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Saving the Golden Goose

How the UK's Crypto Rules Narrowly
Avoid America's Securitarian Trap

Preston Byrne

ABOUT THE AUTHORS

Preston Byrne is the Legal Fellow of the Adam Smith Institute, partner with the Washington, D.C. and Hartford, Connecticut offices of Brown Rudnick LLP, and an adjunct professor at Antonin Scalia Law School in Virginia, where he teaches the course “Cryptocurrency Law and Practice.” He is UK-US dual-qualified and admitted as a solicitor in England and Wales, and as an attorney to the bars of the District of Columbia, New York, and Connecticut.

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EXECUTIVE SUMMARY

- Owing to current financial regulations and legislation, Britain is at the forefront of competition for cryptocurrency and digital asset investment. This has been down to a less aggressive regulatory purview from Parliament and the Treasury, meaning that the Financial Conduct Authority has remained defanged from excessive regulations.
- This is unlike the US model, which is securitarian,¹ which has seen excessive legislation and overempowered regulators who have dampened investor sentiment. This has curtailed interest in the cryptocurrency and digital asset sector relative to global peers.
- The UK treats crypto as a sui generis asset, rather than broader securities such as bonds or options. This leaves spot crypto trading, the principal source of liquidity for and transactions in the cryptocurrency markets, more or less alone. This more liberal approach increases appetite for crypto firms to invest in British operations and use the UK as a base for global trading.
- The British government should stick with its current regime of regulations for crypto and reap the rewards, rather than kill the Golden Goose which the market has nurtured.

¹ The term “securitarian” means “with security as an absolute priority; inordinately obsessed with security.” This article utilizes the term as a double entendre to mean both the obsession with national security as well as classification of crypto as a security for the purposes of the Securities Act of 1933. See *Securitarian*, WIKTIONARY, September 26th, 2023; see also John R. Hibbing, *Populists, Authoritarians or Securitanians? Policy preferences and threats to democratic governance in the modern age. Global Public Policy and Governance*, 47-65 (2022).

INTRODUCTION: UK ENTERS THE CHAT

The United Kingdom’s (“UK”) Financial Conduct Authority (“FCA”) announced new proposed rules in May 2023,² following recently-enacted secondary legislation,³ governing the financial promotion of crypto-assets within the country. These new rules, taken together with the enactment of the UK Financial Services and Markets Act 2023 (the “2023 Act”)⁴ in June of 2023, bring crypto-assets under the UK’s broader financial regulatory regime contained in the UK Financial Services and Markets Act 2000 (“FSMA”), and the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023 (“FPAO 2023”)⁵, which in turn brings so-called “qualifying cryptoassets” into the financial promotions regime set out in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the “Financial Promotion Order”). As the rules entered into force on October 8th, 2023, awareness of and adherence to these new rules is now mandatory for anyone conducting cryptocurrency business in the United Kingdom.

The UK’s new rules on financial promotions – which include criminal penalties – have been criticized by market observers as being too strict. Closer review of the rules, however, reveals a delicate balance between consumer protection and support for business growth and development. It is true that these rules are a departure from the UK’s prior hands-off approach. Historically, the UK took a more laissez-faire approach to cryptoasset regulation than the United States. New rules change this. Historically, the United Kingdom’s financial regulators have, by their own admission,⁶ not had the power to regulate – and thus have not regulated – crypto-assets such as Bitcoin, Ethereum, Cardano, or Cosmos as investments, at least not in the same manner that they regulated TradFi instruments such as securities. This differs significantly from the position in the United States (“US”) where the US Securities and Exchange Commission (“SEC”) asserts enforcement authority over the cryptocurrency sector through the use of 90-year-old securities legislation, with critics alleging it has been prosecuting a politically motivated, bad faith regulation-by-enforcement campaign in the federal courts.⁷

This paper describes how differing regulatory approaches in the UK and the US have evolved to address the challenges posed by the cryptocurrency sector’s growth. All in all, despite the strictness of the UK’s new rules, meaningful – and, from a commercial perspective, material – differences in regulatory philosophies between the two countries remain. Chief among these is that US regulators’ insistence on using securities laws from the era of wireless telegraphy to regulate decentralized crypto-protocols, an approach this writer refers to as “securitarian,” while the UK, despite adopting strict rules around marketing cryptocurrencies, has, with its newest reforms, narrowly avoided falling into this trap. The UK’s approach, while strict, more accurately reflects underlying economic realities and real-world usage of cryptocurrency as encountered in the wild – and as likely to be encountered in the wild over the coming decade. The UK’s model is, therefore, a regulatory model more likely to survive and succeed in the medium-term.

