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## Just Because They Say It: Does the U.S. Really Have the “First-Ever Comprehensive Framework” For Digital Assets?

Carol R. Goforth

*University of Arkansas in Fayetteville*

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# JUST BECAUSE THEY SAY IT: DOES THE U.S. REALLY HAVE THE “FIRST-EVER COMPREHENSIVE FRAMEWORK” FOR DIGITAL ASSETS?

Carol R. Goforth\*

## INTRODUCTION

On March 9, 2022, President Biden made history by signing an Executive Order on Ensuring Responsible Development of Digital Assets (“Executive Order”).<sup>1</sup> The Executive Order called for a balanced approach towards cryptoasset regulation, in which agencies were to work together to “protect consumers, investors, and businesses,”<sup>2</sup> while acting to “reinforce United States leadership in the global financial system and in technological and economic competitiveness, including through the responsible development of payment innovations and digital assets.”<sup>3</sup>

Although the order expressed concern about the potential for digital assets to negatively impact financial stability and create systemic risk,<sup>4</sup> and also warned about “the illicit finance and national security risks posed by misuse of digital assets,”<sup>5</sup> it specifically concluded that “[w]e must support technological advances that promote responsible development and use of digital

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\* Carol R. Goforth is a University Professor and the Clayton N. Little Professor of Law at the University of Arkansas in Fayetteville. She has decades of experience with corporate, securities, and business law issues in the United States and has recently published a number of articles dealing with the regulation of crypto transactions. She is also the co-author of *REGULATION OF CRYPTOASSETS* (2d ed. 2022) with Professor Yuliya Guseva.

1. Exec. Order No. 14,067, 87 Fed. Reg. 14143 (Mar. 9, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/> [<https://perma.cc/SA24-R728>].

2. *Id.*

3. *Id.* at 14144.

4. *Id.* at 14143-44.

5. *Id.* at 14144.

assets.”<sup>6</sup> The order did not, however, lay out any specifics for how these objectives were to be fulfilled, instead calling on a wide range of federal agencies to work together to prepare reports on various aspects of digital asset development and oversight.<sup>7</sup>

On September 16, 2022, the White House released a fact sheet (“Fact Sheet”) proclaiming that it had produced the “First-Ever Comprehensive Framework for Responsible Development of Digital Assets,” based on nine reports stemming from the Executive Order.<sup>8</sup> According to the Fact Sheet, those reports “articulate a clear framework for responsible digital asset development and pave the way for further action at home and abroad.”<sup>9</sup> This claim is exceedingly doubtful, although there is no doubt that the directions suggested by the various reports could have been far less balanced than they are.

The Fact Sheet begins by recognizing the exponential growth in cryptoassets,<sup>10</sup> acknowledging the record \$3 trillion market capitalization for crypto reached in November 2021.<sup>11</sup> It then points out the risks of participating in the crypto market,<sup>12</sup> noting the recent market crash that wiped out hundreds of billions of dollars in investor wealth.<sup>13</sup> Neither of those facts are in dispute. Where the factual nature of the statement becomes

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6. Exec. Order No. 14,067, 87 Fed. Reg. 14143, 14145 (Mar. 9, 2022).

7. *Id.* (calling for interagency cooperation and coordination by a very long list of executive officials, departments, and agencies).

8. *FACT SHEET: White House Releases First-Ever Comprehensive Framework for Responsible Development of Digital Assets*, WHITE HOUSE (Sept. 16, 2022) [hereinafter *Comprehensive Framework*], <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/16/fact-sheet-white-house-releases-first-ever-comprehensive-framework-for-responsible-development-of-digital-assets/> [<https://perma.cc/P3TZ-LFUQ>].

9. *Id.*

10. *Id.*

11. *Id.*; *Crypto World Hits \$3 Trillion Market Cap as Ether, Bitcoin Gain in Trade*, BUS. STANDARD (Nov. 9, 2021, 12:53 AM), [https://www.business-standard.com/article/international/crypto-world-hits-3-trillion-market-cap-as-ether-bitcoin-gain-in-trade-121110900065\\_1.html](https://www.business-standard.com/article/international/crypto-world-hits-3-trillion-market-cap-as-ether-bitcoin-gain-in-trade-121110900065_1.html) [<https://perma.cc/WSU3-W94Q>].

12. *Comprehensive Framework*, *supra* note 8 (reporting that the May 2022 crypto crash “wiped out over \$600 billion of investor and consumer funds”).

13. *Id.*; *see also* Farran Powell & Benjamin Curry, *Crypto Winter Is Here: What You Need To Know*, FORBES ADVISOR (Sept. 2, 2022), <https://www.forbes.com/advisor/investing/cryptocurrency/what-is-crypto-winter/> [<https://perma.cc/PJF6-X6GQ>] (“Since November 2021, the crypto market has dropped 60%—drastically falling from \$3 trillion to less than \$1 trillion, as of this writing.”).

questionable is in the description of the country's regulatory response to crypto.

This Article is divided into two main parts. Part one reviews the reports received by the White House, explaining what they address while pointing out open issues for which no particular direction is established. Part two assesses regulatory gaps in the crypto space in order to make the case that we are far from a comprehensive approach to crypto (or digital assets, as they are sometimes called).

## I. AN ANALYSIS OF THE REPORTS

### A. Report from the Attorney General and Justice Department

The United States Attorney General, acting through the Department of Justice (DOJ), filed the first report requested by the March 2022 Executive Order.<sup>14</sup> This report considers how to strengthen international cooperation in legal enforcement efforts involving crypto crimes. The report candidly details a number of factors making investigation and enforcement of crimes involving digital assets difficult. These include the speed and cross-border nature of crypto transactions,<sup>15</sup> as well as existing inconsistencies in the ability and willingness of foreign law enforcement officials

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14. U.S. DEP'T OF JUST., THE REPORT OF THE ATTORNEY GENERAL PURSUANT TO SECTION 8(B)(IV) OF EXECUTIVE ORDER 14067: HOW TO STRENGTHEN INTERNATIONAL LAW ENFORCEMENT COOPERATION FOR DETECTING, INVESTIGATING, AND PROSECUTING CRIMINAL ACTIVITY RELATED TO DIGITAL ASSETS (2022) [hereinafter DOJ, INTERNATIONAL], <https://www.justice.gov/ag/page/file/1510931/download> [https://perma.cc/YX8F-VS5W].

15. *Id.* at 6. The ability of cryptoassets to facilitate faster transactions is emphasized in numerous sources. See, e.g., Adam Levy, *Why Should You Use Crypto?*, THE MOTLEY FOOL (Sept. 20, 2022), <https://www.fool.com/investing/stock-market/market-sectors/financials/cryptocurrency-stocks/benefits-of-cryptocurrency/> [https://perma.cc/6YC8-FG6G] (listing “[t]ransaction speed” as the first of eight benefits of cryptoassets); *FIAT vs CRYPTO: What's the Difference and Which Is Better?*, ACCELONE (Nov. 14, 2022), <https://accelone.com/blog/fiat-vs-crypto-whats-the-difference-and-which-is-better/> [https://perma.cc/4BNJ-3WQH] (noting that cryptoassets facilitate “[f]ast and cost-effective cross-border transactions”). Similarly, the inherently transnational character of intangible cryptoassets that exist only in digital form on computers in a network is also widely noted. Steve Streetman, *Cryptocurrency: Inherently International*, THINK REALTY (Oct. 25, 2019), <https://thinkrealty.com/cryptocurrency/> [https://perma.cc/R48H-9VWG].

to assist in U.S. investigations.<sup>16</sup> While the report notes a range of current initiatives designed to improve some of the problems that these issues reflect,<sup>17</sup> it is clear that there are gaps in international enforcement. In fact, the ultimate conclusion of the report is that we need to significantly improve international cooperation.<sup>18</sup> For example, the report notes:

Deficient AML/CFT [Anti-Money Laundering and Counter-Financing-of-Terrorism] regulatory and supervisory regimes in many jurisdictions present an opportunity for criminal actors to engage in jurisdictional arbitrage, purposely seeking to further their criminal activities in such jurisdictions. This presents a challenge to U.S. authorities' abilities to prevent or investigate a wide variety of illicit digital asset activity, as digital asset transactions related to crimes, such as ransomware and money laundering, frequently are cross-border by nature.<sup>19</sup>

The DOJ announced the release of a second report on September 16, 2022,<sup>20</sup> entitled “The Role Of Law Enforcement in Detecting, Investigating, And Prosecuting Criminal Activity Related To Digital Assets.”<sup>21</sup> This report has three substantive sections (following an executive summary). The sections focus on illicit use of cryptoassets,<sup>22</sup> existing investigative and enforcement initiatives,<sup>23</sup> and recommendations for appropriate

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16. DOJ, INTERNATIONAL, *supra* note 14, at 8.

17. The report emphasizes ongoing work with international counterparts and continuing participation in efforts to establish workable international standards. *Id.*

18. *Id.* at 19.

19. *Id.* at 16.

20. Press Release, U.S. Dep't of Just., Justice Department Announces Report on Digital Assets & Launches Nationwide Network (Sept. 16, 2022), <https://www.justice.gov/opa/pr/justice-department-announces-report-digital-assets-and-launches-nationwide-network> [<https://perma.cc/AW2U-LR2W>].

