://perma.cc/NW59-DYTB>].

⁷⁹ *Id.* at 3 (finding that nearly seventy percent of all cryptocurrencies offered in ICOs had "lost substantially all their value").

⁸⁰ *Spotlight On Initial Coin Offerings*, *supra* note 72.

⁸¹ *Id.*

unregistered security violating securities law.⁸² As a result, the defendants agreed to return \$1.2 billion and pay an \$18.5 million civil penalty.⁸³ Thus, if an ICO operates similarly to an IPO, the SEC will require that a company register the ICO with the SEC.

The combined use of the public ledger and public keys enables anyone, including investigators, to develop a clear understanding of who is exchanging digital coins with whom. Therefore, in regulating pre-sale pump-and-dump schemes between coin creators and content creators, it is merely necessary to have either the social media influencer's or coin creator's public key. Suppose there has been an exchange of cryptocurrency before a social media influencer's public endorsement of the coin, followed by both the coin creator and the influencer selling off significant portions of their position when the digital asset surged in value. In that case, there is ample circumstantial evidence to suggest a pump-and-dump scheme. Thus, in theory, monitoring and regulating these types of transactions should not be difficult, especially for digital coins that undergo initial coin offerings. Further, they may be legally required to register with the SEC and, therefore, should immediately be on the radar for that agency.⁸⁴ However,

⁸² Press Release, SEC, Telegram to Return \$1.2 Billion to Investors and Pay \$18.5 Million Penalty to Settle SEC Charges, SEC (June 26, 2020), <https://www.sec.gov/news/press-release/2020-146> [<https://perma.cc/L8SM-8PCE>]; *see also* Complaint, SEC v. Telegram Group Inc. & Ton Issuer Inc., (PKC) (S.D.N.Y., 2019) (alleging that Telegram's issuance of "Grams" violated Section 5(a) and 5(c) of the Securities Act for failure to register.).

⁸³ Press Release, SEC, *supra* note 82.

⁸⁴ Press Release, SEC, SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset Were Securities (July 25, 2017), <https://www.sec.gov/news/press->

since 2018, the ICO bubble has burst as poor returns and SEC enforcement cryptocurrencies have scared off companies from fundraising through this method.⁸⁵ Therefore, regulation through ICOs is unreliable and insufficient. Moreover, even if the transactions themselves are easily accessible, if there is no proper regulation to punish individuals, they will continue to act without consequences. As the paragraph below notes, since the currency is an incredibly new and unique asset class, various federal regulatory agencies have struggled to regulate cryptocurrencies.

B. Analyzing Public Statements from Federal Agencies on Cryptocurrencies

Cryptocurrencies are an amalgamation of several types of assets classes.⁸⁶ As the name suggests, virtual coins act as a currency since individuals can exchange these tokens for goods and services.⁸⁷ However, no foreign government can secure its value because it is decentralized.⁸⁸ Additionally, digital currencies sometimes have characteristics of securities

release/2017-131 [<https://perma.cc/K7FP-E7AE>] (finding that the sale of digital tokens by organizations to generate funding for projects are “subject to the requirements of federal securities laws”).

⁸⁵ Ari Levy & Evelyn Cheng, *Investors Are Shunning New Cryptocurrencies Even as They Pour Money into Bitcoin*, CNBC: TECH, <https://www.cnbc.com/2017/11/30/ico-bubble-is-bursting-even-as-bitcoin-price-rises.html> [<https://perma.cc/2MMZ-3633>] (last updated Nov. 30, 2017, 2:48 PM) (finding that twenty-three percent of ICOs reached their fundraising target).

⁸⁶ *Cryptographic Assets and Related Transactions: Accounting Considerations Under IFRS: A Look at Current Financial Reporting Issues*, PWC (Dec. 2019), at 2, <https://www.pwc.com/gx/en/audit-services/ifrs/publications/ifrs-16/cryptographic-assets-related-transactions-accounting-considerations-ifrs-pwc-in-depth.pdf> [<https://perma.cc/TG9F-X8WU>].

⁸⁷ *Id.* at 3–4.

⁸⁸ *Id.* at 2.

such that “they provide economic stake in a legal entity.”⁸⁹ Subsequently, the SEC regulates them as securities for that specified period.⁹⁰ However, this is only for a noticeably short time window, and most virtual currencies are not subject to SEC regulations.⁹¹ The CFTC has determined that cryptocurrencies are commodities.⁹² Most notably, two district courts have affirmed this interpretation.⁹³ However, the CFTC has little experience and little success in enforcing anti-market manipulation regulations. The purpose of this examination is to demonstrate the inadequacies of the current regulatory framework and to propose that the FTC is the appropriate agency to handle disclosure regulation and prevent these types of “pump-and-dump” schemes. To that end, this section discusses how various agencies view and regulate cryptocurrencies and provides reasons why they are inadequate to solve “pump-and-dump” schemes.

Least controversially, the Internal Revenue Service (IRS) has classified cryptocurrencies as property.⁹⁴ Therefore, individuals possessing and

⁸⁹ *Id.* at 4.

⁹⁰ *Id.*

⁹¹ Pisani, *supra* note 47.

⁹² *CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets*, U.S. COMMODITY FUTURES TRADING COMM’N (Jan. 4, 2018), https://www.cftc.gov/sites/default/files/idc/groups/public/%40customerprotection/documents/file/backgrounder_virtualcurrency01.pdf [<https://perma.cc/TX4T-VR6L>] [hereinafter *CFTC Backgrounder*].

⁹³ *U. S. Commodity Futures Trading Comm’n v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) (holding that the CFTC interpretation of cryptocurrencies as a commodity was valid); *U.S. Commodity Futures Trading Comm’n v. My Big Coin Pay, Inc. et al.*, 334 F. Supp. 3d 492 (D. Mass. 2018) (agreeing with the Eastern District of New York classification of cryptocurrencies as a type of commodity).