² Policy Statement PS23/6, “Financial promotion rules for cryptoassets.” UK Financial Conduct Authority. <https://www.fca.org.uk/publication/policy/ps23-6.pdf>

³ The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023, 2023 No. 612 (UK)

⁴ Financial Services and Markets Act 2023 c. 29 (UK)

⁵ 2023 No. 612 (UK)

⁶ “Initial Coin Offerings.” UK Financial Conduct Authority, September 12th, 2017. Available at: <https://www.fca.org.uk/news/statements/initial-coin-offerings> (Accessed: September 23rd, 2023).

⁷ Jesse Hamilton. As SEC Leans on Enforcement to Regulate, Crypto Lawyers Study Every Word. <https://www.coindesk.com/policy/2022/08/18/as-sec-leans-on-enforcement-to-regulate-crypto-lawyers-study-every-word/>

2009-2018: CRYPTOCURRENCY'S EARLY DAYS AND THE GOLDEN ERA OF THE ICO

Early litigation surrounding cryptocurrency dealt with fundamental legal questions, the answers to which had titanic and long-lasting effects on entrepreneurs who would start future crypto businesses. For example, it was in the 2013-14 period, around the collapse of the first major cryptocurrency exchange, Mt Gox, that two of the most legally significant American Bitcoin cases in history – *Securities and Exchange Commission v. Trendon Shavers aka Pirateat40*⁸ and *United States v. Robert M. Faiella*⁹ – were decided. Taken together, these two cases established the simple but, in hindsight, obvious principle that, in America, for legal purposes, Bitcoin should be regarded as money. That this question should have needed to be asked might seem, today, absurd, but the fact is that in 2013 that no one had yet asked a court to render an opinion on the question.

As of the present day, Ethereum and its programming languages have emerged as the most successful implementations of Nick Szabo and Ian Grigg's expansive early visions of what smart contracts might become – as Grigg put it simply in 2015, “state machines with money.” For many years, Ethereum DApp developers have exhibited a preference for, and reliance upon, user-friendly, low-code solutions and hosted user interfaces which interacted with services like Infura, rather than burdening users with responsibility for operating a full node – a task which even professional developers find extremely challenging on consumer-grade hardware.¹⁰ This current architectural approach was recently described by Vitalik Buterin as one which tries “to do as little as possible itself, [and leaving] almost everything up to users to build on top.”¹¹ Unfortunately for Ethereum, leaving critical market infrastructure out of the protocol, and therefore reliant on centralized systems, has exposed DApp developers to legal attack vectors which the U.S. SEC,¹² Commodity Futures Trading Commission,¹³ and Department of Justice¹⁴ have reliably exploited since 2018.¹⁵

8 *Securities and Exchange Commission v. Trendon T. Shavers and Bitcoin Saving and Trust*, No. 4:13-CV-416, United States District Court, E.D. Texas, Sherman Division (E.D. Tex. 2013). In *Shavers*, the defendant collected 263,104 BTC (then \$1.8 million, now \$7.8 billion) in a Ponzi scheme called “Bitcoin Savings and Trust,” contrary to the registration and antifraud provisions of the Securities Act of 1933 (the “1933 Act”). In an effort to defeat the SEC's claims that it had jurisdiction over the matter, Shavers argued that the investments he took were not money because Bitcoin was not money, i.e. not legal tender or specie. As a consequence of the fact that “no money ever exchanged hands,” he argued, there was no “investment of money,” one of the four prongs required by the test set out in *SEC v. W.J. Howey Co.* (the “*Howey Test*”) before a court will find that a contract, transaction or scheme which is otherwise uncategorizable would be an “investment contract” and therefore a security regulated by the provisions of the Securities Act.

9 *United States of America v. Robert M. Faiella*, No. 14. -cr-243(JSR), United States District Court (39 F. Supp. 3d 544 2014).