21. U.S. DEP'T OF JUST., THE REPORT OF THE ATTORNEY GENERAL PURSUANT TO SECTION 5(B)(III) OF EXECUTIVE ORDER 14067: THE ROLE OF LAW ENFORCEMENT IN DETECTING, INVESTIGATING, AND PROSECUTING CRIMINAL ACTIVITY RELATED TO DIGITAL ASSETS (2022) [hereinafter DOJ, ROLE], <https://www.justice.gov/ag/page/file/1535236/download> [<https://perma.cc/YT82-265W>].

22. *Id.* at 4 (“Taxonomy of Criminal Activity Related to Digital Assets”).

23. *Id.* at 14 (“The Role of Law Enforcement Agencies, Financial Regulators, and Private-Sector Cooperation in Identifying and Investigating Potential Criminal Activity Related to Digital Assets”).

responses.<sup>24</sup> However, rather than painting a picture of a comprehensive approach to handling crypto-based criminal activity, the overall impression created by the document is that much remains to be clarified.

The report offers five groups of recommendations, including one category that the DOJ calls “priority proposals” essential to continued successful prosecutions. According to the document, changes are needed to aid “in gathering evidence and ensuring a suitable U.S. forum,” to facilitate forfeiture of crypto and increase available sentences, to broaden application of the Bank Secrecy Act (BSA), and to add resources for law enforcement and regulatory agencies.<sup>25</sup> The report also calls for the BSA to be amended so that peer-to-peer platforms connecting buyers and sellers are covered by money-transmitter requirements.<sup>26</sup> How this would work for distributed autonomous organizations (DAOs) or others in peer-to-peer networks, or on discussion boards that allow crypto owners to communicate, is not addressed.

The DOJ was also responsible for a third report, which was to provide the Department’s assessment of the potential for a U.S. central bank digital currency (CBDC) and changes that might be required in order to create one.<sup>27</sup> Possibly in response to the contents of that report, the Fact Sheet claims that the Biden Administration “has developed Policy Objectives for a U.S. CBDC System.”<sup>28</sup> It also reports the creation of a new “interagency working group to consider the potential implications of a U.S. CBDC, leverage cross-government technical expertise,

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24. *Id.* at 36 (“Legislative and Regulatory Actions That Could Enhance Efforts to Disrupt, Investigate, and Prosecute Criminal Activity Related to Digital Assets”).

25. *Id.* at 36-37.

26. DOJ, ROLE, *supra* note 21, at 38-39 (suggesting “changes to clarify that the statute applies to platforms providing services that enable their users to transfer digital assets in a manner analogous to traditional money-transmitting businesses”).

27. Exec. Order No. 14,067, 87 Fed. Reg. 14143, 14146 (Mar. 9, 2022) (requiring the Attorney General to provide, through the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy, “an assessment of whether legislative changes would be necessary to issue a United States CBDC, should it be deemed appropriate and in the national interest”).

28. *Comprehensive Framework*, *supra* note 8 (under the heading “Exploring a U.S. Central Bank Digital Currency (CBDC)”).

and share information with partners.”<sup>29</sup> The DOJ report itself, however, was not immediately made public, leading to calls on October 5, 2022, from members of the House Financial Services Committee for the report to be released.<sup>30</sup> As suggested by the legislators seeking release of the report, there is some dispute over the issue of whether the Federal Reserve Bank would have authority to develop a digital currency: “Congress’ authority over coining money is exclusive. The Supreme Court has recognized Congress’ power to coin money and regulate the value thereof, confirming Congress’ authority to regulate each phase of currency.”<sup>31</sup> Such a dispute over a foundational issue makes it reasonably clear that the “framework” is not as comprehensive as the Fact Sheet suggests.

### B. Reports from the Department of the Treasury

Not surprisingly, the original White House Executive Order also requested a number of reports from the Department of the Treasury (“Treasury”).<sup>32</sup> Treasury’s earliest response<sup>33</sup> was a document describing a Framework for International Engagement on Digital Assets, released on July 7, 2022.<sup>34</sup> That relatively brief document focuses on promoting international engagement and cooperation on the development and implementation of “global principles and standards for how digital assets are used and

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29. *Id.*

30. Turner Wright, *US Lawmakers Request Justice Dept Share CBDC Assessment*, COINTELEGRAPH (Oct. 5, 2022), <https://cointelegraph.com/news/us-lawmakers-request-justice-dept-share-cbdc-assessment> [<https://perma.cc/9TWM-8USC>].

31. Letter from House Fin. Servs. Comm., to Merrick Garland, Att’y Gen., U.S. Dep’t of Just. (Oct. 5, 2022), [https://financialservices.house.gov/uploadedfiles/2022-10-05\\_digital\\_assets\\_working\\_group\\_letter\\_on\\_cbdc\\_assesment\\_finalupdated.pdf](https://financialservices.house.gov/uploadedfiles/2022-10-05_digital_assets_working_group_letter_on_cbdc_assesment_finalupdated.pdf) [<https://perma.cc/L82G-XNC3>]. The Supreme Court held almost 150 years ago that “[e]very contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be.” *Knox v. Lee (The Legal Tender Cases)*, 79 U.S. (12 Wall.) 457, 549 (1870); *Juilliard v. Greenman (The Legal Tender Cases)*, 110 U.S. 421, 449 (1884).

32. Exec. Order No. 14,067, 87 Fed. Reg. 14143, 14146-47 (Mar. 9, 2022).

33. This particular report had an early deadline, being called for within 120 days of the issuance of the Executive Order. *Id.* at 14150-51.

34. Press Release, U.S. Dep’t of the Treasury, Fact Sheet: Framework for International Engagement on Digital Assets (July 7, 2022) [hereinafter *Treasury, International*], <https://home.treasury.gov/news/press-releases/jy0854> [<https://perma.cc/CD5E-B2XK>].

transacted.”<sup>35</sup> However, while the fact sheet was long on aspirations, as noted by others, it was short on details.<sup>36</sup>

One of the interesting takeaways from this particular document is the rather odd juxtaposition of calls for increased international cooperation and coordination alongside an overarching concern about protecting America’s core values and standards.<sup>37</sup> While ostensibly speaking in terms of international cooperation, “the phrase ‘U.S. values’ appears six times as the guidestar of U.S. policy in the Treasury statement.”<sup>38</sup> Of course, the precise nature of these “U.S. values” is not delineated in the document.

Further indicating that Treasury has yet to decide on a “comprehensive” approach to anything relating to crypto, one day after releasing this document, the Department issued a request for public comment “pertaining to the implications of development and adoption of digital assets and changes in financial market and payment infrastructures for United States consumers, investors, businesses, and for equitable economic growth.”<sup>39</sup> The request seeks input on six distinct issues, each of which is accompanied by a list of multiple sub-issues.<sup>40</sup>

On September 16, 2022, the Secretary of the Treasury announced the issuance of three additional reports compiled in

35. *Id.*

36. One source complained that the release was “a triumph of bureaucratic vagueness.” Ben Schreckinger, *Treasury Unveils Its Global Crypto Response—Sort Of*, POLITICO (July 8, 2022), <https://www.politico.com/newsletters/digital-future-daily/2022/07/08/treasury-unveils-its-global-crypto-response-sort-of-00044762> [<https://perma.cc/S5FC-E4FV>].

37. *US Treasury Sets Out International Cooperation Plan to Rein in Digital Assets*, PYMNTS (July 8, 2022), <https://www.pymnts.com/news/regulation/2022/us-treasury-sets-out-international-cooperation-plan-to-rein-in-digital-assets/> [<https://perma.cc/FA5A-HC2V>] (characterizing the report as “suggesting that more engagement with foreign counterparts and in international organizations is needed if the U.S. wants to make sure that digital assets around the world respect America’s core values and the country contributes to set international standards”).

38. Schreckinger, *supra* note 36.

39. Ensuring Responsible Development of Digital Assets; Request for Comment, 87 Fed. Reg. 40881, 40882 (July 8, 2022).

40. For example, the request seeks comments on “risks arising from current market conditions in digital assets and any potential mitigating factors,” followed by a list of six kinds of concerns, including market transparency; accuracy and reliability of market data; technological risks; smart contract design and security; settlement and security; and jurisdictional and legal conditions. *Id.*



response to the March 2022 Executive Order.<sup>41</sup> The three reports included “The Future of Money and Payments,”<sup>42</sup> which was accompanied by a fact sheet detailing the recommendations in that report;<sup>43</sup> “Crypto-Assets: Implications for Consumers, Investors, and Businesses”;<sup>44</sup> and “Action Plan to Address Illicit Financing Risks of Digital Assets.”<sup>45</sup> A follow-up to the last of these reports, released on September 20, 2022, took the form of an expedited request for comment inviting public response on “digital-asset-related illicit finance and national security risks as well as the publicly released action plan to mitigate the risks.”<sup>46</sup>

One of the common themes across these reports is that changes are needed. The report on money and payments suggests we need to work on a possible U.S. CBDC, improve competition in the U.S. payments system, establish a federal framework for payment regulation, and improve cross-border payments.<sup>47</sup> One of the critical observations of the report is that “not all consumers make the same payment choices or have the same access to payment options, and certain segments of the population may disproportionately bear the costs and inefficiencies of payment systems.”<sup>48</sup> In addition, the report candidly acknowledges that it is “difficult to predict the impact of stablecoins on the future of

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41. Press Release, U.S. Dep’t of the Treasury, Statement from Secretary of the Treasury Janet L. Yellen on the Release of Reports on Digital Assets (Sept. 16, 2022), <https://home.treasury.gov/news/press-releases/jy0956> [<https://perma.cc/6G5Z-7AEX>].