⁹⁴ I.R.S. Notice 2014-21, 2014-16 I.R.B. 938.

exchanging digital currencies must pay applicable taxes.⁹⁵ Moreover, this also means that cryptocurrencies are subject to seizure to pay fines and or restitution to victims.⁹⁶ Thus, the impact of this classification merely extends to taxation and the evaluation of a person's or company's level of assets.⁹⁷ It does not create a regulatory framework that monitors fraud or other malicious schemes. Thus, while this is important for individuals or corporations who wish to sue for their lost cryptocurrency, it is not a solution to preventing or punishing those who perpetuate “pump-and-dump” scams.

The Financial Crime Enforcement Network (FinCEN), a bureau within the United States Treasury, has recently taken an interest in incorporating cryptocurrencies within its regulatory framework.⁹⁸ On May 9th, 2019, FinCEN issued an interpretative guidance concerning the Bank Security Act for money service businesses.⁹⁹ As the introduction notes, “[t]his guidance is not any new regulatory expectation or requirements” but instead applies to previously established regulations, administrative rulings, and guidance to “certain business models involving money transmission denominated in value that substitutes for currencies, specifically,

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*, FINCEN GUIDANCE, FIN-2019-G001 (May 9, 2019), <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

⁹⁹ *Id.*

convertible virtual currencies (CVCs).”¹⁰⁰ Further, the guidance continues by defining convertible virtual currencies to include a “medium of exchange that operates like a currency but does not have all the attributes of “real” currency, as defined by 31 C.F.R. § 1010.100(m) . . . (such as ‘digital currency,’ ‘cryptocurrency,’ ‘cryptoassets,’ ‘digital asset,’ etc.).”¹⁰¹ Strengthening this position, Congress subsequently passed the Anti-Money Laundering Act of 2020 (AMLA), which broadened the definition of “financial institution” to include “businesses that exchange or engage in the transmission of cryptocurrency.”¹⁰² Further, the AMLA resolved any doubt as to FinCEN’s authority over cryptocurrencies by amending the Banking Securities Act to expand the definition of “monetary instruments” to include activities related to “value that substitutes for currency.”¹⁰³

Now, while FinCEN has been provided apparent authority from Congress to regulate cryptocurrencies, Congressional authority and the purpose of the Banking Security Act do not allow FinCEN to regulate this particular issue.¹⁰⁴ Although FinCEN now has authority over “financial institutions” that deal with “the transmission of currency, funds, or value that substitutes for currency” such as cryptocurrencies through the amended Banking Security Act, the Banking Security Act does not provide FinCEN

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. at 1161–1239 (2021); 31 U.S.C. § 5312(a)(2) (2020).

¹⁰³ 31 U.S.C. § 5312(a)(2) (2020).

¹⁰⁴ *Id.*

the ability to punish individuals from advertising a particular coin to their fans and subsequently selling their position as the price rises.¹⁰⁵ The Banking Security Act's purpose and structure require banks and other financial institutions to record and submit any instance of suspicious activity to the FinCEN to prevent money laundering.¹⁰⁶ However, somebody could argue that social media influencers and those paying social media influencers to advertise a particular digital coin to inflate the price constituted suspicious activity. It would be nearly impossible for a financial institution to determine between legal and illicit transactions. If financial institutions cannot tell the difference between illegal and lawful transactions, then there is nothing that FinCEN can do to regulate. Thus, FinCEN cannot sufficiently regulate social media influencers manipulating the market for their gain.

In 2017, the SEC had determined that Bitcoin is not a security.¹⁰⁷ The agency reasoned that because Bitcoin and other similarly structured digital currencies are “decentralized,” there is not a single individual or collective entity that is receiving the benefit of the exchange nor “whose efforts are a key determining factor in the enterprise.”¹⁰⁸ In essence, these identified

¹⁰⁵ *Id.*

¹⁰⁶ 31 U.S.C. § 5311 (2021).

¹⁰⁷ Chairman Jay Clayton, *Statement on Cryptocurrencies and Initial Coin Offerings*, SEC (Dec. 11, 2017), <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> [<https://perma.cc/AXR6-7CZP>].

¹⁰⁸ Pisani, *supra* note 47.

digital currencies fail the “Howey Test.”¹⁰⁹ However, the agency has not yet removed the possibility that other digital coins may be subject to SEC disclosure and registration requirements mandated for securities.¹¹⁰ This omission is especially relevant for newly created cryptocurrencies that undergo ICOs. Since the coin creator secures investment funding before the coin's release, the SEC has determined that it may have authority over such transactions.¹¹¹

Examining the SEC's Complaint filed against Telegram Group Inc. and its subsidiary, Ton Issuer Inc., illustrates its position on digital tokens and ICOs.¹¹² Within the filing, it mentions that SEC issued a “DAO Report” which advised that “those who would use . . . distributed ledger or blockchain-enabled means for capital raising, to take appropriate steps to ensure compliance with the U.S. federal securities laws.”¹¹³ Further, this report also determined that digital assets issued utilizing the ICO process are “investment contracts,” which must abide by relevant securities laws.¹¹⁴ Interestingly, while these new coins may be under the regulation of the SEC

¹⁰⁹ SEC v. W.J. Howey Co., 328 U.S. 293, 300–01 (1946) (the Howey Test looks to determine whether a transaction qualifies as an “investment contract” and therefore a security. The test looks to determine if (1) there is an investment of money in a common enterprise (2) with a reasonable expectation of profits derived from the efforts of others).

¹¹⁰ Pisani, *supra* note 47.

¹¹¹ *Id.*

¹¹² Complaint, *supra* note 82.

¹¹³ *Id.* at 9 (citing Press Release, SEC, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (July 25, 2018), <https://www.sec.gov/news/press-release/2017-131> [<https://perma.cc/AXR6-7CZP>]) (original quotations omitted).

¹¹⁴ *Id.* at 11–13.

as the coin becomes increasingly decentralized, those requirements are removed as the coin is no longer considered a security.¹¹⁵ Thus, while the SEC disclosure rules for coin creators may be a partial solution to the “pump-and-dump” schemes, as it would require registration and put coin creators on notice, this would only affect a small percentage of digital currencies.