10 Steve Anderson, *Popular Cypherpunk Jameson Lopp Finds Parity Ethereum Sync To Be Disk I/O Bound* (February 2, 2023), <https://www.thecoinrepublic.com/2020/02/02/popular-cypherpunk-jameson-lopp-finds-parity-ethereum-sync-to-be-disk-i-o-bound/>

11 Vitalik Buterin, *Should Ethereum be okay with enshrining more things in the protocol?* (September 30 2023), <https://vitalik.eth.limo/general/2023/09/30/enshrinement.html>

12 U.S. Securities and Exchange Commission, *SEC Charges EtherDelta Founder with Operating an Unregistered Exchange* (Press Release, November 8, 2018), <https://www.sec.gov/news/press-release/2018-258>

13 U.S. Commodity Futures Trading Commission, *CFTC Issues Orders Against Operators of Three DeFi Protocols for Offering Illegal Digital Asset Derivatives Trading* (Press Release, September 7, 2023), <https://www.cftc.gov/PressRoom/PressReleases/8774-23>

14 U.S. Securities and Exchange Commission, U.S. Department of Justice, *Tornado Cash Founders Charged With Money Laundering and Sanctions Violations* (Press Release, August 23rd, 2023), <https://www.justice.gov/usao-sdny/pr/tornado-cash-founders-charged-money-laundering-and-sanctions-violations>

15 This is a fate which developers might be able to avoid if they would cease relying on centralized infrastructure for their applications, such as hosted web interfaces, and would release source for fully-functional applications which allowed users to interact directly with the blockchain without hitting any third party endpoints, paired with careful regulatory advice. See e.g. *Bernstein v. United States Department of Justice et al.*, 922 F. Supp 1426 (N.D. Cal. 1996).

2018-2022: THE SECURITIES AND EXCHANGE COMMISSION AT WAR

During the height of the 2017-18 ICO boom, after the DAO Report and before the first enforcement actions, the question of whether, when, and how the United States would seek to enforce its securities laws in the cryptocurrency space remained, for the most part, theoretical. Among practicing attorneys, there were two camps. It was the author's observation that attorneys over the age of 40, or not directly in the employ of cryptocurrency companies, tended to adopt the view that cryptocurrency ICOs were "investment contracts" per *Howey* and, accordingly, that consequences for issuing those tokens without a registration statement being in effect, or listing those tokens on crypto exchanges, should follow. This view was reinforced by the pronouncements of then-SEC Chair Jay Clayton, who claimed in Senate hearings and television appearances that "every ICO [he'd] seen"¹⁶ was a security. Clayton's earlier remarks were recently echoed by SEC Chair Gensler, who quipped that while "Congress could have said in 1933 or 1934 that securities laws applied only to stocks and bonds... Congress included a long list of 30-plus items in the definition of a security, including the term 'investment contract'... These laws have been on the books for decades."¹⁷

In the other camp, a number of law firms publicly advanced the theory, often in law review-length papers, that cryptocurrency tokens on completed networks should be treated as consumptive and thus not satisfying the "expectations of profits" limb of the *Howey* test, per precedents such as *Forman*.¹⁸ This view was, confusingly, reinforced by a speech by then-Director of the Corporation Finance Division of the SEC Bill Hinman in May of 2018, which has come to be known by practitioners simply as the "Hinman Speech." During this speech Hinman further confused the matter by pronouncing, sans precedent, that "[i]f the network on which the token or coin is to function is sufficiently decentralized – where purchasers could no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts – the assets may not represent an investment contract."¹⁹

In the autumn of 2018, fourteen months after publishing its written warning shot, the SEC began a campaign of enforcement which continues to the present day against issuers, promoters, centralized exchanges, and decentralized exchanges alike.

THE UK MIRROR UNIVERSE: FROM LAISSEZ-FAIRE TO FSMA 2023

Simultaneous to the ramping-up of the United States' regulation-by-enforcement campaign, the UK Financial Conduct Authority was charting an entirely different course by declaring crypto largely "hands-off." While conceding, like the SEC, in a noncommittal fashion that "[w]hether an ICO falls within the FCA's regulatory boundaries can only be decided case by case[,] [m]any ICOs will fall outside of the regulated space" – i.e., the Financial Conduct Authority conceded that it

¹⁶ Stan Higgins, SEC Chief Clayton: "Every ICO I've Seen Is a Security" (February 6, 2018), CoinDesk, <https://www.coindesk.com/markets/2018/02/06/sec-chief-clayton-every-ico-ive-seen-is-a-security/>

¹⁷ Gary Gensler, Chair, Testimony of Chair Gary Gensler, *Before the United States House of Representatives Committee on Financial Services*, Sept. 27, 2023.