42. U.S. DEP’T OF THE TREASURY, THE FUTURE OF MONEY AND PAYMENTS: REPORT PURSUANT TO SECTION 4(B) OF EXECUTIVE ORDER 14067 (2022) [hereinafter TREASURY, MONEY], <https://home.treasury.gov/system/files/136/Future-of-Money-and-Payments.pdf> [<https://perma.cc/G669-SG48>].

43. *Fact Sheet: Treasury Report on the Future of Money and Payments*, U.S. DEP’T OF THE TREASURY (Sept. 20, 2022) [hereinafter *Treasury, Fact Sheet*], <https://home.treasury.gov/system/files/136/FactSheet-Treasury-Report-Future-Money-Payments.pdf> [<https://perma.cc/4Q8U-4FGR>].

44. U.S. DEP’T OF THE TREASURY, CRYPTO-ASSETS: IMPLICATIONS FOR CONSUMERS, INVESTORS, AND BUSINESSES (2022) [hereinafter TREASURY, CRYPTO], [https://home.treasury.gov/system/files/136/CryptoAsset\\_EO5.pdf](https://home.treasury.gov/system/files/136/CryptoAsset_EO5.pdf) [<https://perma.cc/KVB2-7TVC>].

45. U.S. DEP’T OF THE TREASURY, ACTION PLAN TO ADDRESS ILLICIT FINANCING RISKS OF DIGITAL ASSETS (2022) [hereinafter TREASURY, ILLICIT], <https://home.treasury.gov/system/files/136/Digital-Asset-Action-Plan.pdf> [<https://perma.cc/H4U2-Y5EC>].

46. Ensuring Responsible Development of Digital Assets; Request for Comment, 87 Fed. Reg. 57556 (Sept. 20, 2022). Comments were due November 3, 2022.

47. TREASURY, MONEY, *supra* note 42, at 45-49.

48. *Id.* at 13.

money and payments.”<sup>49</sup> Finally, there are multiple pages laying out a variety of open issues relating to CBDCs that have yet to be decided.<sup>50</sup>

The report on “Crypto-Assets” explicitly recognizes that “stakeholders continue to deliberate on legislative proposals on the subject of crypto-asset market regulation” but also concludes that “there are much needed actions to be undertaken in the meantime using the existing authorities available to the regulators to protect the U.S. consumers, investors, and businesses.”<sup>51</sup> Much of this report suggests continuing reliance on existing authorities, although it also recognizes that additional guidance and rules are needed.<sup>52</sup> It also suggests that some forms of crypto-based businesses, particularly those that are decentralized, are or “may be operating in non-compliance with U.S. law and regulation.”<sup>53</sup> Non-Fungible Tokens (NFTs) are also identified as being subject to an incomplete legal landscape.<sup>54</sup>

One particularly problematic aspect of this report is the bald assertion at the start of the section titled “Fraud, Theft, and Mismanagement,” that “[a]s the crypto-asset market has grown, so has the volume of fraud, scams, and theft in the ecosystem; indeed, unlawful transaction activity globally reached an all-time high in value in 2021.”<sup>55</sup> The text of the report also contains the statement that “[a]ccording to one private sector estimate, there

49. *Id.* at 14.

50. *Id.* at 30-44.

51. TREASURY, CRYPTO, *supra* note 44, at 50.

52. “U.S. regulatory agencies should continue using their existing authorities to issue supervisory guidance and rules, as needed, to address current and emerging risks in crypto-asset products and services for consumers, investors, and businesses.” *Id.* at 2.

53. *Id.* at 10. For example, the Chair of the U.S. Securities and Exchange Commission (SEC) has opined on multiple occasions that most crypto issuers and exchanges are in violation of the federal securities laws by virtue of failing to register with the commission. *See, e.g.*, Gary Gensler, Chair, SEC, Prepared Remarks of Gary Gensler on Crypto Markets (Apr. 4, 2022), <https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422> [<https://perma.cc/3FDN-8QGX>].

54. TREASURY, CRYPTO, *supra* note 44, at 25. For an explanation of some of the issues facing NFTs, see *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, JONES DAY (Apr. 2021), <https://www.jonesday.com/en/insights/2021/04/nfts-key-us-legal-considerations-for-an-emerging-asset-class> [<https://perma.cc/8MUX-HZ63>].

55. TREASURY, CRYPTO, *supra* note 44, at 26 (citing CHAINALYSIS, THE 2022 CRYPTO CRIME REPORT 3 (2022), <https://go.chainalysis.com/2022-Crypto-Crime-Report.html> [<https://perma.cc/JZN7-6J4E>]).

was \$14 billion worth of crypto-asset-based crime, globally, in 2021, up from \$7.8 billion in 2020.”<sup>56</sup> Acknowledgement that as a percentage of overall crypto activity this amounted to “an all-time low as a share of all crypto-asset activity” was relegated to ultra-small print in a footnote.<sup>57</sup>

The Treasury’s “Action Plan” on illicit activity, as suggested by the title of the report, focuses on additional actions required to develop “a coordinated interagency action plan.”<sup>58</sup> The report identifies gaps in AML/CFT regimes in other jurisdictions, difficulties in dealing with anonymity-enhancing technologies, and issues created where peer-to-peer transactions occur without the assistance of intermediaries.<sup>59</sup> The report does assert that the United States “has been a leader in applying its AML/CFT framework to virtual assets domestically,” listing a number of enforcement actions taken by a host of U.S. regulators.<sup>60</sup> Despite claims of such success, the ultimate conclusion of the report is that a number of high priority actions need to be taken, including updating existing regulations under the BSA and strengthening supervision of crypto transactions.<sup>61</sup>

### C. Reports from the Office of Science and Technology Policy

Although one of the DOJ reports evaluated the potential of a U.S. CBDC,<sup>62</sup> the Office of Science and Technology Policy (OSTP) was also called upon for a technical evaluation of a U.S. CBDC.<sup>63</sup> The OSTP report does not make any recommendation about the overall desirability of a CBDC or propose particular design options,<sup>64</sup> implicitly recognizing that such choices still

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56. *Id.* at 27.

57. *Id.* at 26 n.109.

58. TREASURY, ILLICIT, *supra* note 45, at 1.

59. *Id.* at 4-7.

60. *Id.* at 7-9.

61. *Id.* at 12-14.

62. TREASURY, MONEY, *supra* note 42, at 45.

63. OFF. OF SCI. & TECH. POL’Y, WHITE HOUSE, TECHNICAL EVALUATION FOR A U.S. CENTRAL BANK DIGITAL CURRENCY SYSTEM (2022) [hereinafter OSTP, CBDC], <https://www.whitehouse.gov/wp-content/uploads/2022/09/09-2022-Technical-Evaluation-US-CBDC-System.pdf> [<https://perma.cc/C6WV-T8KP>].

64. *Id.* at 6.

need to be made. Instead, the report offers a daunting list of open issues, including choices about intermediation, technical interoperability, permissions, access tiering, privacy protection, remediation, security, maintenance of the ledger, as well as other financial design choices.<sup>65</sup>

A second OSTP report focused on climate and energy implications of digital assets.<sup>66</sup> After reciting the historically high demand for energy associated with cryptoassets,<sup>67</sup> the report concludes that “future electricity demand from crypto-asset operations is uncertain.”<sup>68</sup> In addition, the office notes both that different crypto technologies have varying impacts and that some applications have the potential to minimize or mitigate environmental impacts.<sup>69</sup> Because energy demand from the crypto sector is variable and continually evolving, “existing energy systems models do not adequately represent digital technologies such as data centers and telecommunications networks, let alone crypto-asset and blockchain networks.”<sup>70</sup> As a result, without offering specific guidance on how this would be assured and after admitting that there is no industry consensus on best practices, the report suggests that optimal responsible development of cryptoassets “would encourage consensus mechanisms that minimize energy usage and environmental impacts while maximizing benefits to consumers.”<sup>71</sup> It also lists a number of potentially helpful applications and opportunities for further technological innovation, again without explaining how to achieve the potential that is described.<sup>72</sup>

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65. *Id.* at 11-40.

66. OFF. OF SCI. & TECH. POL’Y, WHITE HOUSE, CLIMATE AND ENERGY IMPLICATIONS OF CRYPTO-ASSETS IN THE UNITED STATES (2022) [hereinafter OSTP, CLIMATE], <https://www.whitehouse.gov/wp-content/uploads/2022/09/09-2022-Crypto-Assets-and-Climate-Report.pdf> [<https://perma.cc/JVD9-SHYX>].

67. *Id.* at 5 (“As of August 2022, published estimates of the total global electricity usage for crypto-assets are between 120 and 240 billion kilowatt-hours per year, a range that exceeds the total annual electricity usage of many individual countries, such as Argentina or Australia.”).

68. *Id.*

69. *Id.* at 5-8.

70. *Id.* at 18.

71. OSTP, CLIMATE, *supra* note 66, at 11.

72. *Id.* at 27-30.

