



SPECIAL REPORT

PEERING INTO THE CRYSTAL BALL: CRYPTO ENFORCEMENT IN A SECOND TRUMP TERM

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INTRODUCTION

In November 2021, at the height of cryptocurrency’s “bull run,” the market capitalization for crypto reached a record of nearly \$3 trillion.¹ Just a year later, and shortly after FTX petitioned for Chapter 11 bankruptcy protection in November 2022, however, this value had plummeted by 75%.² While there were many factors other than FTX’s collapse that led to this significant decline, FTX’s failure was a watershed moment for government enforcement efforts across the crypto industry.

This *Special Report* explores how the government has pursued crypto companies and individuals following the collapse of FTX and how those enforcement priorities may change and impact crypto’s future under the Trump administration starting January 2025. In particular, we analyze enforcement priorities that have emerged over the last two years since FTX, including actions related to (1) failure to register securities, (2) fraudulent offerings, (3) money laundering and mixers, and (4) market manipulation and liquidity pools. With the reelection of President-elect Donald J. Trump – who has signaled an intention to substantially reduce regulatory scrutiny over crypto – these enforcement priorities, and the governmental entities and units advancing them, will undoubtedly shift. After our analysis of each priority, we provide commentary on what to expect from the Trump administration going forward.

¹ See *Crypto Total Market Cap*, TradingView (November 7, 2021), <https://www.tradingview.com/symbols/TOTAL/>.

² See *Crypto Total Market Cap*, TradingView (November 13, 2022), <https://www.tradingview.com/symbols/TOTAL/>.

FAILURE TO REGISTER CASES

The US Securities and Exchange Commission (SEC) has long taken an expansive view of what constitutes an “investment contract,” and thus what must be registered and regulated. This expansive view has been a foundational element of enforcement efforts related to crypto. Shortly after the demise of FTX, which itself was a centralized exchange, the SEC initiated a flurry of actions against centralized exchanges, including Binance, Coinbase, and Kraken. In these complaints, the SEC alleged that staking-as-a-service (staking) platforms, which enable customers to lock up crypto within blockchain validators, and numerous tokens listed by centralized exchanges, were unregistered securities. As the primary means for consumers to swap between government-issued (fiat) currencies and cryptocurrencies, the SEC’s focus on centralized exchanges implicitly targeted crypto’s “on-ramps” and “off-ramps.” In subsequent enforcement actions, the SEC has further extended its breadth of enforcement into lending protocols, thus signaling a shift from regulating where consumers *access* crypto to how consumers *use* crypto.

In February 2023, the SEC took aim at Kraken when it investigated and ultimately entered into a \$30 million settlement that required Kraken to discontinue its staking platform.³ While Kraken agreed to a final judgment without admitting or denying the SEC’s allegations, the settlement raised concerns even within the SEC. Of note, Commissioner Hester Peirce

commented that the SEC had “known about crypto staking programs for a long time” and questioned the decision to “shut down entirely a program that has served people well.”⁴ Despite internal divergence on staking among SEC Commissioners, several months later, in June 2023, the SEC brought similar claims against the staking platforms offered by Binance and Coinbase, the two largest centralized exchanges by trading volume. In its dual complaints, filed just one day apart, the SEC additionally alleged that both Binance and Coinbase were operating as unregistered exchanges involved in the sale of unregistered “crypto asset securities.”⁵ In November 2023, and just nine months after Kraken’s staking settlement, the SEC, seemingly doubling down on its stance that centralized exchanges are “unregistered,” commenced a separate enforcement action against Kraken on the basis that it had “simultaneously acted as a broker, dealer, exchange, and clearing agency” with respect to several purported “crypto asset securities.” The SEC’s “failure to register” actions in 2023, which are all in active litigation, are indicative of enforcement towards a specific, and foundational, segment of the industry – centralized exchanges – as opposed to particular actors.

While centralized exchanges are channels for consumers to access crypto markets, lending protocols put crypto to use by improving market liquidity and enabling customers to earn yields. Here, too, the SEC has actively pursued unregistered securities theories, as evidenced by enforcement actions against Genesis and Celsius. In January 2023, the SEC alleged that Genesis, through its Gemini Earn crypto lending, had violated

³ See *Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay \$30 Million to Settle SEC Charges*, U.S. Securities and Exchange Commission (February 9, 2023), <https://www.sec.gov/newsroom/press-releases/2023-25>.