¹⁸ *United Housing Foundation v. Forman*, 421 U.S. 837, 854-55

¹⁹ William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (Speech, June 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418>

had no specific power to regulate initial coin offerings. This hands-off approach by the FCA was likely meant to signal that cryptocurrencies which were designed to be an integral part of a “state machine with money” and conferred no rights to or promises of future returns, within the UK’s borders, were fair game to develop and sell to consumers.

Unlike the United States, the FCA’s authority to intervene over particular products and asset classes, for years, was close to non-existent. The FCA’s authority over financial promotions and financial products more generally could, and can be, found in various places e.g. Section 21 of FSMA 2000, as amended, and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, as amended (commonly referred to as the “Regulated Activities Order” or the “RAO”), neither of which – prior to the entry into force of the changes in the FSMA 2023 – made any reference whatsoever to cryptocurrency.

Circa 2017, the Parliament of the United Kingdom had granted its regulators little by way of authority to interfere in cryptocurrency except in very limited circumstances. As is commonly known among American lawyers, the SEC derives practically all of its authority to govern the cryptocurrency market from a definition in a 90-year-old law, Section 2 of the Securities Act of 1933,²⁰ which defines a “security” as including something called an “investment contract.” “Investment contracts” have been defined, in turn, by a 76-year-long string of precedents beginning with the case *Securities and Exchange Commission v. W.J. Howey Co.*,²¹ which holds in relevant part that an investment contract is a contract, transaction, or scheme in which an investor makes an investment of money into a common enterprise in a manner giving rise to an expectation of profit arising from the efforts of others.²² Put another way, the SEC has the power to regulate something as a “security” even if the thing being regulated is not a “security” in the sense that the word is defined in a dictionary or was understood by anyone prior to cryptocurrency being invented, as long as the fact pattern surrounding that thing can be fairly described by the Howey limbs. The openness of the Howey definition, and the fact that the primary way users of cryptocurrency interact with it is through purchase for investment purposes, necessarily means that the SEC has a claim to authority over cryptocurrency, and has exercised that authority, to regulate the US cryptocurrency markets in aggressive fashion, against issuers (via Section 5 of the Securities Act of 1933) and against spot exchanges which permit cryptocurrencies to be traded (via Section 6 of the Securities Exchange Act of 1934).

The UK’s rules never historically permitted this kind of intervention in the cryptocurrency markets. Its equivalent to Section 5 of the 1933 Act, Section 85 FSMA, states in relevant part that “[i]t is unlawful for transferable securities ... to be offered to the public in the United Kingdom unless an approved prospectus has been made available to the public before the offer is made,” and furthermore that it is unlawful “to request the admission of transferable securities... to trading on a regulated market... unless an approved prospectus has been made available to the public before the request was made.”²³ The key question for an American practitioner is what, exactly, the UK means by the term “transferable security.” The answer, in 2017 and today, is “anything which is a transferable security for the purposes of Directive 2009/39/EC” (commonly known as the Markets in Financial Instruments Directive, or MiFID, and, in the wake of the UK’s exit from the European Union (“EU”), replaced by the retained EU law, the Markets in Financial Instruments Regulation (or “UK MiFIR”). MiFID told, and its successor legislation MiFIR tells, us that “transferable securities” means “those classes of securities which are negotiable on the capital market (with the excep-

²⁰ 15 U.S.C. § 77b(a)(1)

²¹ 328 U.S. 293 (1946)

²² *Id.* at 328.

²³ Section 85, Financial Services and Markets Act 2000 c. 8 (UK)

tion of instruments of payment) such as – (a) shares in companies and other securities equivalent to shares... (b) bonds or other forms of securitized debt... [and] (c) “any other securities giving the right to acquire or sell any such securities or giving rise to a cash settlement determined by reference to such securities... or other indices or measures[.]”²⁴ Interpreting this statute through the lens of the English language, since most fungible cryptocurrencies are neither “securities”, nor “shares,” nor negotiable, nor debt, nor granting the right to acquire or sell other securities, the prohibition on selling securities from Section 85 does not apply to the sale of cryptocurrency.