### D. Reports from the Department of Commerce

Under the terms of the Executive Order, the U.S. Department of Commerce (“Commerce”) was also responsible for a report on “Responsible Advancement of U.S. Competitiveness in Digital Assets.”<sup>73</sup> The recommendations included in the report are predicated on the undeniable facts that there are diverse use-cases for crypto, a wide variety of approaches and priorities in different jurisdictions, and a wide range of potential risks associated with the technology.<sup>74</sup> Proceeding from that foundational information, the report recommends “four broad categories of action.”<sup>75</sup> These are: (1) “Ensuring effective regulatory approaches and addressing regulatory gaps”; (2) “International engagement and trade promotion”; (3) “Meaningful public-private engagement”; and (4) “Sustained U.S. leadership in technological research and development (R&D).”<sup>76</sup> Described as a “framework,” the Commerce Department explicitly acknowledged that adoption of its recommendations is uncertain.<sup>77</sup>

With regard to the first of its recommendations, Commerce begins by touting the strength and appeal of U.S. financial markets.<sup>78</sup> It then cites approvingly a number of prior enforcement actions taken by both the Commodity Futures Trading Commission (CFTC) and SEC against various crypto businesses.<sup>79</sup> The report does acknowledge that “[m]any digital asset firms have expressed concerns that existing regulation is not consistently applied to their products and services as to other

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73. U.S. DEP’T. OF COM., RESPONSIBLE ADVANCEMENT OF U.S. COMPETITIVENESS IN DIGITAL ASSETS (2022), <https://www.commerce.gov/sites/default/files/2022-09/Digital-Asset-Competitiveness-Report.pdf> [<https://perma.cc/2XK2-343B>].

74. *Id.* at 2.

75. *Id.* at 5.

76. *Id.* at 5-6.

77. *Id.* at 2.

78. U.S. DEP’T OF COM., *supra* note 73, at 6.

79. *Id.* at 6-7.

financial products and services,” and that, in their opinion, “guidance coming from regulators on initial coin offerings or other product introductions has not been clear and is often issued on an ad hoc basis, creating uncertainties.”<sup>80</sup> However, these comments are expressly disclaimed in a footnote, which says these statements “do not reflect the Commerce’s views.”<sup>81</sup> It is therefore not surprising that “Commerce endorses regulators’ existing approach that both ensures regulation of the financial sector, including through application of existing law, and responsible innovation that identifies and mitigates risks prior to launch.”<sup>82</sup> On the other hand, even while Commerce suggests continuing to apply existing rules, it does admit that “important regulatory gaps have emerged that require action by independent regulatory agencies, federal executive branch agencies, Congress, or some combination of the three.”<sup>83</sup> It does not offer advice on what such changes should entail.

With regard to international engagement, Commerce says that “federal departments and agencies should continue to engage internationally to promote development of digital asset policies and CBDC technologies consistent with U.S. values and standards.”<sup>84</sup> As for future directions, the report suggests that Commerce could continue to promote U.S. policies and to highlight U.S. digital firms’ work.<sup>85</sup>

As for the need for public-private partnerships, Commerce suggests that there is a need for a forum in which diverse viewpoints can be articulated and explored, with the added possibility of creating an advisory committee including members from “businesses focused on digital assets, legacy financial services firms, research institutions and universities, trade and

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80. *Id.* at 8.

81. *Id.* at 8 n.13.

82. *Id.* at 8.

83. U.S. DEP’T OF COM., *supra* note 73, at 8-9 (citing PRESIDENT’S WORKING GRP. ON FIN. MKTS. ET AL., REPORT ON STABLECOINS (2021), [https://home.treasury.gov/system/files/136/StableCoinReport\\_Nov1\\_508.pdf](https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf) [<https://perma.cc/E7N3-C6QT>], for the contention that legislative reforms may be required—without further elaboration).

84. *Id.* at 9.

85. *Id.*

advocacy associations, civil society groups, and others.”<sup>86</sup> It also recognizes the need for additional informational resources for the public,<sup>87</sup> and creation of a larger skilled workforce.<sup>88</sup> Again, the report suggests that additional partnerships could be created, but how they would function is left unspecified, particularly given that substantial efforts to improve training in science, technology, engineering, and math have been underway (relatively unsuccessfully) for some time already.<sup>89</sup>

Commerce’s final recommendation calls for “Sustained U.S. Leadership in Technological Research and Development.”<sup>90</sup> The report asserts that “[f]ederal agencies have played a significant role in research leadership” by providing support that has spanned decades.<sup>91</sup> While one might question the extent to which the United States has actually supported development of cryptoassets as opposed to technological breakthroughs that enabled the development of distributed ledger technologies more broadly, it is certainly true that the federal government offers considerable resources, particularly through the National Science Foundation.<sup>92</sup> The report suggests continuing such financial research support including in the areas of tokenization and related applications.<sup>93</sup> However, this section of the report also suggests that it is time for research support to be more coordinated with

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86. *Id.* at 11.

87. *Id.* at 12.

88. U.S. DEP’T OF COM., *supra* note 73, at 13.

89. In 1983, the National Commission on Excellence in Education reported (relying on data from 1980) that most states required only one year of math and one year of science to earn a high school diploma. NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 19 (1983), [https://edreform.com/wp-content/uploads/2013/02/A\\_Nation\\_At\\_Risk\\_1983.pdf](https://edreform.com/wp-content/uploads/2013/02/A_Nation_At_Risk_1983.pdf) [https://perma.cc/Z2SY-S9ES] (“Thirty-five States require only 1 year of mathematics, and 36 require only 1 year of science for a diploma.”). Today’s standards are substantially more rigorous, at least on paper, but even with these changes “[t]he United States typically scores toward the middle of the pack in international comparisons of math and science understanding among students in industrialized nations. At the same time, the latest results from the National Assessment of Educational Progress reveal grounds for concern.” *The Push to Improve STEM Education*, EDUC. WK. (Mar. 21, 2008), <https://www.edweek.org/teaching-learning/the-push-to-improve-stem-education/2008/03> [https://perma.cc/J6W8-TCBW].

90. U.S. DEP’T OF COM., *supra* note 73, at 15.

91. *Id.*

92. *Id.* at 15-16.

93. *Id.* at 16.

“government agencies and regulatory bodies whose mission focus is most likely to be impacted by emerging technologies and applications.”<sup>94</sup> The report fails to explain how such coordination should be achieved, other than with “new partnerships,” why such coordination is needed, or how it would likely impact the availability of functional support for the technologies in question.<sup>95</sup>

### **E. Subsequent Report by the Financial Stability Oversight Council**

In addition to the original reports referenced in the release announcing the “Comprehensive Framework,”<sup>96</sup> on October 3, 2022, the Financial Stability Oversight Council (FSOC) released its report on financial stability risks associated with crypto.<sup>97</sup> The FSOC assessment was accompanied by a fact sheet summarizing the focus of the report.<sup>98</sup> That summary characterizes the report as covering “financial stability risks and regulatory gaps posed by various types of digital assets” along with recommendations to address these concerns.<sup>99</sup>

## **II. WHY THIS IS NOT A COMPREHENSIVE FRAMEWORK**

Although the reports are voluminous, it is misleading to think of the documents as creating or reflecting a “comprehensive

94. *Id.* at 17.

95. U.S. DEP’T OF COM., *supra* note 73, at 17.

96. *Comprehensive Framework*, *supra* note 8.

97. FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON DIGITAL ASSET FINANCIAL STABILITY RISKS AND REGULATION (2022) [hereinafter FSOC REPORT], <https://home.treasury.gov/system/files/261/FSOC-Digital-Assets-Report-2022.pdf> [https://perma.cc/W7PS-69T6]. Although released after the other reports called for by the executive order, the report was timely, as the order gave the FSOC 210 days to produce this report. Exec. Order No. 14,067, 87 Fed. Reg. 14143, 14148-49 (Mar. 9, 2022).

98. U.S. DEP’T OF THE TREASURY, FACT SHEET: THE FINANCIAL STABILITY OVERSIGHT COUNCIL’S REPORT ON DIGITAL ASSET FINANCIAL STABILITY RISKS AND REGULATION (2022), <https://home.treasury.gov/system/files/261/Fact-Sheet-Report-on-Digital-Asset-Financial-Stability-Risks-and-Regulation.pdf> [https://perma.cc/WJ2E-HK5N].

99. *Id.* at 1.



framework.” The word “framework” in this context would suggest that there is a basic conceptual structure or system in place on which to build future details.<sup>100</sup> Unfortunately, it is hard to look at the collection of comments, observations, principles, and generalized priorities for future action and ascertain where the country plans on going from here, much less how it intends to get there. This reality calls into question the assertion by the Biden Administration that we have a comprehensive crypto framework.

### A. Lack of Consistency in the Reports

One of the problems with the reports is that they do not present a cohesive whole. Each document offers unique generalized recommendations and priorities that are not integrated with the recommendations in the other reports. The agencies do not even agree on whether to talk about crypto as digital assets or cryptoassets,<sup>101</sup> or perhaps as virtual assets.<sup>102</sup> While this may be a superficial difference, it is reflective of significant differences in approach and priority.