The CFTC has made the most assertive stance concerning cryptocurrencies.¹¹⁶ The CFTC views virtual currencies as a commodity and therefore entirely under the purview of their agency. The Commodity Exchange Act (CEA), 7 U.S.C § 1(a), broadly defines commodity to include any “goods and articles [. . .] and all services, rights, and interests [. . .] in which contracts for future delivery are presently or in the future dealt in.”¹¹⁷ The agency reasons that virtual currencies are commodities because it has the authority of most categories of derivatives transactions.¹¹⁸ Therefore, depending on their structure, digital assets may be deemed to be “a commodity, swap, or other derivatives.”¹¹⁹ The agency first exercised its

¹¹⁵ *Id.*

¹¹⁶ *CFTC Backgrounder*, *supra* note 92.

¹¹⁷ 7 U.S.C.A. § 1(a)(9) (West 2022).

¹¹⁸ *Id.*

¹¹⁹ *Digital Assets Primer*, U.S. COMMODITY FUTURES TRADING COMM’N (Dec. 2020), <https://www.cftc.gov/media/5476/DigitalAssetsPrimer/download> [<https://perma.cc/TV64-8AGG>].

authority in 2015, and subsequently, two federal district courts have reaffirmed its jurisdiction over digital assets.¹²⁰

Again, however, despite the CFTC's firm stance and recent validation from the courts, the question becomes whether the CFTC is the best agency to regulate market manipulation for social media influencers. The CFTC does indeed have regulatory authority to monitor and enforce anti-manipulation and anti-fraud rules under CEA, which have been subsequently enhanced through Dodd-Frank's section 753's amendment to CEA section 6(c)(1) and the promulgated Rule 180.1.¹²¹ Despite this authority, the CFTC exercised this authority sparingly.¹²² Moreover, the attempted recent enforcement of Rule 180.1 and CEA Section 6(c)(1) in *Commodity Futures Trading Commission v. Wilson* have tempered their scope.¹²³ The court in *Wilson* held that, despite proving that the defendant (1) had the ability to; and (2) intent to; (3) move the value of an interest rate

¹²⁰ U. S. Commodity Futures Trading Comm'n v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y. 2018); U.S. Commodity Futures Trading Comm'n v. My Big Coin Pay, Inc. et al., 334 F. Supp. 3d 492 (D. Mass 2018).

¹²¹ The Commodity Futures Trading Commission must satisfy a four-prong test in order to demonstrate market manipulation. The elements of the test are as follows: "(1) that the accused has the ability to influence market prices; (2) that the accused specifically intended to create or effect a price or price trend that does not reflect legitimate forces of supply and demand; (3) the artificial prices existed; and (4) that the accused caused the artificial prices." *Q & A – Anti-Manipulation and Anti-Fraud Final Rules*, COMMODITY FUTURES TRADING COMM'N, https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/amaf_qa_final.pdf [<https://perma.cc/9CCL-UFDL>].

¹²² Aitan Goelman, *Decision in DRW Makes it Even Harder for the CFTC To Prove Up Manipulation*, N.Y.U. COMPLIANCE & ENFORCEMENT BLOG (Jan. 22, 2019), https://wp.nyu.edu/compliance_enforcement/2019/01/22/decision-in-drw-makes-it-even-harder-for-the-cftc-to-prove-up-manipulation/#ftn1 [<https://perma.cc/N9HP-YCAH>].

¹²³ U.S. Commodity Futures Trading Comm'n v. Wilson, 27 F. Supp. 3d 517 (S.D.N.Y. 2014).

swap that would personally benefit the Defendant, because the Defendant believed that the higher price was the “true” or “natural” value, they are not in violation of CFTC regulations.¹²⁴ Thus, a defendant merely needs to demonstrate that they genuinely believed that the market undervalued the commodity. With a nascent and volatile market such as cryptocurrencies, the question as to the proper value for many digital currencies is currently unknown. Therefore, it will be difficult to enforce.

The complicated legal status of digital currencies incentivizes bad actors to take advantage of the regulatory confusion. The IRS and FinCEN both have regulations governing cryptocurrencies but neither deal directly with the issue at hand. The regulation that would be most effective to prevent a pump-and-dump scheme would be the disclosure and registration requirements of the SEC. However, the SEC has made it clear that there is only a tiny window in which a digital asset can be considered a security. Moreover, despite the CFTC’s affirmed authority over virtual currencies as commodities, recent court decisions have tempered their jurisdiction to enforce anti-manipulation litigation. Therefore, agencies should create regulation that creates a chilling effect on those who would typically endorse coins with bad intentions or with little regard for those who would buy them. That is precisely why this Note proposes that the FTC should broaden the scope of its endorsement disclosure rules to include the endorsement of cryptocurrencies.

¹²⁴ *Id.* at 533–34.

III. THE FEDERAL TRADE COMMISSION DISCLOSURE OF PAID ENDORSEMENTS

Established in 1914 by Woodrow Wilson, the FTC is one of the oldest federal agencies regulating commerce.¹²⁵ Specifically, the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, provides the Commission the authority to enforce fair business practices and anti-trust laws.¹²⁶ In 1938, Congress expanded the duties assigned to the FTC to ensure consumers' protection from "unfair or deceptive acts or practices affecting commerce."¹²⁷ Today, the FTC has three strategic goals: (1) to "[p]rotect consumers from unfair and deceptive practices in the marketplace"; (2) to "[m]aintain competition to promote a marketplace free from anticompetitive mergers, business practices, or public policy outcomes"; and (3) to "[a]dvance the FTC's performance through excellence in managing resources, human capital, and information technology."¹²⁸ The mission of the FTC, the authority granted to the agency, and experience in

¹²⁵ *Our History*, FTC, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/3BY2-VTRR>].

¹²⁶ *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/K3Q7-3FEY>] (last updated May 2021) [hereinafter *FTC Enforcement Authority*].

¹²⁷ 15 U.S.C.A. § 45(a)(1); see also Tisha James, Note, *The Real Sponsors of Social Media: How Internet Influencers Are Escaping FTC Disclosure Laws*, 11 OHIO ST. BUS. L.J. 61, 69 (2017).

¹²⁸ *About the FTC*, FTC, <https://www.ftc.gov/about-ftc> [<https://perma.cc/S3MH-VVHJ>].

combating this type of enforcement make it an obvious choice for the enforcement of social media disclosure rules within the cryptocurrency markets.