⁴ See Hester M. Peirce, *Kraken Down: Statement on SEC v. Payward Ventures, Inc., et al.*, U.S. Securities and Exchange

Commission (February 9, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-kraken-020923>.

⁵ See *SEC v. Binance Holdings Ltd. et al.*, No. 1:23-cv-01599 (D.D.C. June 5, 2023); see also *SEC v. Coinbase, Inc. and Coinbase Global, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. June 6, 2023).

registration requirements.⁶ Genesis, without admitting the SEC's allegations, ultimately entered into a \$21 million settlement.⁷ The SEC continued its pursuit against lending protocols when it filed a similar complaint against Celsius' "Earn Interest Program" in July 2023.⁸ Unlike its complaint against Genesis, the SEC's enforcement action, which was commenced alongside separate civil and criminal actions by the Commodity Futures Trading Commission (CFTC), Department of Justice (DOJ), and Federal Trade Commission (FTC), alleged that Celsius' founder, Alex Mashinsky, had made false and misleading statements while also engaging in market manipulation.⁹ Whereas the SEC's claims against centralized exchanges have been more focused on alleged failure to register theories, the SEC's actions towards lending protocols have been more fraud focused.

What to expect under the Trump administration:

In light of President-elect Trump's statements in support of the crypto industry and criticism of Chair Gensler, who has announced his intention to resign from the SEC on January 20, 2025, it is likely the broader interpretation of the securities laws will be pulled back in a Trump administration. A reconfigured SEC may also decline to pursue pending cases, which could be significant. Indeed, the nominee for SEC Chair, Paul Atkins, is a noted free-market and cryptocurrency advocate. The SEC in the Trump administration will thus likely ease enforcement actions on digital assets and provide greater clarity on how federal securities law applies to cryptocurrency. We expect, at a minimum, more leniency towards crypto

exchanges and lending protocols and more "favorable" settlement terms to defendants in the crypto space, although how the anticipated guidance and eased enforcement will play out remain to be seen.

SECURITIES FRAUD

In addition to actions challenging the offering of certain crypto products as unlawful unregistered securities, government regulators, particularly the SEC and DOJ, have become increasingly attuned to fraudulent crypto schemes. Fraud in crypto can be bifurcated into instances where fraudulent activities were alleged to have occurred due to representations about the *nature* of a crypto product and how it worked, as in the case of the TerraUSD (UST) algorithmic stablecoin, and more "traditional" fraud arising from the actions of individuals. As it relates to the latter, these cases have ranged from alleged "pump-and-dump" schemes to insider trading of non-fungible tokens (NFTs). Whereas the SEC has largely taken the lead on enforcement actions against purportedly unregistered crypto exchanges and lending protocols, the DOJ has been actively involved with instances where these companies and/or individuals are further implicated in securities fraud.

The collapse of Terraform Labs in May 2022, which erased an estimated \$40 billion in market value from the crypto industry, was among the first in a series of dominoes to fall, leading up to FTX. In March 2023, just a month after the SEC's enforcement action against Terraform Labs and its founder, Do Kwon, for securities fraud and offering and selling unregistered

⁶ See *SEC v. Genesis Global Capital, LLC and Gemini Trust Company, LLC*, No. 1:23-cv-00287 (S.D.N.Y. January 12, 2023).

⁷ See *Genesis Agrees to Pay \$21 Million Penalty to Settle SEC Charges*, U.S. Securities and Exchange Commission (March 19, 2024), <https://www.sec.gov/newsroom/press-releases/2024-37>.

⁸ See *SEC v. Celsius Network Ltd. and Alexander "Alex" Mashinsky*, No. 1:23-cv-06005 (S.D.N.Y. July 13, 2023).