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100. *Framework*, MERRIAM-WEBSTER (Feb. 10, 2023), <https://www.merriam-webster.com/dictionary/framework> [<https://perma.cc/DG5N-72AB>]. Dictionary.com says the word means “a basic structure, plan, or system, as of concepts.” *Framework*, DICTIONARY.COM, <https://www.dictionary.com/browse/framework> [<https://perma.cc/PFS3-NWND>] (last visited Feb. 25, 2023). It offers as an example of such a framework the idea that a legislative bill could provide a legal framework to address particular problems. *Id.*

101. While most of the reports refer to crypto as “digital assets,” the White House Office of Science and Technology Policy speaks of them as cryptoassets. See OSTP, CLIMATE, *supra* note 66, at 4. The Department of the Treasury has itself waffled on the appropriate terminology, sometimes presenting reports that talk of cryptoassets, and sometimes talking about digital assets. Compare TREASURY, CRYPTO, *supra* note 44, at 4, with Treasury, International, *supra* note 34.

102. In one case, Treasury used “digital assets” in the title of a report, but then changed terminology in the text, referring to virtual assets and virtual asset service providers (VASPs) in the report itself. See TREASURY, ILLICIT, *supra* note 45, at 2. This particular report offers a distinction between digital assets and virtual assets that does not appear to have been used in any of the other reports, suggesting that virtual assets are “a subset of digital assets that does not include central bank digital currencies (CBDCs) or representations of other financial assets, such as digitized representations of existing securities or deposits.” *Id.* at 1.

More significantly, while many of the reports overlap in the issues which they address,<sup>103</sup> the priorities identified by the different agencies are neither consistent nor cohesive.<sup>104</sup> For example, there are calls for existing regulators to stay the course, relying on existing precedents,<sup>105</sup> alongside conflicting suggestions that regulators need to issue new rules and additional guidance.<sup>106</sup> Another troubling aspect of the reports is how often they include calls for action without providing any significant level of detail.<sup>107</sup> None of this indicates that there is a viable framework for future developments in place.

### B. Open Issues for Regulators

Another issue that is made clear upon a reading of the reports is that they do not offer suggestions as to how to resolve many of the issues that have weighed most heavily on the most active

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103. For example, two different reports focused on the potential for a U.S. CBDC. *See supra* notes 28-31 and accompanying text (noting that the text of the report had not been made public as of Oct. 5, 2022); OSTP, CBDC, *supra* note 63. There were also two distinct reports with a focus on international efforts. *See* U.S. DEP'T OF COM., *supra* note 73, at 1 (noting that this report “pertains to . . . how the United States can both reinforce leadership in the global financial system as well as foster technological and economic competitiveness”); Treasury, International, *supra* note 34. Multiple reports focused on the risks associated with illicit activities in the crypto space. DOJ, ROLE, *supra* note 21; TREASURY, ILLICIT, *supra* note 45; FSOC REPORT, *supra* note 97.

104. *See generally* Sandra Waliczek et al., *What We Can Learn About the Future of Digital Assets Regulation from Recent US Government Reports*, WORLD ECON. F. (Sept. 27, 2022), <https://www.weforum.org/agenda/2022/09/5-takeaways-from-the-u-s-federal-government-s-review-of-digital-assets/> [<https://perma.cc/LF7K-9PBN>].

105. U.S. DEP'T OF COM., *supra* note 73, at 8 (“Commerce endorses regulators’ existing approach . . .”). Still, the report does acknowledge that some gaps in regulation have emerged. *Id.* at 8-9.

106. TREASURY, CRYPTO, *supra* note 44, at 51 (“The U.S. agencies should, as appropriate, review existing regulations and take steps to clarify regulatory requirements applicable to crypto-asset products and services, address novel fraudulent practices, and enhance disclosure requirements.”).

107. Even the Comprehensive Framework notes the need for additional development of basic facts. For example, it explicitly states:

The United States will continue to monitor the development of the digital assets sector and its associated illicit financing risks, to identify any gaps in our legal, regulatory, and supervisory regimes. As part of this effort, Treasury will complete an illicit finance risk assessment on decentralized finance by the end of February 2023 and an assessment on non-fungible tokens by July 2023.

*Comprehensive Framework*, *supra* note 8.

regulators in the space. Calls for enhanced regulation have come from multiple sources, including industry participants,<sup>108</sup> independent observers,<sup>109</sup> legislators,<sup>110</sup> and regulators themselves.<sup>111</sup> Some of the calls for changes in authority and clarification have come from two of the most active enforcement agencies in the crypto space, the SEC and CFTC.<sup>112</sup>

Reports circulated in 2018 suggested that the SEC believed crypto exchanges to be “an unregulated mess.”<sup>113</sup> While those claims may have overstated the extent of the SEC’s dissatisfaction, the tenor of the SEC’s concerns seems clear. In the opinion of regulators, “many online trading platforms will appear to investors as SEC-registered and regulated

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108. The CEO of Binance, a crypto exchange that itself has been the subject of multiple investigations, called for increased regulation following the spectacular collapse of the FTX exchange in November 2022. Kyt Dotson, *Binance CEO Calls for Regulation, Announces Crypto ‘Industry Recovery Fund’ After FTX Collapse*, SILICONANGLE (Nov. 14, 2022), <https://siliconangle.com> [<https://perma.cc/M2CW-4N9E>]. For information about some recent actions involving Binance, see Derek Andersen, *Bad Day for Binance with SEC Investigation and Reuters Exposé*, COINTELEGRAPH (June 7, 2022), <https://cointelegraph.com/news/bad-day-for-binance-with-sec-investigation-and-reuters-expose> [<https://perma.cc/P3QS-UGKQ>].

109. Economic and academic experts have suggested a range of potential approaches. See *Academic and Economic Experts Debate the Need and Scope of Crypto Regulation*, PYMNTS (Feb. 24, 2022), <https://www.pymnts.com/cryptocurrency/2022/academic-and-economic-experts-debate-the-need-and-scope-of-crypto-regulation/> [<https://perma.cc/L5EY-47ZL>].

110. For a look at comments from a number of federal legislators all calling for greater clarity, see Nikhilesh De, *FTX Collapse Sparks Alarm from US Lawmakers*, COINDESK (Nov. 11, 2022, 9:08 AM), <https://www.coindesk.com/policy/2022/11/10/ftx-collapse-sparks-alarm-from-us-lawmakers/> [<https://perma.cc/DTF5-2DBW>].

111. Tim Shaw, *Treasury Calls for Tighter Crypto Regulation, Oversight*, THOMSON REUTERS: TAX & ACCT. (Oct. 5, 2022), <https://tax.thomsonreuters.com/news/> [<https://perma.cc/A296-ND58>] (“A body of government regulators led by the Treasury secretary warned of risks posed by the proliferation of digital assets and urged Congress to pass legislation that addresses gaps in the financial system.”).

112. The efforts of the SEC and CFTC are specifically acknowledged in a number of reports. See, e.g., TREASURY, ILLICIT, *supra* note 45, at 8; U.S. DEP’T OF COM., *supra* note 73, at 6-7; FSOC REPORT, *supra* note 97, at 86-94. Although their enforcement efforts are acknowledged, not much is said about how their roles need to be adjusted in order to move forward. One exception is that some of the reports include recognition that additional resources might be needed. DOJ, ROLE, *supra* note 21, at 36-37. The FSOC also “recommends that Congress appropriate necessary resources to member agencies for supervision and regulation of crypto-asset activities.” FSOC REPORT, *supra* note 97, at 119.

113. Romain Dillet, *SEC Says Cryptocurrency Exchanges Are an Unregulated Mess*, TECHCRUNCH (Mar. 7, 2018, 12:22 PM), <https://techcrunch.com/2018/03/07/sec-says-cryptocurrency-exchanges-are-an-unregulated-mess/> [<https://perma.cc/3MNH-QHGS>].

marketplaces.”<sup>114</sup> The concern was that these unregulated businesses “may give investors the false impression that they are regulated or meet the regulatory standards of a national securities exchange.”<sup>115</sup> Calls for enhanced regulation increased after FTX collapsed in November 2022.<sup>116</sup> Despite this, the extent of the SEC’s authority over exchanges remains unclear, both because of lack of clarity<sup>117</sup> as to which cryptoassets are securities and also because of difficulty in applying existing regulations to decentralized platforms.<sup>118</sup>

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114. *The SEC Says Crypto-Currency Exchanges Are an Uncontrolled Mess*, NEWSBEEZER (Mar. 7, 2018), <https://newsbeezer.com/the-sec-says-crypto-currency-exchanges-are-an-uncontrolled-mess/> [<https://perma.cc/C6VH-VSZB>].

115. *Id.*

116. See James Field, *SEC Chair Gary Gensler Reiterates Call for Digital Asset Registration in the Wake of FTX Collapse*, COINGEEK (Nov. 10, 2022), <https://coingeeek.com/sec-chair-gary-gensler-reiterates-call-for-digital-asset-registration-in-the-wake-of-ftx-collapse/> [<https://perma.cc/Q9L9-RW4Q>].

117. SEC Commissioner Hester Peirce, often in the minority on the Commission, has made repeated calls for additional regulatory clarity. Sarah Milby, *Hester Peirce, “Crypto Mom,”* UNIV. OF CHI. (Feb. 12, 2021), <https://womansrational.uchicago.edu/2021/02/12/hester-peirce-crypto-mom-on-responsible-regulation-and-innovation/> [<https://perma.cc/AX3K-NXEN>] (“Peirce has been unsuccessful in convincing her colleagues in the SEC to abandon the pattern of fractured regulation by enforcement action and to instead consider creating comprehensive, clear regulations for cryptocurrencies that benefit consumers and investors.”); see also Brian Croce, *SEC Commissioner Calls on Congress to Pass Crypto Regulatory Bill*, PENSIONS & INVS. (Oct. 12, 2022, 4:01 PM), <https://www.pionline.com/regulation/sec-commissioner-calls-congress-pass-crypto-regulatory-bill> [<https://perma.cc/F44U-X4XR>]. Peirce has specifically claimed that “it is a good time for legislation. It’s up to Congress to figure out how they want to allocate the regulatory responsibility.” *Id.* Even when individual decisions are reached, such as the memorandum order issued November 7, 2022, by the District Court for the District of New Hampshire, the rulings have no precedential value when the issue is litigated in other courts. *SEC v. LBRY, Inc.*, No. 21-cv-260, 2022 WL 16744741 (D.N.H. Nov. 7, 2022).