A. The Development of FTC Disclosure Regulations

The Federal Trade Commission has had a long history regulating celebrities and corporate brands.¹²⁹

Since the 1970s, The FTC has been aware of the need and consequently created rules and procedures for advertisement endorsement disclosures.¹³⁰

With the advent of the internet and small-scale celebrities, known as social media influencers, the FTC has adopted and sought to affirm its mission to protect consumers from “unfair or deceptive acts or practices affecting commerce.”¹³¹ Due to the FTC’s experience regulating company-affiliate sponsorship disclosures, the agency should additionally oversee similar relationships within the cryptocurrency space.

1. The Introduction of the Guidelines Regulating Endorsements to the 2009 Amendment

¹²⁹ Jason Goldstein, *How New FTC Guidelines on Endorsement and Testimonials Will Affect Traditional and New Media*, 28 CARDOZO ART & ENT. L.J. 609, 612 (2011).

¹³⁰ *Id.* at 613.

¹³¹ 15 U.S.C.A. § 45(a)(1).

The FTC has and continues to release various guides to notify advertisers of what types of advertisements the agency would consider deceptive.¹³² In 1972, the FTC issued a notice for public comment for the “Guide Concerning the Use of Endorsement and Testimonial in Advertising.”¹³³ Subsequently, in 1975, the FTC released definitions, still used by the FTC today, for “expert endorsements” and “endorsements by organizations,” as well as protocols for advertisers to follow for endorsements of products.¹³⁴ 16 C.F.R. § 255 was amended in 1980, providing celebrities an exception to the general disclosure rule.¹³⁵ That being said, they do not have to disclose any connection to a company when the endorsement is “reasonably expected” by an audience, such as a celebrity appearance in a television advertisement.¹³⁶

It was not until 2009 that the FTC amended the Endorsement Guidelines once again.¹³⁷ In the early 2000s, the New York Times released a story reporting that celebrities were going on talk shows supporting certain products or brands without disclosing their monetary connection to said brand.¹³⁸ Stars going on talk shows is distinctive to advertisements featuring celebrities because, during interviews, the audience assumes that

¹³² Goldstein, *supra* note 129, at 613–15.

¹³³ Goldstein, *supra* note 129, at 613.

¹³⁴ *Id.* at 612; *see also* 16 C.F.R. § 255.5 (1980).

¹³⁵ Goldstein, *supra* note 129, at 613; 16 C.F.R. §255.5 (1980).

¹³⁶ Goldstein, *supra* note 129, at 613.

¹³⁷ *Id.*

¹³⁸ *Id.*

the celebrities speak candidly and independently.¹³⁹ This report prompted the advertisement watchdog group known as Commercial Alert to submit a petition to the FTC to strengthen their disclosure regulations and eliminate loopholes that these celebrities were exploiting.¹⁴⁰ The 2009 amendment to the endorsement guidelines placed greater responsibility on advertisers and endorsers to disclose their paid sponsorships.¹⁴¹

Along with the New York Times reporting on celebrities, the creation of the internet influenced the FTC to update the endorsement guidelines.¹⁴² The development of the internet created a new class of influencers, a group of individuals whose influence was not as widespread as a typical celebrity but, regardless, held a position of power over their followers.¹⁴³ These individuals have become known as social media influencers, whose influence extended exclusively to the social media platforms where they posted content.¹⁴⁴ What makes social media influencers distinctive from celebrities is the viewer's expectation of endorsements.¹⁴⁵ Whereas with stars appearing in an advertisement, the audience often expects that

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 615.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 16 C.F.R. § 255.0, 255.1, 255.5 (2009) (refers to social media influencers as “bloggers,” which for the time of its enactment was the primary means of creating content on the internet. However, as the internet ecosystem as evolved to easily allow for more complicated media such as videos it is far more proper to label them as social media influencers. This is further strengthened by the fact that the FTC has regulated social media influencers under the same framework as bloggers. Therefore, I will refer to “bloggers” as “social media influencers” for the duration of this Note). *See generally* 16 C.F.R. § 255.0 (2009); *see also* Complaint, FTC v. Teami, Inc., No. 8:20-cv-00518 (M.D. Fla. 2020).

¹⁴⁵ Goldstein, *supra* note 129, at 613.

advertisers paid the celebrity to endorse a product or a brand; there is no similar expectation regarding social media influencers.¹⁴⁶ In essence, social media influencers were similar to celebrities giving televised interviews because, in both cases, people assumed they were speaking earnestly and personally when discussing products and services. This assumption is particularly true when the social media influencer incorporates the brand or the product within their own produced works.

The 2009 updated 16 C.F.R. § 255.5 guidelines provide an illustrative example to demonstrate this point.¹⁴⁷ Example 7 describes the following situation:

A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed,

¹⁴⁶ *Id.*

¹⁴⁷ 16 C.F.R. § 255.5 (2009).

and it should have procedures in place to try to monitor his postings for compliance.¹⁴⁸

This example illuminates the FTC's rules and procedures requiring social media influencers endorsing a product to disclose any "material connection" between themselves and the product seller.¹⁴⁹ As highlighted by the example, the elements for disclosure of a paid endorsement are as follows: An endorser must (1) clearly; and (2) conspicuously; (3) publicly disclose any material connection between the endorsers and the seller of the advertised product if; (4) a consumer would not expect a connection, and it would affect how consumers evaluate the endorsement.¹⁵⁰

2. Current Federal Trade Commission Enforcement of Social Media Influencer Endorsements

Most violations of 16 C.F.R. § 255 for failure to properly disclose a material connection between the endorser and the seller of a product settle out of court.¹⁵¹ Therefore, it is difficult to analyze its enforcement in practice. However, the following sanctions provide insight into the FTC's development and current enforcement of endorsement rules for social media influencers.

One of the first fines brought against advertisers in violation of the 2009 amended guidelines concerning social media influencers came in

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Although there is no direct evidence to demonstrate that violations of 16 C.F.R. § 255 are often settled out of court, I was unable to locate a case that actually went to trial.