⁹ See *SEC Charges Celsius Network Limited and Founder Alex Mashinsky with Fraud and Unregistered Offer and Sale of Securities*, U.S. Securities and Exchange Commission (July 13, 2023), <https://www.sec.gov/newsroom/press-releases/2023-133>.

securities, Do Kwon was criminally indicted for commodities, securities, and wire fraud offenses based on his deceptive messaging pertaining to the Terra blockchain and the UST algorithmic stablecoin.¹⁰ Specifically, consumers were led to believe that UST was perpetually pegged to a price of \$1.00 and that the “burning” and “minting” of its companion token, LUNA, was a “programmable” safeguard to maintain UST’s stability. The DOJ alleges that consumers were defrauded because UST was promoted as safe and that the underlying algorithm ensured that it would retain its “peg” – meaning that each UST would be worth \$1 USD. The allegations are that there were other market activities – like the involvement of significant market makers – that artificially retained the “peg” to maintain investor confidence. In connection with the SEC’s verdict, in June 2024, Terraform Labs and Do Kwon were ordered to pay more than \$4.5 billion in penalties after a jury held them liable for securities fraud.¹¹

In contrast to Terraform Labs, where UST holders were found to have been misled by the “algorithmic” nature of the stablecoin, the enforcement actions by the DOJ and SEC in November 2023 against SafeMoon have focused on alleged fraudulent acts by its founders. SafeMoon is an alleged “pump-and-dump” scheme where the underlying SFM token, alongside assertions from the founders that they would take SFM “[s]afely to the moon,” increased in price by more than 55,000% in the span of five weeks to a market capitalization

more than \$5.7 billion.¹² While the SEC construed SFM as an unregistered “crypto asset security” that investors were misled into funding, the DOJ’s investigation has focused on the fraudulent misappropriation of “locked” SFM liquidity by the founders.¹³ Specifically, SFM investors were allegedly misled into believing that SafeMoon’s founders could not access liquidity “locked” within the protocol, when the founders were allegedly withdrawing these funds for their own personal expenditures. In the aftermath of securities fraud allegations from the SEC and DOJ, SafeMoon filed for Chapter 7 bankruptcy in December 2023.

There have also been a few enforcement actions concerning NFTs. In June 2022, the DOJ brought the first-ever indictment concerning NFT insider trading when Nathaniel Chastain, a former product manager at OpenSea, was indicted under a wire fraud (not securities fraud) theory for “using confidential information about what NFTs were going to be featured on OpenSea’s homepage for his personal financial gain.”¹⁴ Chastain was ultimately sentenced to three months in prison in August 2023 due to wire fraud and money laundering convictions, but was never charged with securities fraud.¹⁵ Also in August 2023, shortly after Chastain’s conviction, the SEC entered a settlement with Impact Theory, in which Impact Theory neither admitted nor denied the SEC’s findings,

¹⁰ See *SEC v. Terraform Labs PTE Ltd. and Do Hyeong Kwon*, No. 1:23-cv-01346 (S.D.N.Y. February 16, 2023); see also *United States v. Do Hyeong Kwon*, No. 1:23-cr-00151 (S.D.N.Y. March 23, 2023).

¹¹ See *Terraform and Kwon to Pay \$4.5 Billion Following Fraud Verdict*, U.S. Securities and Exchange Commission (June 13, 2024), <https://www.sec.gov/newsroom/press-releases/2024-73>.

¹² See *SEC Charges Crypto Company SafeMoon and its Executive Team for Fraud and Unregistered Offering of Crypto Securities*, U.S. Securities and Exchange Commission (November 1, 2023), <https://www.sec.gov/newsroom/press-releases/2023-229>.

¹³ See *Founders and Executives of Digital-Asset Company Charged in Multi-Million Dollar International Fraud*, U.S. Attorney’s Office,

Eastern District of New York (November 1, 2023), <https://www.justice.gov/usao-edny/pr/founders-and-executives-digital-asset-company-charged-multi-million-dollar>.

¹⁴ See *Former Employee of NFT Marketplace Charged in First Ever Digital Asset Insider Trading Scheme*, U.S. Attorney’s Office, Southern District of New York (June 1, 2022), <https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-charged-first-ever-digital-asset-insider-trading-scheme>.