118. The SEC recognizes this issue and has proposed amending its regulations to add computer protocols to the definition of exchange in order to extend its authority over platforms that do not function as traditional exchanges. See Amendments Regarding the Definition of “Exchange” and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, 87 Fed. Reg. 15496 (proposed Mar. 18, 2022) (to be codified at 17 C.F.R. pts. 232, 240, 242, 249). However, as of December 1, 2022, the amendments had not been made, and there were a wide range of negative comments about the proposal calling into question whether it would ever be adopted. See Comments on Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange,” Exchange Act Release No. 34-94062 (Dec. 1, 2022), <https://www.sec.gov/comments/s7-02-22/s70222.htm> [<https://perma.cc/4HDW-UQSE>].

Another glaring regulatory gap involves oversight for the spot or physical markets for cryptoassets (such as Bitcoin) that are not securities. The SEC has authority only over trading platforms that involve securities.<sup>119</sup> The CFTC can enforce its antifraud mandates in the spot markets for commodities,<sup>120</sup> but under current rules it has no authority to regulate the markets in which commodities transactions occur.<sup>121</sup>

In February 2022, CFTC Chair Rostin Behnam appealed to Congress, seeking authority over crypto spot markets.<sup>122</sup> In a February 8, 2022, letter to members of the Senate Committee on Agriculture, Nutrition, and Forestry, Behnam wrote that “[t]he cash market for trading digital assets is currently subject to an insufficient patchwork of regulations.”<sup>123</sup> In his opinion, “there are important principles missing from the current regulatory framework applicable to digital asset markets that we see in other federally regulated markets, particularly ones that primarily cater to retail investors.”<sup>124</sup> He repeated this request in July, noting that “there are several unique elements of the digital asset commodity cash market . . . suggesting it would benefit greatly from CFTC oversight.”<sup>125</sup>

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119. *See, e.g.*, 15 U.S.C. § 78f (prescribing SEC regulation of “[n]ational securities exchanges”). The Securities Exchange Act of 1934 Act defines both “exchange” and “security.” Securities Exchange Act of 1934, § 3, 48 Stat. 881, 882-84 (codified as amended at 15 U.S.C. § 78c). An exchange is an organization which maintains “a market place or facilities for bringing together purchasers and sellers of securities.” 15 U.S.C. § 78c(a)(1). “[S]ecurity” includes investment contracts, although it does not list anything like crypto or digital assets by name. *See* 15 U.S.C. § 78c(a)(10).

120. *See Statement of Commissioner Dawn D. Stump Regarding Enforcement Action Relating to Bitcoin Fraud*, CFTC (Mar. 8, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement030822> [<https://perma.cc/HAW9-SLLZ>].

121. *Id.*

122. Nikhilesh De, *CFTC Should Oversee Crypto Spot Markets, Chief Reiterates Before Congress*, COINDESK (Feb. 10, 2022, 11:30 AM), <https://www.coindesk.com/policy/2022/02/09/cftc-should-oversee-crypto-spot-markets-chief-reiterates-before-congress/> [<https://perma.cc/XCK4-LAZZ>].

123. Letter from Rostin Behnam, Chairman, CFTC, to Debbie Stabenow, Chair, U.S. Senate Comm. on Agric., Nutrition, & Forestry, John Boozman, Ranking Member, U.S. Senate Comm. on Agric., Nutrition, & Forestry, David Scott, Chairman, House Comm. on Agric., and Glenn Thompson, Ranking Member, House Comm. on Agric. 6 (Feb. 8, 2022), <https://www.agriculture.senate.gov> [<https://perma.cc/HNU5-7K9B>].

124. *Id.*

125. Rostin Behnam, Chairman, CFTC, Keynote Address of Chairman Rostin Behnam at the Brookings Institution Webcast on The Future of Crypto Regulation (July 25, 2022),

A third area in which regulatory oversight is lacking is in decentralized finance (“DeFi”) applications.<sup>126</sup> Federal Reserve Chair Jerome Powell has been particularly vocal about the need for added clarification and certainty in the DeFi space. In a September 2022 presentation on digital finance organized by Banque de France, he opined, “We need to be very careful about how crypto activities are taken within the regulatory perimeter . . . there’s a real need for more appropriate regulation . . . as decentralized finance expands . . . .”<sup>127</sup>

The regulatory regime applicable to NFTs<sup>128</sup> is also unclear. There have been private lawsuits arguing that certain NFTs are securities,<sup>129</sup> and there have been increasing levels of concern

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<https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehtnam24>  
[<https://perma.cc/EB4Z-RSPK>].

126. “DeFi is short for ‘decentralized finance,’ an umbrella term for a variety of financial applications in cryptocurrency or blockchain geared toward disrupting financial intermediaries.” Alyssa Hertig, *What is DeFi?*, COINDESK (Nov. 16, 2022), <https://www.coindesk.com/learn/what-is-defi/> [<https://perma.cc/H3CU-PXGR>]. Despite increasing popularity of DeFi applications, they reveal regulatory gaps because “U.S. financial regulation assumes the presence of intermediaries,” which are missing in this sector. Jai Massari & Christian Catalini, *DeFi, Disintermediation, and the Regulatory Path Ahead*, THE REGUL. REV. (May 10, 2021), <https://www.theregreview.org/2021/05/10/massari-catalini-defi-disintermediation-regulatory-path-ahead/> [<https://perma.cc/Q77H-S987>]; see also *Statement on DeFi Risks, Regulations, and Opportunities*, SEC (Nov. 9, 2021), <https://www.sec.gov/news/statement/crenshaw-defi-20211109> [<https://perma.cc/XW3U-7S3G>].

127. *Fed’s Powell Reiterates Call for Appropriate Regulation of Digital Finance*, REUTERS (Sept. 27, 2022, 2:58 PM), <https://www.reuters.com/business/feds-powell-reiterates-call-appropriate-regulation-digital-finance-2022-09-27/> [<https://perma.cc/G5QZ-FNSB>].

128. An NFT is a digital asset that is “unique and can’t be replaced with something else.” Mitchell Clark, *NFTs, Explained*, THE VERGE (June 6, 2022, 7:30 AM), <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq> [<https://perma.cc/C9LK-EDTA>]. For analysis of the regulatory issues impacting NFTs, see *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, *supra* note 54.

129. See Class Action Complaint for Violations of the Securities Act of 1933 at 3-5, *Friel v. Dapper Labs, Inc.*, (No. 21 Civ. 5837), 2023 WL 2162747 (S.D.N.Y. Feb. 22, 2023) (complaint available at <https://www.dandoddiary.com/wp-content/uploads/sites/893/2021/06/Dapper-Labs-lawsuit-complaint.pdf> [<https://perma.cc/DR32-KKXH>]). For a discussion of this litigation, see Gargi Chaudhuri & James Masella, III, *Are NFTs Securities? Analysis of the NBA Top Shot Litigation and Other NFT-Related Actions*, JDSUPRA (Mar. 30, 2022), [https://www.jdsupra.com/legalnews/are-nfts-securities-analysis-of-the-nba-2972108/#\\_ftn14](https://www.jdsupra.com/legalnews/are-nfts-securities-analysis-of-the-nba-2972108/#_ftn14) [<https://perma.cc/L2PA-MY4J>]. On February 22, 2023, the court allowed the securities class action to proceed on the grounds that the NFTs are securities for purposes of the federal securities laws. See *Federal Court Concludes That Certain NFTs May Be Securities: Preliminary Determination in Ongoing NBA Top Shot Litigation*, COVINGTON (Mar. 6, 2023), <https://www.cov.com/en/news-and-insights/insights/2023/04/federal-court->

about the amount of fraud permeating the NFT space.<sup>130</sup> Nonetheless, it is not at all clear which regulators have jurisdiction over these unique assets. There is considerable doubt as to whether NFTs are likely to be classifiable as securities.<sup>131</sup> Although the definition of commodity is very broad, it is also not clear that the CFTC will be able to effectively regulate the sales of these assets in the actual or spot markets.<sup>132</sup> Intellectual property rights are also unclear and not generally within the expertise of agencies such as the SEC or CFTC.<sup>133</sup>

In addition to gaps in the regulatory structure that fail to clarify when crypto is a security, that do not allocate regulatory authority over the spot markets for crypto commodities, that do not address DeFi, and which have failed to provide appropriate rules for NFTs, there are other open issues as well. For example, there have also been suggestions that there is insufficient regulation or oversight for crypto miners and validators,<sup>134</sup> for stablecoin issuers,<sup>135</sup> for businesses involved in crypto lending,<sup>136</sup>

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concludes-that-certain-nfts-may-be-securities-preliminary-determination-in-ongoing-nba-top-shot-litigation [https://perma.cc/2LU5-KBBF].