2011 when the FTC settled with Legacy Learning Systems for \$250,000.¹⁵² The FTC alleged that the Legacy Learning Systems, which sells instructional courses containing DVDs and written materials, provided products to affiliates who subsequently posed as non-associated customers or independent reviewers.¹⁵³ The deceptive scheme had these affiliates write glowing reviews on various online storefronts.¹⁵⁴ Legacy Learning Systems sold learning material to tricked customers under the purview of positive independent reviews.¹⁵⁵ The FTC charged the company with “disseminating deceptive advertisements without clearly disclosing that affiliates were paid for every sale they generated.”¹⁵⁶ The affiliates, however, were not fined.¹⁵⁷ The reason for this is likely because they reviewed anonymously. Thus, they did not use their influence to sway their followers. That is, the reviewers were allowed to endorse the product without adequately disclosing their material connection because they were anonymous. Thus, they were not considered “bloggers” or social media influencers for the sake of 16 C.F.R. § 255.5.

The most famous example of FTC social media influencer disclosure enforcement involved Warner Brothers and various YouTube stars.¹⁵⁸ The FTC found that Warner Brothers violated 16 C.F.R.

¹⁵² James, *supra* note 127, at 81.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Complaint, FTC v. Legacy Learning Sys. Inc. et. al, No. c-004323 (M.D. Tenn. 2011).

¹⁵⁶ James, *supra* note 127, at 81.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 82.

§ 255.5 because they provided YouTube influencers free early copies of video games without disclosing their paid sponsorship properly.¹⁵⁹ Additionally, Warner Brothers offered influencers monetary compensation for positive exposure to said games, which included a requirement that prevented these influencers from discussing the negative qualities of the product.¹⁶⁰ Despite evidence suggesting that Warner Brothers was aware of the violation and the evidence that they provided compensation to influencers in exchange for endorsements, the FTC did not issue a fine to Warner Brothers or any influencer.¹⁶¹ For enforcement to prevent behavior, it must cost more than a mere slap on the wrist.

Finally, most recently, in 2020, the FTC brought charges against Teami, Inc., a “weight loss” tea producer, for making false claims to consumers about the effectiveness of their product.¹⁶² In addition, the FTC sent warnings to several prominent social media influencers, such as Cardi B and Jordin Sparks, for failure to disclose their sponsorship between themselves and Teami adequately.¹⁶³ The FTC notified the influencers that

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Lesley Fair, *FTC’s Teami Case: Spilling the Tea About Influencers and Advertisers*, FTC: BUS. BLOG (Mar. 6, 2020, 11:22 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/ftcs-teami-case-spilling-tea-about-influencers-advertisers> [<https://perma.cc/TL37-ZE3J>].

¹⁶³ Warning letter from Richard Quaresima, Acting Associate Director for the FTC Division of Advertising Practices, to social media influencers (Mar. 5, 2020), <https://www.ftc.gov/system/files/documents/cases/1823174teamiwarningletters.pdf> [hereinafter *Teami Warning Letter*].

disclosure of their endorsement must be “clear and conspicuous.”¹⁶⁴ Teami, Inc. paid the FTC \$1 million in settlements fees, which was a reduction from the \$15.2 million judgment due to the organization’s financial condition.¹⁶⁵

Revealingly in the Teami case, the FTC expounded on social media influencers’ requirements to properly adhere to the disclosure regulations.¹⁶⁶ They provided four additional rules that social influencers must follow.¹⁶⁷ Firstly, an influencer must make followers aware of the sponsorship within the first three lines of a post so that it is unmistakable of the material connection.¹⁶⁸ Secondly, an influencer must make followers aware of the sponsorship in every post related to the endorsement.¹⁶⁹ Therefore, every tweet in a Twitter thread must contain a sponsorship notice. Thirdly, abbreviations of the word sponsorship, such as #sp, are insufficient to satisfy the “clear and conspicuous” element.¹⁷⁰ Finally, if an influencer posts a sponsored video, they must disclose their paid relationship with the seller of the product.¹⁷¹

¹⁶⁴ See Complaint, FTC v. Teami, Inc., No. 8:20-cv-00518, (M.D. Fla., 2020), https://www.ftc.gov/system/files/documents/cases/complaint_4.pdf.

¹⁶⁵ Fair, *supra* note 162.

¹⁶⁶ Teami Warning Letter, *supra* note 163.

¹⁶⁷ *Id.* (citing *Disclosure 101 for Social Media Influencer: Influencer Guide*, FTC (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf).

¹⁶⁸ See *Disclosure 101 for Social Media Influencer: Influencer Guide*, *supra* note 167.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

This case is illustrative for three reasons. First, it demonstrates that the FTC is able and willing to adjust its rules and regulations to fit the changing commercial and technological landscape.¹⁷² Second, the FTC recognizes the impact that social media influencers have on their followers and also understands that the abuse of this relationship must be monitored and properly regulated.¹⁷³ Finally, the FTC actions represented a sharp departure from the Warner Brothers case, levying a hefty fine against Teami.¹⁷⁴

As of February 12th, 2020, the FTC has issued a regulatory review of the “Guides Concerning the Use of Endorsements and Testimonials in Advertising.”¹⁷⁵ Further, in May 2021, the FTC issued a press release discussing the massive increase in cryptocurrency scams.¹⁷⁶ However, although this press release discusses various cryptocurrency grifts, including a fraud involving bad actors impersonating celebrities, it does not confer any scams involving actual celebrities or influencers.¹⁷⁷ Thus, while it is clear that the FTC believes that the technological advancement of the

¹⁷² See *Teami Warning Letter*, *supra* note 163 (expanding the scope of 16 C.F.R. § 255.5 to include social media influencers).

¹⁷³ *Id.*

¹⁷⁴ Compare James, *supra* note 127, at 82 (highlighting the low fine the FTC gave to Warner Brothers), with Fair, *supra* note 162 (noting the massive fine levied against Teami).

¹⁷⁵ Lesley Fair, *Endorsement Guides: FTC Wants Your Feedback*, FTC: BUS. BLOG (Feb. 12, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/02/endorsement-guides-ftc-wants-your-feedback> [<https://perma.cc/4LFN-5MTV>].

¹⁷⁶ Press Release, FTC, *FTC Data Shows Huge Spike in Cryptocurrency Investment Scams* (May 17, 2021), <https://www.ftc.gov/news-events/press-releases/2021/05/ftc-data-shows-huge-spike-cryptocurrency-investment-scams> [<https://perma.cc/MW4N-N3F6>].