¹⁵ See *Former Employee of NFT Marketplace Sentenced to Prison in First-Ever Digital Asset Insider Trading Scheme*, U.S. Attorney’s Office, Southern District of New York (August 22, 2023), <https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-sentenced-prison-first-ever-digital-asset-insider>.

following allegations that the company had sold NFTs as unregistered investment contracts.¹⁶

What to expect under the Trump administration:

While the DOJ is not bound by the SEC’s positions on whether a certain token is a security, if the SEC changes its position, it is likely that the DOJ in the Trump administration would be influenced by a policy reversal. However, unlike failure to register cases, the DOJ will likely still pursue clear-cut cases of fraud and misrepresentations to consumers regarding cryptocurrencies, possibly even memecoins, which are frequently scrutinized as “pump-and-dump” schemes, even if it must rely more on non-securities charges such as wire fraud or money laundering. However, we do anticipate less enforcement actions on more aggressive securities theories, like those concerning NFTs.

MIXERS AND MONEY LAUNDERING

Government enforcement authorities have also been focused on money laundering theories in the crypto space, and in particular mixer protocols that are alleged to facilitate money laundering.

Mixers. “Mixers” are crypto protocols that blend user’s crypto using smart contracts. Proponents of mixers tout their ability to enhance financial privacy by making it

difficult to identify and trace the origin, destination, and parties of the underlying transactions. However, governments and law enforcement agencies around the world frequently assert that because mixers can limit the ability to trace on-chain assets, they are widely used to perpetuate criminal activity, such as the money laundering of stolen crypto or crypto payments for illicit activities. Prior to FTX, the government issued civil penalties and sanctions against various crypto mixers.¹⁷ Although FTX did not implicate any mixing technology, since 2022 the government has been aggressive in its prosecutions and sanctioning of mixers, including taking new, expansive approaches to “money transmitter” definitions.

The DOJ continues to pursue cases involving money laundering and terrorist financing. In August 2023, it charged Tornado Cash founders Roman Storm and Roman Semenov with unlicensed money transmission and money laundering conspiracies.¹⁸ In its briefing on motions to dismiss the indictment, the DOJ adopted a novel theory on “control,” arguing that despite certain Financial Crimes Enforcement Network (FinCEN) guidance on this subject, “control” over user funds may not be a necessary element of charging unlicensed money transmission. The court denied the motion to dismiss, noting that the portion of the FinCEN guidance relied upon by the defendants on its “control” theory related to self-hosted and multi-signature digital wallets and not mixers.¹⁹

¹⁶ See *SEC Charges LA-Based Media and Entertainment Co. Impact Theory for Unregistered Offering of NFTs*, U.S. Securities and Exchange Commission (August 28, 2023), <https://www.sec.gov/newsroom/press-releases/2023-163>.

¹⁷ See, e.g., *In the matter of Larry Dean Harmon d/b/a Helix*, Assessment of Civil Money Penalty Number 2020-2, Financial Crimes Enforcement Network (October 19, 2020), https://www.fincen.gov/sites/default/files/enforcement_action/2023-04-05/HarmonHelix_Assessment_and_SoF_508_101920.pdf; U.S. Treasury Issues First-Ever Sanctions on a Virtual Currency Mixer,

Targets DPRK Cyber Threats, U.S. Department of the Treasury (May 6, 2022), <https://home.treasury.gov/news/press-releases/jy0768>; *U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash*, U.S. Department of the Treasury (August 8, 2022), <https://home.treasury.gov/news/press-releases/jy0916>.

¹⁸ *U.S. v. Storm*, 23-cr-430 (S.D.N.Y. Aug. 21, 2023).

¹⁹ Oral Hearing Transcript, *U.S. v. Storm*, 23-cr-430 (S.D.N.Y. Sept. 26, 2024).