130. “One of the [most] popular NFT trading sites estimated that over 80 percent of the artwork minted using its free tool were ‘plagiarized works, fake collections, and spam.’” Clark, *supra* note 128.

131. See Jules Carter, *Everything You’ve Ever Wanted to Know About NFTs and Securities Regulation (and a Few Things You Didn’t)*, THOMSON REUTERS: WESTLAW TODAY (Aug. 15, 2022), <https://today.westlaw.com/> [https://perma.cc/G5HG-3TGB].

132. See *supra* notes 120-21 and accompanying text.

133. See *NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, *supra* note 54.

134. Professor Angela Walch, in testimony in the summer of 2021, suggested a need to regulate miners or validators who “extract” value by selecting, ordering, and proposing transactions to be added to the blockchain. *Cryptocurrencies: What Are They Good For?: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 117th Cong. 9-10 (2021) (statement of Angela Walch, Professor of Law, St. Mary’s University School of Law), <https://www.banking.senate.gov/imo/media/doc/Walch%20Testimony%207-27-21.pdf> [https://perma.cc/362B-A8GP].

135. One observer complained, “Currently, stablecoins are not regulated in any meaningful way. While some issuers have U.S. state licenses, these impose minimal requirements. There are no standards requiring issuers to protect reserves or maintain liquidity and no immediate recourse for spurned investors.” Alan Chu, *What Is the Right Approach to Regulating Stablecoins?*, FORKAST (June 23, 2022, 11:04 AM), <https://forkast.news> [https://perma.cc/H4CD-JXGV].

136. See Carol Goforth, *Neither a Borrower nor a Lender Be: Analyzing the SEC’s Reaction to Crypto Lending*, 18 U. MASS. L. REV. 2, 7-9 (2022).

and others.<sup>137</sup> Taken together, these gaps make it fairly obvious that the United States does not yet have a “comprehensive framework” for the regulation of cryptoassets. Moreover, it is clear that Congress is not at the point of being ready to step in and fill these gaps.

### C. Uncertainty in Congress

More than fifty bills and resolutions relating to crypto regulation were introduced during the 117th and 118th Congresses.<sup>138</sup> The bills covered a wide range of topics also covered in the reports discussed in the first part of this Article, including CBDCs, national security, and supporting blockchain technology in the United States.<sup>139</sup> Other proposals advanced particular ideas about how to improve regulatory clarity with regard to cryptoassets and transactions.<sup>140</sup> Some of the proposed regulations related to the application of Bank Secrecy Act provisions,<sup>141</sup> while others focused more on whether cryptoassets

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137. For example, some banks seeking to provide services in the crypto ecosystem are operating without clear guidance. Custodia Bank was originally told that it was eligible for a Federal Reserve master account but eventually had to turn to court to obtain clarification. See David M. Gossett et al., *Custodia Bank Wins Important Digital Asset Decision*, DAVIS WRIGHT TREMAINE LLP: BLOG (Nov. 23, 2022), <https://www.dwt.com/blogs/financial-services-law-advisor/2022/11/custodia-bank-digital-assets-court-wyoming#page=1> [<https://perma.cc/T7NP-WWKQ>].

138. Jason Brett, *Congress Has Introduced 50 Digital Asset Bills Impacting Regulation, Blockchain, and CBDC Policy*, FORBES (May 19, 2022, 11:59 PM), <https://www.forbes.com/sites/jasonbrett/2022/05/19/congress-has-introduced-50-digital-asset-bills-impacting-regulation-blockchain-and-cbdc-policy/?sh=91482694e3f0> [<https://perma.cc/LNY9-YV7Q>]. While the source claims that the bills were introduced in the 118th Congress, at least some of the bills discussed in the article were actually introduced in the 117th Congress. See, e.g., Clarity for Digital Tokens Act of 2021, H.R. 5496, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5496/text?r=5&s=1> [<https://perma.cc/B6NP-G5WR>].

139. Other topics, such as the taxation of crypto-based businesses and transactions, were also addressed in some of the bills. Some of the tax-related bills would have modified the definition of brokers required to report information to the IRS, and some would have added de minimis exemptions for small-value transactions. Brett, *supra* note 138.

140. *Id.*

141. See, e.g., Blockchain Regulatory Certainty Act, H.R. 5045, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5045/text?r=4&s=1> [<https://perma.cc/CD7E-DQFZ>]. This bill would have exempted certain non-controlling blockchain participants from the requirement to register as money transmitters or financial institutions. One problem with this particular bill was the breadth of the proposal, which



should be regulated as securities or commodities.<sup>142</sup> The significant variety in these bills signals some of the divisions among legislators, underlining the reality that the United States is not working within an existing, agreed-upon framework.

In terms of bills that gathered a significant amount of attention,<sup>143</sup> on June 7, 2022, Senators Cynthia Lummis (R-

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included language exempting the providers of blockchain services from any licensing or registration requirement (with no limitation) unless they had “control” over a digital currency. *Id.* This would presumably have completely exempted trading platforms that do not have their own cryptoassets from any registration requirement. This could have made detecting and dealing with money laundering, fraud, and market manipulation much more difficult, and is doubtless broader than would be wise.

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

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

The Clarity for Digital Tokens Act of 2021, H.R. 5496, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5496/text?r=5&s=1> [<https://perma.cc/N5XW-7Q5Q>], reflected a similar level of dissatisfaction with the SEC’s current approach but was limited to cryptoassets. The stated purpose of the bill was to “exclude[] certain offerings of digital tokens (i.e., a digital representation of value or rights recorded on a publicly available ledger) from securities registrations.” *Summary: H.R. 5496—117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/5496?s=1&r=27> [<https://perma.cc/C3A3-LYAB>] (last visited Feb. 26, 2023). The bill would have essentially adopted the three-year safe harbor originally suggested by SEC Commissioner Hester Peirce. Hester Peirce, Comm’r, SEC, *Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization* (Feb. 6, 2020), <https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06> [<https://perma.cc/T69A-5ABK>].

143. *See, e.g.*, Andrew Hinkes et al., *10 Impactful Provisions of the Lummis-Gillibrand Bill*, K&L GATES: FINTECH & BLOCKCHAIN L. WATCH (June 7, 2022), <https://www.fintechlawblog.com/2022/06/10-impactful-provisions-of-the-lummis-gillibrand-bill/> [<https://perma.cc/4MY7-JD56>]; Avik Roy, *Lummis-Gillibrand Crypto Bill: An Important Step in Bringing Regulatory Clarity to Bitcoin, Stablecoins, & Digital Assets*, FORBES (July 8, 2022, 6:41 PM), <https://www.forbes.com/sites/theapothecary/2022/07/08/lummis-gillibrand-crypto-bill-an-important-step-in-bringing-regulatory-clarity-to-bitcoin-stablecoins-digital-assets/?sh=65e34e37647d> [<https://perma.cc/H2ZC-C24A>].

Wyoming) and Kirsten Gillibrand (D-New York) introduced the Lummis-Gillibrand Responsible Financial Innovation Act.<sup>144</sup> This particular bill is far more detailed and encompassing than most other proposals initiated to date.<sup>145</sup> As filed, the bill included eight distinct titles and fifty-six sections, covering definitions, taxation, securities regulation, commodities regulation, consumer protection, payments innovation, and interagency coordination. A section-by-section overview of the bill describes the primary objectives of the proposal.<sup>146</sup> Those include a clearer division of responsibility between the SEC and CFTC with more tailored disclosure requirements for cryptoassets, additional regulatory authority for the CFTC, and additional disclosures and operational requirements to protect consumers.<sup>147</sup>

On August 3, 2022, Senators Debbie Stabenow (D-Michigan) and John Boozman (R-Arkansas), along with Cory Booker (D-New Jersey) and John Thune (R-South Dakota) introduced the Digital Commodities Consumer Protection Act of 2022.<sup>148</sup> A section-by-section analysis of the bill explains that its primary purpose is to give the CFTC authority over spot markets in cryptoassets that are not securities, although it also includes improved cybersecurity standards for intermediaries and outlines

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144. Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/4356/text?r=1&s=1> [<https://perma.cc/2NGM-2U5G>]; see also Press Release, Kirsten Gillibrand, U.S. Senator, 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/5PZG-S9XH>].

