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Cryptoassets and the SEC's Mandate

In recent months, the SEC has been the subject of intensifying criticism regarding its role in cryptoasset regulation. While some critiques properly raise questions and engage in constructive debate, others have resorted to shrill attacks that betray a reflexively adversarial position toward any agency involvement in the cryptoasset space. We [continue](#) to [maintain](#) that far greater regulatory clarity is indispensable to sustainable growth in the cryptoasset industry. While we do not believe that such clarity comes from civil enforcement actions that are lodged against ancillary players with limited transparent analysis, it is just as important that public debate about the terms of cryptoasset oversight not categorically disparage all SEC action in this space. There are key questions that require solutions and the cryptoasset industry and its investors ultimately stand to benefit from the SEC leadership's stated commitment to discharge its historic investor protection mandate in this arena despite its novel technology. This memo, it bears noting, does not necessarily reflect the views of our clients or our firm. Rather, it reflects the views of a specialized Crypto Team that we have formed in order to focus on the rapidly changing issues generated by the cryptoasset industry.

A central challenge confronting the SEC (and other agencies) is that cryptoassets' transformative potential raises significant risks to retail investors without adapted regulatory guardrails. Both the recent downturn in overall cryptoasset prices and substantial losses resulting from hacks and protocol security failures have made this painfully clear. While we express no view here as to whether any particular cryptoasset is a security, there are at least some circumstances where that [analysis](#) is relatively uncomplicated — and where existing SEC guidance has had a salutary effect. In particular, there are still circumstances where manifestly centralized project teams raise capital from the U.S. public in consideration for tokens and use the proceeds to develop a network or platform, while touting the tokens as an attractive investment whose value derives from that network or platform. The SEC provided clear guidance that such a fact pattern constitutes a securities offering in its 2017 [Munchee](#) order. Moreover, some SEC actions over the last year, like the settlement with [BlockFi](#) concerning its centralized cryptoasset yield-bearing product, have anticipated market vulnerabilities that have otherwise wrought harm to thousands of investors, as evident in particular in the bankruptcies of Celsius and Voyager. And the SEC has been continually vigilant in combatting fraud, from which the cryptoasset industry is not immune.

At the same time, we believe increased regulatory clarity in key areas remains necessary. For instance, we encourage the SEC to follow through on Chairman Gensler's [acknowledgment](#) that tailored disclosures may be appropriate with respect to whichever cryptoassets are properly deemed securities. Further consideration is also required as to whether cryptoassets that lack any indicia of equity or debt (as opposed to the arrangements by which they are sold) constitute securities. We also maintain our [call](#) for the SEC to provide more prescriptive guidance and/or no-action relief for industry leaders who are acting in good faith to comply with rules oriented toward traditional "centralized" securities that do not squarely fit cryptoassets (such as transfer agent rules). Lastly, we [continue](#) to [believe](#) there is a place for enhanced legislative clarity and global coordination, where appropriate. Legislative action could clearly define the oversight responsibilities with respect to the spot markets and the issuance of stablecoins (particularly if such stablecoins are not issued by regulated banks or trust companies). In the competitive and

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inherently borderless global marketplace for cryptoasset projects, the U.S. agencies, including the SEC, should consider solutions proffered by foreign jurisdictions, such as the European Union's nascent ["Markets in Crypto-assets"](#) regulation.

A pillar of U.S. economic prosperity is the recognition that while investors should be able to risk their capital in a free market, they should have the benefit of protection in the form of regimented disclosure from an enterprise's operators so that they can make informed investment decisions, and that the market should be operated in an orderly and fair manner. While this paradigm will not fit every cryptoasset, there are many for which a careful evaluation of its basic premise is warranted. That inquiry hinges on thoughtful input from crypto industry leaders and transparent analysis by the SEC and other regulators, all of which can arise only from sustained constructive dialogue.

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