¹⁷⁷ *Id.*

last decade requires a revision of the endorsement guidelines, it is either unaware of the extent of the issue or falsely believes that it does not have the authority to regulate it.

IV. TWO PROPOSALS TO EXPAND THE SCOPE OF THE FTC'S DISCLOSURE RULES

To combat the disingenuous endorsement of newly minted cryptocurrencies, the FTC should strengthen and broaden the scope of 16 C.F.R. § 255 to include cryptocurrencies. The CFTC's designation of virtual currencies as a commodity and federal district courts' reaffirmation of this classification provide sufficient justification to regulate cryptocurrencies as "products" for consumers. Therefore, the FTC should require social media influencers to disclose any material connections to the creator of digital currencies. However, due to the volatility of the cryptocurrency markets, combating market manipulation within the space may require even broader regulation. This even more comprehensive regulation would require individuals with a significant following and significant stake in a cryptocurrency to reveal their position when making public comments. This section describes the two proposals and details how they would solve the problems of bad actors in the cryptocurrency space.

A. Proposal One: Broadening 16 C.F.R. § 255 to Include Digital Assets Specifically

Proposal one for broadening the scope of 16 C.F.R. § 255 would merely require all influencers provided coins or cash to promote a specific digital currency to disclose this relationship in any advertisement of the token. Therefore, consumers are aware of those material connections if a coin rises due to the endorsements and subsequently crashes due to the “pump-and-dump” scheme. It would allow the FTC to fine these influencers and digital coin creators. More importantly, this threat of sanction will become an incentive for social media influencers to take endorsements with caution to avoid public condemnation due to unwittingly becoming a part of a scheme to scam their followers.

Returning to the examples addressed at the beginning of this Note.¹⁷⁸ This expansion would have likely solved the issue observed in the “Save The Kids” scam. It is unlikely that these social media stars would be willing to risk their reputation and, as a result, their livelihood for the compensation they received, which was a mere \$30,000.¹⁷⁹ This fact is especially true if these influencers face FTC sanctions for deceptive advertising and failure to disclose their sponsorship. It would also provide fans of social media influencers a means of redress in the event of a “pump-and-dump” scheme. All these facts would cause influencers to think before they accept

¹⁷⁸ See *supra* Part I.

¹⁷⁹ Oscar Gonzalez, *Cryptocurrency Pump-and-Dump Schemes: What You Should Know About These Scams*, CNET: CRYPTOCURRENCY (Aug. 6, 2021, 11:00 PM), <https://www.cnet.com/personal-finance/crypto/cryptocurrency-pump-and-dump-schemes-what-you-should-know-about-these-scams/> [<https://perma.cc/Z3TH-QYVP>] (describing multiple variations on the cryptocurrency “pump-and-dump” scheme).

payments from coin creators to determine if it could potentially put their careers at risk.

B. Proposal Two: Broadening 16 C.F.R. § 255 to Require Public Figures to Disclose Their Cryptocurrency Market Positions

Proposal two is a more drastic change to the endorsement disclosure rules. It would require individuals with (1) a substantial social following on social media sites and (2) a significant stake in a particular digital currency to (3) disclose their position by publishing their public key any time they make a (4) public statement with respect to that cryptocurrency. This proposal would significantly reduce the market manipulation perpetuated by public figures like Elon Musk.

By far, the trickiest of issues to deal with is the market manipulation of individuals with high levels of fame. Since the public does not generally consider most celebrities as financial experts, it is reasonable to argue that they may hold incorrect assumptions about an emerging market such as cryptocurrencies. That is because, as previously discussed, it would be necessary to demonstrate to the court that an individual insincerely endorses a particular digital asset. The accused individual could merely argue that they sincerely believed in the currency. Thus, because digital assets are an emerging market and, therefore, incredibly volatile, disclosing their positions would educate consumers and force these influencers to consider what these public endorsements mean for their brand.

One of the strongest arguments against this particular proposal is against the traditional notion of what the “Guides Concerning the Use of Endorsements and Testimonials” cover. The guidelines provide standards for expert testimony, sponsored testimony or endorsements, endorsements from an organization, and any material connection between a company and an endorser.¹⁸⁰ Thus, as currently designed, the guidelines focus exclusively on relationships between organizations and third-party entities who deceptively advertise.

However, the entire purpose of the FTC, as emphasized by their first strategic goal, is to “[p]rotect consumers from unfair and deceptive practices in the marketplace.”¹⁸¹ Moreover, the guidelines are not set in stone, highlighted by the fact that the FTC is currently undergoing review to revise § 255 for the new decade.¹⁸² Therefore, it is not outside of the FTC’s purview to consider expanding its enforcement of deceptive advertisements to include the abuse of an individual’s high status within society to endorse a volatile digital currency for the sole purpose of benefiting said individual, especially when these influencers pitch coins with no intrinsic value.

It is problematic for an influencer such as Elon Musk to be able to rapidly shift investments to Dogecoin purely as a “joke” or a “hustle.” Even

¹⁸⁰ 16 C.F.R. § 255.0.

¹⁸¹ *FTC Enforcement Authority*, *supra* note 126.

¹⁸² Statement of Commissioner Rohit Chopra, *Regarding the Endorsement Guides Review Commission File No. P204500*, FTC (Feb. 12, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566445/p204500_-_endorsement_guides_reg_review_-_chopra_stmt.pdf.

more so because his tweets caused a rapid speculative market that crashed even faster than its meteoric rise; at the end of the day, the only individual who without a doubt benefited from the Dogecoin bubble was the individual who initiated it, that being Elon Musk.¹⁸³ Therefore, by requiring these individuals to disclose their exact positions in these assets, we can both prevent such events from taking place and enforce restitution in the event of a massive market crash.