145. Gillibrand, *supra* note 144.

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

147. *Id.*

148. Press Release, John Boozman, U.S. Senator, Boozman, Stabenow, Booker and Thune Introduce Legislation to Regulate Digital Commodities (Aug. 3, 2022), <https://www.boozman.senate.gov/public/index.cfm/2022/8/boozman-stabenow-booker-and-thune-introduce-legislation-to-regulate-digital-commodities> [<https://perma.cc/U8YV-YPYV>]. The text of the bill is found in the Digital Commodities Consumer Protection Act of 2022, S. 4760, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/4760/text> [<https://perma.cc/7GCY-5HG5>].

disclosure and registration requirements for brokers in the space.<sup>149</sup>

On September 29, 2022, Senator Bill Hagerty (R-Tennessee) introduced the Digital Trading Clarity Act of 2022, which would provide crypto exchanges with a safe harbor from certain SEC enforcement actions.<sup>150</sup> This bill would generally exclude from the definition of “security” cryptoassets listed through intermediaries that meet requirements such as custody and disclosure along with other investor protections.<sup>151</sup> This would change upon issuance of a final judgment to the contrary by a federal court or if the SEC issues “a statement, formal rulemaking, or enforcement action, and without objection from the Commodity Futures Trading Commission’ determines that a digital asset is a security.”<sup>152</sup>

Even this superficial overview of pending bills indicates that there is substantial disagreement about how to address the existing gaps in clear regulation. As commentators have noted, “Cryptocurrency advocates and regulators can agree on one thing: Congress should pass new laws for crypto. Whether Congress can agree on what those laws look like remains uncertain.”<sup>153</sup> International observers have also called on U.S. legislators to act to address the holes in current regulations,<sup>154</sup> while

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149. *Digital Commodities Consumer Protection Act of 2022 Section-by-Section*, U.S. SENATE COMM. ON AGRIC., NUTRITION, & FORESTRY, [https://www.agriculture.senate.gov/imo/media/doc/crypto\\_bill\\_section\\_by\\_section1.pdf](https://www.agriculture.senate.gov/imo/media/doc/crypto_bill_section_by_section1.pdf) [<https://perma.cc/ULY6-29YA>] (last visited Feb. 26, 2023).

150. Press Release, Bill Hagerty, U.S. Senator, Hagerty Introduces Legislation to Provide Crucial Regulatory Clarity for Digital Assets (Sept. 29, 2022), <https://www.hagerty.senate.gov/press-releases/2022/09/29/hagerty-introduces-legislation-to-provide-crucial-regulatory-clarity-for-digital-assets/> [<https://perma.cc/5WLM-EVAR>].

151. Bill Flook, *Senate Bill Establish Temporary SEC Safe Harbor for Crypto Exchanges*, THOMSON REUTERS: TAX & ACCT. (Oct. 7, 2022), <https://tax.thomsonreuters.com/news/senate-bill-establish-temporary-sec-safe-harbor-for-crypto-exchanges/> [<https://perma.cc/KE5V-CG6J>].

152. *Id.*

153. Colin Wilhelm & Stephanie Murray, *Despite Call for Congress to Act, New Crypto Laws Look Unlikely This Year*, THE BLOCK (Oct. 5, 2022, 2:00 PM), <https://www.theblock.co/post/175080/despite-call-for-congress-to-act-new-crypto-laws-look-unlikely-this-year> [<https://perma.cc/YPQ7-T5UT>].

154. “The EU’s financial services chief has urged US politicians to draw up sweeping new rules to govern the crypto industry, warning that digital assets could pose a threat to financial stability if left to grow unchecked.” Kiran Stacey, *EU Financial Services Chief*

simultaneously questioning the ability of American politicians to come together successfully.<sup>155</sup>

In fact, while it might at one time have seemed possible to achieve movement on the crypto regulation front in 2022, that possibility was lost with the focus on the midterm elections.<sup>156</sup> Thus, even though there has been bipartisan support for legislative reform, that “interest so far isn’t translating into success.”<sup>157</sup> Even the shocking implosion of the FTX exchange in early November 2022 did not improve the prospects for consensus.<sup>158</sup>

## CONCLUSION

The preceding discussion indicates fairly definitively that there are gaps in the way that cryptoassets are regulated in the United States. As explained by Jimmie Lenz, the director of the Master of Engineering in Fintech program at Duke University and head of the Digital Asset Research and Engineering Collaborative, the problems arise because “[t]hey are trying to fit

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*Calls on US to Create New Crypto Rules*, FIN. TIMES (Oct. 17, 2022), <https://www.ft.com/content/690a371d-2a87-4e45-84eb-5222bff8f983> [<https://perma.cc/9XVA-3RDX>].

155. *Id.* (“US president Joe Biden has also talked of the importance of regulating the crypto industry, but members of Congress are split over how to do so.”).

156. Allyson Versprille, *Crypto Overhaul Fizzles in Congress, Leaving Industry and Investors in Limbo*, BLOOMBERG (Oct. 5, 2022), <https://www.bloomberg.com/news/articles/2022-10-05/crypto-overhaul-fizzles-in-congress-leaving-industry-in-limbo> [<https://perma.cc/N6H6-T4KX>] (“Several high-profile, bipartisan bills that once seemed to have a promising shot of passing before the end of 2022 are held up . . . . And now with lawmakers squarely focused on next month’s elections, their chances of becoming law in 2022 have all but evaporated.”).

157. *Id.*

158. MacKenzie Sigalos, *Sam Bankman-Fried Steps Down as FTX CEO as His Crypto Exchange Files for Bankruptcy*, CNBC (Nov. 11, 2022), <https://www.cnbc.com/2022/11/11/sam-bankman-frieds-cryptocurrency-exchange-ftx-files-for-bankruptcy.html> [<https://perma.cc/DHC5-F32E>] (“In the space of days, FTX went from a \$32 billion valuation to bankruptcy as liquidity dried up . . . .”). Notwithstanding this collapse, Senate Banking Committee Chair Sherrod Brown has “told reporters he was unsure about the need for legislation, which he noted could be heavily influenced by the crypto industry itself.” Zachary Warmbrodt & Eleanor Mueller, *Elizabeth Warren Wants to Pass a Major Crypto Bill*, *Sherrod Brown Says Not So Fast*, POLITICO (Nov. 15, 2022), <https://www.politico.com/news/2022/11/15/ftx-sec-cftc-crypto-regulations-00067040> [<https://perma.cc/WXX4-5YB7>].

a square peg into a round hole.”<sup>159</sup> Kristin Smith, executive director of the Blockchain Association, says, “New technology often requires a fresh look at regulation. It’s clear that we need a regulatory framework for stablecoin and crypto spot markets.”<sup>160</sup> Even a high-level overview of the FTX collapse brings home the accuracy of these statements.<sup>161</sup>

In fact, a report from a panel of state and federal financial regulators lists those two areas as two of the three most significant gaps in current crypto regulation, along with the problems created when DeFi applications allow retail customers to participate in transactions without the assistance of regulated intermediaries.<sup>162</sup> The problem, however, is not only that these gaps exist, but that “Congress may not be able to act on them any time soon. That could leave the market overseen by regulators competing for jurisdiction, encouraging the crypto industry to move offshore.”<sup>163</sup>

It is ironic that these issues continue to exist even though “the crypto industry has been pushing hard for new laws. They say Congress needs to step in because current American financial rules, and the government agencies enforcing them, are ill-equipped for digital assets.”<sup>164</sup>

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159. Kurt Woock, *Crypto Regulation: What’s New and What Investors Need to Know*, NERDWALLET (Dec. 19, 2022), <https://www.nerdwallet.com/article/investing/crypto-regulation> [<https://perma.cc/XY7F-3XK3>].

160. Rosemarie Miller, *Crypto Rule Suggestions from U.S. Panel Seek to Plug Holes*, FORBES (Oct. 11, 2022), <https://www.forbes.com/sites/rosemariemiller/2022/10/11/crypto-rule-suggestions-from-us-panel-seek-to-plug-holes/?sh=1d98367d2754> [<https://perma.cc/2K48-UZ8H>].

161. Stephen Katte, *Calls for Regulation Get Louder as FTX Contagion Continues to Spread*, COINTELEGRAPH (Nov. 29, 2022), <https://cointelegraph.com/news/calls-for-regulation-get-louder-as-ftx-contagion-continues-to-spread> [<https://perma.cc/UDG8-KM3H>] (“Crypto executives and politicians are becoming louder in their calls for crypto regulation as the aftermath of the FTX collapse continues to reverberate through the industry.”); see also Peter Whoriskey & Dalton Bennett, *Crypto’s Free-Wheeling Firms Lured Millions. FTX Revealed the Dangers.*, WASH. POST (Nov. 16, 2022), <https://www.washingtonpost.com/business/2022/11/16/ftx-collapse-crypto-exchanges-regulation/> [<https://perma.cc/JBD6-YN5C>] (complaining that crypto exchanges operate “outside the traditional banking system” and “are not subject to the same type of regulation, insurance and disclosure rules that protect customers of traditional banks”).

162. Miller, *supra* note 160.

163. *Id.*

164. Versprille, *supra* note 156.

Perhaps the problem can be attributed to the Biden Administration trying to have it both ways, insisting that the United States needs to encourage development of the new technology and continue U.S. leadership in FinTech, while simultaneously pushing for aggressive enforcement to address fraud and illicit use of cryptoassets.<sup>165</sup> Similarly, there is the contrast between pushing for increased clarity while insisting that we already have the framework in place. The reality of the situation is that “[c]rypto is regulated by many government bodies but lacks one unifying framework,” meaning rules can be cloudy.<sup>166</sup>

Regardless of the cause of the current situation, inaccurate claims that the United States has developed a comprehensive framework only confuse the situation rather than clarify it.

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165. Josephine Wolff, *The Competing Priorities Facing U.S. Crypto Regulations*, BROOKINGS: TECH STREAM (Oct. 17, 2022), <https://www.brookings.edu/techstream/the-competing-priorities-facing-u-s-crypto-regulations-bitcoin-ethereum/> [<https://perma.cc/BB48-H7P7>] (“[T]he Biden administration made clear in their executive order just how much the U.S. government wants to have it both ways, touting the potential benefits of virtual currencies for ‘responsible financial innovation’ as well as the risks they pose to consumers, investors, and the ‘financial stability and financial system integrity.’”).

166. Woock, *supra* note 159.