Contemporaneously with the FTX collapse in November 2022, the Office of Foreign Assets Control (OFAC) redesignated Tornado Cash that same month.²⁰ The redesignation related to Tornado Cash materially assisting the North Korean hacker organization, Lazarus Group, through its smart contracts that “were used to obfuscate the source and destination of funds.”²¹ OFAC’s authority is derived from the International Emergency Economic Powers Act (IEEPA), which allows for the president to block “any property in which any foreign country or a national thereof has any interest.”²² On November 26, 2024, the US Court of Appeals for the Fifth Circuit ruled that Tornado Cash’s immutable smart contracts do not constitute “property” under the IEEPA “because they are not ownable, not contracts, and not services.”²³ Unlike unilateral contracts that can be revoked by the offeror, the court emphasized that Tornado Cash does not control immutable smart contracts because it “cannot change the code, delete the code, or remove the code” once on the blockchain.²⁴ Taken together, the Fifth Circuit held that OFAC “exceeded its statutory authority” by sanctioning Tornado Cash.²⁵ The Fifth Circuit’s interpretation of “control,” and Tornado Cash’s lack thereof as it relates to immutable smart contracts, may have implications in the DOJ’s case against Storm and Semenov.

Money laundering. Besides mixers, other crypto operations and technologies have been additional targets by the government. Multiple crypto exchanges

and individuals, most of which were foreign, were targeted in criminal actions after FTX, with many of them targeted for Bank Secrecy Act (BSA) and IEEPA violations.²⁶ Many of these cases focus on facts and circumstances alleging that crypto companies are facilitating the movement of funds for terrorist organizations and ransomware attacks. The DOJ has continued to be aggressive in its enforcement of the BSA and IEEPA and has been working steadfast to apply the applicable anti-money laundering and know-your-customer laws to the crypto industry.

What to expect under the Trump administration:

While we expect a generally more crypto-friendly regulatory approach under the Trump administration, particularly with respect to unlicensed money transmission cases, investigation and enforcement actions against money laundering will likely continue as those matters often have national security implications. While we do anticipate reduced enforcement action on failure to register cases, we do not anticipate less enforcement on services the DOJ believes are primarily focused on “mixing” or money laundering.

²⁰ See *Treasury Designates DPRK Weapons Representatives*, U.S. Department of the Treasury (November 8, 2022), <https://home.treasury.gov/news/press-releases/jy1087>.

²¹ *Id.*

²² See 50 U.S.C. § 1701(a)(1)(B).

²³ See *Van Loon, et al. v. Dept. of the Treasury, et al.*, No. 23-50669 (5th Cir. 2024).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, e.g., *United States v. Binance Holdings Limited*, No. 2:23-cr-178 (W.D. Wa. Nov. 14, 2023) (information charging international crypto exchange Binance with BSA violations, conducting an

unlicensed money transmitter business, and IEEPA violations); *United States v. Zhao*, Docket No. 2:23-cr-00179 (W.D. Wash. Nov 14, 2023), D.I. 31 (plea agreement with former Binance CEO for BSA violations); *United States v. Flashdot Limited*, No. 1:24-cr-168 (S.D.N.Y. Mar. 21, 2024) (indicting crypto exchange KuCoin for violating the BSA and conducting an unlicensed money transmitter business in violation of § 1960); *United States v. Legkodymov*, No. 1:23-cr-496 (E.D.N.Y. Jan. 14, 2023) (criminal complaint charging founder of crypto exchange Bitzlato with conducting an unlicensed money transmitter business that involves funds known to the defendant to have been derived from a criminal offense).

MARKET MANIPULATION AND LIQUIDITY POOLS

Market making is an integral part of maintaining efficient bid-ask spreads in traditional finance exchanges and in crypto exchanges. There are still inefficiencies in crypto exchanges and the market remains disjointed at times. In order to make sure that users can buy and sell particular cryptocurrencies on a particular exchange, market makers generally stand ready to execute those transactions. The FTX collapse shined a light on crypto market manipulation because of underlying code that granted Alameda Research numerous undisclosed privileges and advantages on FTX's exchange, including the ability to withdraw customer assets.²⁷ Since FTX, government agencies have continued their enforcement of market manipulation in the crypto industry, focusing on two main themes: wash trading and on-chain attacks.

