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SEC V. THE CRYPTO INDUSTRY — TRACKING THE SEC'S ONGOING LITIGATION AGAINST DIGITAL ASSET EXCHANGES

“This is a question of great economic and political significance.” (Kraken’s motion to dismiss; see page 7.) Whether a digital asset exchange may offer digital assets for secondary trading without those digital assets being registered as securities and operate in the US without being registered with the US Securities and Exchange Commission as a securities exchange, clearing agency, or broker is being litigated in courts across the country, and likely will be litigated for years to come. The US Supreme Court may be the ultimate arbiter if it becomes necessary to resolve circuit court splits on these issues (which seem to be on the horizon). In the meantime, trillions of dollars hang in the balance as exchanges operating in the US face the threat of regulation by enforcement.

By Frederick L. Block, Alyse J. Rivett, Sarah V. Riddell, and Madeleine Ayer *

On January 10, 2024, in a highly anticipated event for the crypto industry, the US Securities and Exchange Commission (“SEC”) approved by a 3-2 vote the first US-listed, exchange-traded product to track spot bitcoin.¹ For the first time in his tenure, SEC Chairman Gary Gensler voted against his Democratic colleagues and sided with the two Republican commissioners to approve 11 applications for spot bitcoin exchange-traded funds, including from well-known financial services

firms.² Chairman Gensler released a post-approval statement, emphasizing that the decision did not signal the Commission’s support of bitcoin or other cryptocurrencies.³ Indeed, Gensler warned investors that, unlike other exchange-traded products, bitcoin was a “speculative, volatile asset” used in part to fund crime.⁴ Gensler conceded, however, that the SEC’s recent loss against Grayscale⁵ in the US Court of Appeals for the District of Columbia left the agency with little choice

¹ Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, to List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units, Securities Exchange Act Release No. 34-99306 (Jan. 10, 2024) (“Approval Order”), <https://www.sec.gov/files/rules/sro/nysearca/2024/34-99306.pdf>.

² *Id.*

³ Chair Gary Gensler, Statement on the Approval of Spot Bitcoin Exchange-Traded Products (Jan. 10, 2024).

⁴ *Id.*

⁵ *Grayscale Invs., LLC v. SEC*, No. 22-1142 (D.C. Cir. 2023).

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