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## POTENTIAL IMPACT OF THE SEC'S RULEMAKING AGENDA ON CRYPTO

*The current SEC administration has expressed the view that most crypto assets are offered and sold as securities and has proposed several rules that address “digital asset securities” or “crypto asset securities.” In this article, the authors address how certain SEC rule proposals could impact existing crypto market participants if the rules are adopted as proposed and the SEC’s view that most crypto assets are offered and sold as securities prevails.*

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Under Chair Gary Gensler, the Securities and Exchange Commission (“SEC”) is engaging in an unprecedentedly active rulemaking agenda<sup>1</sup> that includes several rules that address “crypto asset securities.” The inclusion of crypto asset securities in the SEC’s rulemaking agenda is notable because of the continuing disagreement between the SEC, the crypto industry, and other financial

regulators about whether most crypto assets are offered and sold as securities.

SEC officials generally take the view that the vast majority of crypto assets are offered and sold as investment contracts, a type of security.<sup>2</sup> Under this view, both the transaction in which the crypto asset is

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<sup>1</sup> According to the Agency Rule List from Spring 2023, the SEC is on track to propose and finalize 63 new rules by the end of the current Chair’s first four years in office. This represents a dramatic increase in the pace of rulemaking from the previous two Chairs, Chairs Mary Jo White and Jay Clayton, who finalized 22 rules and 43 rules, respectively, that they had proposed. As of September 20, 2023, of the 63 rules on Chair Gensler’s docket, 16 have been proposed and finalized, 33 have been proposed but not yet finalized, and 14 have not yet been proposed. Kenneth E. Bentsen, Jr., *The Unprecedented Speed and Volume of SEC Rulemaking*, SIFMA (Sept. 21, 2023), <https://www.sifma.org/resources/news/the-unprecedented-speed-and-volume-of-sec-rulemaking/>.

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<sup>2</sup> *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946). See, e.g., Chair Gary Gensler, “Partners of Honest Business and Prosecutors of Dishonesty”: Remarks Before the 2023 Securities Enforcement Forum (Oct. 25, 2023), <https://www.sec.gov/news/speech/gensler-remarks-securities-enforcement-forum-102523>; Comm’r Allison Herren Lee, *Send Lawyers, Guns and Money: (Over-) Zealous Representation by Corporate Lawyers Remarks at PLI’s Corporate Governance – A Master Class 2022* (Mar. 4, 2022), <https://www.sec.gov/news/speech/lee-remarks-pli-corporate-governance-030422>; Comm’r Jaime Lizarraga, *Digital Assets: Putting Investors First* (Nov. 16, 2022), <https://www.sec.gov/news/speech/lizarraga-brooklyn-law-school-20221116>.

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