C. Arguments Against Both Proposals and a Response

In 2009, when the FTC first revised its “Guides Concerning the Use of Endorsements and Testimonials” to include “bloggers” as mandatory disclosure of material connections, there was outrage within the online community.¹⁸⁴ Professor Dan Gillmor of Arizona State University’s Walter Cronkite School of Journalism and Mass Communication believed that the new rules were “unworkable in practice” and “worryingly vague and wide-ranging.”¹⁸⁵ His fear of the regulation stemmed mainly from being unable to determine the line of acceptableness for positive comments on products. He writes, “I’ve posted a number of Twitter tweets about Android . . . [w]here, exactly – in a post with a total length of 140 characters – should the disclosure go?”¹⁸⁶ He was also concerned that the 2009 regulations

¹⁸³ Morris, *supra* note 23.

¹⁸⁴ James, *supra* note 127, at 76.

¹⁸⁵ *Id.* (citing Dan Gillmor, *A Dangerous Federal Intervention in Social Media*, MEDIACTIVE (Oct. 5, 2009), <http://mediactive.com/2009/10/05/a-dangerous-federal-intervention-in-social-media/> [<https://perma.cc/8BDT-2LC5>]) (original quotations omitted).

¹⁸⁶ Gillmor, *supra* note 185.

would “give traditional print and broadcasters a pass while applying harsh regulations to bloggers” because broadcasting and traditional media and the internet “*are not the same.*”¹⁸⁷ Comparing the lack of clarity for positive comments on Twitter, he writes, “[a]nd what about the extremely common practices of traditional media . . . [e]very news organization covering technology gets freebies by the container-load” and yet these relationships are “too-rarely disclosed.”¹⁸⁸ Changes to the “Guides Concerning the Use of Endorsements and Testimonials” were meant with trepidation, especially as the agency attempted to bring a new form of media into its purview. However, it has been more than a decade since the FTC has updated its guidelines concerning endorsements to include the digital space.¹⁸⁹ The detractors such as Professor Gilmour were wrong about the impact of the change to the regulation.

In fact, to Professor Gilmour’s concerns about the blurred line between positive comments and disclosure, large social media platforms, including Twitter, have provided social media influencers the ability to label their messages as “Promoted” or “Paid Partnerships” to ensure that they abide by disclosure laws.¹⁹⁰ Though, Professor Gilmour was fair to point out the double standard towards traditional media, as insufficient disclosure of

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Goldstein, *supra* note 129, at 613.

¹⁹⁰ Twitter, *About Rules and Best Practices with Account Behaviors*, <https://help.twitter.com/en/rules-and-policies/twitter-rules-and-best-practices> [<https://perma.cc/DM5X-JLVR>].

sponsored content is a severe problem for local news stations.¹⁹¹ This example underlines the importance of an evolving regulatory system to tackle new technological developments. Nevertheless, similar to the previous illustration, there will most certainly be detractors as with any change to the guidelines. This section will denote the most likely arguments against the changes and levels counterarguments towards those points.

First, a likely argument against expanding 16 C.F.R. § 255 to include digital assets explicitly is that any regulation into the nascent cryptocurrency space would stifle innovation. If influencers are nervous about accepting endorsements for coins, then new cryptocurrencies will have a difficult time marketing themselves in an already saturated market. Therefore, although this regulation would prevent bad actors from taking advantage of new investors, it would also prevent innovative coin creators from maximizing their exposure, decreasing their chances at a successful launch of a digital asset.

This argument does hold some merit, but it is true of nearly all forms of regulation of markets. Luckily, this most recent year demonstrated the massive potential for value creation in the cryptocurrency market.¹⁹²

¹⁹¹ See John Wenzel, *Denver7's "Mile High Living" Pranked by HBO's "Last Week Tonight with John Oliver,"* DENVER POST (May 25, 2021, 6:41 AM), <https://www.denverpost.com/2021/05/25/denver7-mile-high-living-john-oliver/> [<https://perma.cc/QXZ8-ZMJ5>] (describing a segment of "Last Week Tonight with John Oliver" wherein the host was able to pay for and pitch a fake health product on a Denver local news show with minimal oversight by the company and with limited disclosure that it was a paid promotion).

¹⁹² Kate Dore, *Made a Killing with Crypto in 2021? How to Calculate Your Tax Bill,* CNBC: SMART TAX PLANNING (Jan. 5, 2022),

Individuals around the world became overnight millionaires based on their investment in cryptocurrency.¹⁹³ Further, investors are hungry to provide funds to up-and-coming start-ups that improve blockchain technology.¹⁹⁴

Additionally, suppose a coin creator can properly and legitimately differentiate themselves in the crypto sphere. In that case, it is unnecessary to spend money on extensive marketing as the value-add of their innovation would be apparent to prudent investors in the space. Moreover, if a digital currency is legitimate, social media influencers have nothing to concern themselves with by disclosing their material connection to the coin. The entire purpose of both proposals is to incentivize reasonable influencers to properly research new coins and prevent bad actors from taking advantage of their fans. Therefore, consistent with the proposed guidelines' goal, only coins with no inherited value would be problematic for social media influencers to endorse. Thus, the chilling effect would exclusively occur with maliciously or poorly designed cryptocurrencies.

<https://www.cnbc.com/2022/01/05/made-a-killing-with-crypto-in-2021-how-to-calculate-your-tax-bill.html> [<https://perma.cc/WTZ9-GKZE>] (noting that in 2021 “[t]he digital asset market value soared past \$2 trillion”).

¹⁹³ Matthew Fox, *A Crypto Wallet Shows an Investor Made an \$8000 Shibu Inu Coin Purchase Last Year. Today, It Is Worth \$5.7 Billion*, MKT. INSIDER: CURRENCIES (Oct. 28, 2021, 4:52 PM),

<https://markets.businessinsider.com/news/currencies/crypto-investor-turned-8000-into-5-billion-buying-shiba-inu-2021-10> [<https://perma.cc/3X5G-HMAZ>]

(highlighting a single crypto purchase that net the wallet holder \$5.7 billion dollars in value).

¹⁹⁴ Marco Quiroz-Guiterrez, *Investors Poured a Record \$30 Billion into Crypto in 2021*, FORTUNE (Dec. 20, 2021, 5:28 PM), <https://fortune.com/2021/12/20/investors-pour-record-money-cryptocurrency/> [<https://perma.cc/283S-HEDJ>].