Wash trading. Wash trading generally refers to trades that occur without a change in beneficial ownership and send a false perception of market activity that does not reflect the true supply and demand of the asset. The DOJ and SEC have recently actively investigated wash trading schemes on both decentralized and centralized exchanges. In October 2024, the DOJ and SEC filed parallel charges in Massachusetts against 18 individuals and entities for widespread alleged fraud and manipulation in the crypto markets, including wash-trading schemes.²⁸ The charges include the first-ever criminal charges against alleged crypto market makers

— for market manipulation, as well as charges against the leaders of four crypto companies and employees at the firms. The charges were accompanied by the announcement of four guilty pleas and the seizure of more than \$25 million in crypto and the deactivation of so-called “trading bots.” Notably, the investigation involved the FBI's first-known creation of its own cryptocurrency, NexFund AI, in an apparent effort to lure market makers and others into executing agreements and engaging in manipulative trading of that cryptocurrency. The FBI is now offering refunds to retail users who purchased NexFund AI.

On-chain attacks. Smart contracts are code, and any vulnerabilities in the code can be exploited by malicious actors. On-chain attacks refer to blockchain transactions that exploit smart contracts to steal funds or manipulate other users or transactions. The DOJ brought a notable criminal case against two brothers who exploited the integrity of the Ethereum blockchain. The brothers studied math and computer science at the Massachusetts Institute of Technology and allegedly manipulated and tampered with the process and protocols by which transactions are validated and added to the Ethereum blockchain. Through this exploit, they alleged fraudulently gained access to pending private Ethereum transactions and used that access to alter certain transactions and obtain more than \$25 million worth of crypto from victim traders.²⁹

²⁷ See, e.g., *CFTC v. Nishad Singh*, 1:23-cv-01684 (S.D.N.Y. Feb. 28, 2023).

²⁸ See *Eighteen Individual and Entities Charged in International Operation Targeting Widespread Fraud and Manipulation in the Cryptocurrency Markets*, United States Attorney's Office, District of Massachusetts (October 9, 2024), <https://www.justice.gov/usao-ma/pr/eighteen-individuals-and-entities-charged-international-operation-targeting-widespread>; see also *SEC Charges Three So-Called Market Makers and Nine Individuals in Crackdown on*

Manipulation of Crypto Assets Offered and Sold as Securities, U.S. Securities and Exchange Commission (October 9, 2024), <https://www.sec.gov/newsroom/press-releases/2024-166>.

²⁹ See *Two Brothers Arrested for Attacking Ethereum Blockchain and Stealing \$25M in Cryptocurrency*, U.S. Department of Justice (May 15, 2024), <https://www.justice.gov/opa/pr/two-brothers-arrested-attacking-ethereum-blockchain-and-stealing-25m-cryptocurrency>.

What to expect under the Trump administration:

Like money laundering, wash trading and on-chain attacks are examples of more traditional criminal activity that could continue to be pursued in the Trump administration, regardless of any shifts in regulatory scrutiny in the crypto space more generally. However, we anticipate that the new administration may be more open to consider the business necessity of market makers and liquidity providers to making sure that there is an orderly market on crypto exchanges.

nurture the crypto industry. McDermott's crypto team will continue to track and report on these developments.

LOOKING AHEAD

With the market capitalization for crypto back around \$3 trillion, and an unprecedented Bitcoin rally over \$100,000, the doldrums from the fallout of FTX may seem like a distant memory.³⁰ In just the past two years, regulatory authorities have vastly reshaped the crypto industry through enforcement actions related to (1) failure to register securities, (2) fraudulent offerings, (3) money laundering and mixers, and (4) market manipulation and liquidity pools. While the crypto industry has presumably matured from the aftermath of FTX, and at the very least become acutely aware of applicable regulatory authorities, government enforcement actions have not yet translated into comprehensive legal frameworks. Notably, the SEC's most far-reaching actions against the major centralized exchanges continue to be litigated, although it is an open question on whether those will continue after Inauguration Day. Bipartisan legislation, such as the Financial Innovation and Technology for the 21st Century Act (FIT 21) and the Lummis-Gillibrand Payment Stablecoin Act, could supplant a period of "regulation by enforcement" with regulations that could

³⁰ See *Crypto Total Market Cap*, TradingView (November 13, 2024), <https://www.tradingview.com/symbols/TOTAL/>.

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