For both proposed expansions of the regulations, opponents would likely argue that it is unnecessary to require disclosure because of the blockchain's innate transparency since every crypto transaction creates a publicly accessible receipt on the ledger. Further, to the famous influencers such as Elon Musk, if they are praising a digital asset, would it not be evident to the public that they hold some position in said asset and subsequently would benefit from their success? To both points, the purpose of the expansion proposals is two-fold. First, to provide a means of redress should bad actors perpetuate a “pump-and-dump” scheme. Secondly, to create a chilling effect forcing social media influencers to pause and consider their impact on their promotion of digital assets. Thus, while blockchain technology and common sense may seem to render the expansion superfluous, it solves rampant issues within the nascent space.

One may argue that the journalists involved in the “Save The Kids” investigation quickly discovered the connection between the social media influencers and the coin creator.¹⁹⁵ Therefore, broadening 16 C.F.R. § 255 is an overreaction to an issue that the market would be able to oversee itself. However, although the reporters uncovered the “Save The Kids” fraud following a lengthy investigation, it was not the only scam of this kind executed that year.¹⁹⁶ This particular case only received sufficient attention because of the number of prominent social media influencers

¹⁹⁵ Coffeezilla, *supra* note 17.

¹⁹⁶ *Id.* (providing examples of other scheme perpetuated by the influencers involved in “Save The Kids”).

involved, the number of individuals scammed, and the influencers maliciously advertised the coin as a “charity coin.”¹⁹⁷ To be sure, due to the quasi-unregulated nature of the cryptocurrency market, a large percentage of “pump-and-dump” schemes are likely going unnoticed. Thus, there needs to be a system that punishes bad actors and makes others cautious of engaging in such an activity. Both objectives are satisfied by requiring influencers to disclose their relationship to coin creators.

Similarly, as posed above, people likely believe that Elon Musk holds Dogecoin and Bitcoin. As mentioned in the introduction, Musk’s company, Tesla, released their quarterly reports, which explicitly detailed the amount of Bitcoin the company held.¹⁹⁸ Further, it would be nigh impossible to prove that Musk perpetuates a “pump-and-dump” scam on established and popular coins such as Bitcoin or Dogecoin. However, this regulation does not deal exclusively with established digital currencies. Imagine another incredibly famous influencer publicly praising a specific unknown alternative coin. By requiring the celebrity to disclose their position in the digital tokens, especially if they held a majority position, it would be straightforward for the authorities that they were potentially involved in a “pump-and-dump” scheme. This regulatory change would allow remedy for victims. Moreover, although it is unlikely that this would prevent all celebrities from praising digital assets to benefit themselves, it would force

¹⁹⁷ *Id.*

¹⁹⁸ *Tesla Quarterly Report, supra* note 31.

them to consider their actions by requiring them to disclose their position. Again, this proposal would likely satisfy the purposes of the expansion.

Another argument against the proposals would likely be that another agency such as the SEC or the CFTC would be better able to regulate the cryptocurrency space and therefore should have authority to oversee market manipulators. Additionally, instead of providing control to SEC or CFTC, Congress could create a unique agency specifically devoted to monitoring the cryptocurrency markets.

To the first argument, both the SEC and CFTC have specific failings that prevent them from ensuring proper enforcement. As previously mentioned, the SEC would be an ideal candidate to regulate market manipulators within the space and would be able to punish individuals perpetuating “pump-and-dump” schemes. However, the SEC has determined that once a digital asset has become decentralized, they are no longer considered securities.¹⁹⁹ Thus, it would not be able to regulate them.²⁰⁰

The CFTC does have the ability to enforce market manipulation regulation and has authority over the cryptocurrency space.²⁰¹ Nevertheless, recent court rulings may render their market manipulation powers ineffective.²⁰² A social media influencer would need to argue that they

¹⁹⁹ Clayton, *supra* note 107.

²⁰⁰ *Id.*

²⁰¹ *CFTC Backgrounder*, *supra* note 92.

²⁰² *CFTC v. Wilson*, 27 F. Supp. 3d 517 (S.D.N.Y. 2014).

earnestly believed in the specific cryptocurrency.²⁰³ Since the vast majority of those influencers engaged in the space are not financial analysts, it would be difficult to prove otherwise even if the coin's value plummeted. Finally, the FTC has been effectively enforcing disclosure laws since the 1970s.²⁰⁴ Thus, the FTC should have the authority to continue to do what they do best in the new market.

To the second argument, I firmly believe that Congress should create an agency whose sole purpose is to regulate the cryptocurrency markets because of the complexity and unique nature of digital currencies as an asset class. This new agency would solve the issues as to which agency should oversee the space. Moreover, it would also provide clarity to consumers instead of the patchwork of regulations by various agencies currently seen. However, in the meantime, the proposal to expand the purview of the FTC's disclosure regulations would help prevent and prosecute bad actors within the space.

IV. CONCLUSION

The development of new technologies, particularly new ways to do business, has always been an exciting and chaotic period. During this

²⁰³ *Id.*

²⁰⁴ Goldstein, *supra* note 129.

period, bad actors often take advantage of people's excitement and naivete to deceive. The creation of cryptocurrencies is no different. In 2021 alone, scammers stole nearly thirty billion dollars from consumers within the digital asset space.²⁰⁵ Among those scammers should include influencers who purposely endorse a token that they knew was valueless and coin creators who paid these influencers to endorse these same tokens. Additionally, individuals with extensive followings have found that they can move the cryptocurrency markets by merely tweeting out the name of an asset. One such individual has consistently enjoyed creating and destroying bubbles on digital currencies. In both examples, celebrities and social media influencers exploited their followers' goodwill. By expanding the scope of the FTC's disclosure regulations to include cryptocurrencies, these bad actors can be held accountable. Additionally, the FTC can provide individuals redress in the event of harm, and influencers would be more cautious when accepting money to endorse digital currencies.

²⁰⁵ MacKenzie Sigalos, *Crypto Scammers Took a Record \$30 Billion in 2021*, CNBC: CRYPTO DECODED (Jan. 6, 2022, 4:00 AM), <https://www.cnbc.com/2022/01/06/crypto-scammers-took-a-record-14-billion-in-2021-chainalysis.html> [<https://perma.cc/3G8E-J965>].