For this reason, in the 2014-2022 period the UK regulators largely stuck to the course the United States charted after Faiella but before its regulation-by-enforcement campaigns of 2018. To wit, they were fairly hands-off. The UK treated crypto business as, first and foremost, a counter-terrorist financing risk rather than as a consumer protection risk. For this reason, the UK eventually imposed a tailor-made requirement that crypto-asset business should be registered with the FCA under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.²⁵ What the UK never did, and still has not done with the reforms under FSMA 2023 and the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023 (“FPAO 2023”)²⁶, is treat cryptocurrency like a security. Although HM Treasury does have powers under FSMA 2023 to introduce authorization and conduct regulation requirements for firms trading in cryptoassets, specifically under its amendments to Section 21 FSMA 2000²⁷ which added “cryptoassets” to the list of investments in relation to which the Treasury was granted express power to regulate – defining “cryptoassets” as “a cryptographically secured digital representation of value or contractual rights [...] which may include [distributed ledger technology]”²⁸ – so far, any proposals that the securitization of crypto should be enacted would be just that, proposals, and not the law of the land.

The most immediately relevant provisions from the various changes to the UK’s financial regulatory regime for cryptocurrency developers are changes which bring cryptocurrency marketing fully under the existing “financial promotions” regime.²⁹ Section 21(1) of FSMA 2000³⁰ prohibits, “in the course of business... an invitation or inducement to... engage in investment activity, or... to engage in claims management activity.” Section 21(9) of FSMA 2000³¹ defines “engaging in investment activity” as “entering or offering to enter into an agreement the making of performance of which by either party constitutes a controlled activity; or exercising any rights conferred by a controlled investment to acquire, dispose of, underwrite, or convert a controlled investment.” “Controlled activities” and “controlled investments”³² are themselves defined on a list, Schedule 1, Parts I and II, respectively, of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the “Financial Promotion Order”). The FPAO 2023 adds “qualifying cryptoassets” to that list.

“Qualifying cryptoassets” are defined in the FPAO, and post-October 8th, 2023, the Financial Promotions Order, as assets which are (a) fungible and transferable where “transferable” means where the asset “confers transferable rights; or... a communication made in relation to the cryp-

²⁴ Directive 2009/39/EC, 2009 O.J. (L 142) 3(EC)/ Markets in Financial Instruments Regulation, 2017 O.J. (L 87) 331 (UK)

²⁵ 2017 No. 692 (UK)

²⁶ 2023 No. 612 (UK)

²⁷ Section 21, Financial Services and Markets Act 2000 c. 8 (UK)

²⁸ Section 417(1), Financial Services and Markets Act 2000 c. 8 (UK)

²⁹ See Tim Davison, Preston Byrne, *Marketing Cryptoassets to Consumers in the UK*, (June 29 2023), <https://brownrudnick.com/wp-content/uploads/2023/06/Brown-Rudnick-Client-Alert-Marketing-Cryptoassets-to-Consumers-in-the-UK.pdf>.

³⁰ Section 21(1), Financial Services and Markets Act 2000 c. 8

³¹ *Ibid.*

³² *Ibid.*

toasset describes it as being transferable or conferring transferable rights,” which is not e-money, fiat currency, digitally issued fiat currency, or redeemable only from the issuer. Neither the term “fungible” nor “transferable” is defined; an English court is likely to look to the plain meaning of each term and conclude that it does not discriminate between “decentralized” cryptocurrencies like Bitcoin, Dogecoin, and Litecoin on the one hand and cryptocurrencies which were sold through an ICO, such as Ripple, Ethereum, and Onecoin, on the other. Due to the requirement that “qualifying cryptoassets” be fungible, products which use a non-fungible data structure such as procedurally generated art NFT collections are more likely to not be captured by the new regulations, although whether a particular product is or is not affected by the incoming rules will always be an analysis of the totality of the facts. The rules also prohibit incentives to invest such as “refer a friend” bonuses, mandate a 24-hour “cooling off” period between a consumer receiving a direct offer financial promotion and being able to invest, and more robust appropriateness rules for cryptoassets.

In summation, under the new law, inducements to invest in crypto made in the course of business cannot be communicated to consumers unless they are made by an entity with the right license and the marketing complies with certain rules about its content. The rules are sufficiently broad that a number of firms including ByBit³³ and PayPal³⁴ have elected to temporarily suspend operations in the UK, presumably to develop UK-specific marketing copy and web presences which comply with the new rules. The types of marketing covered by the financial promotion regime could include not only marketing in a formal sense like a television advertisement or an investment memorandum, but also less formal communications where cryptocurrency companies usually market their protocols such as podcasts, hackathons, conference events, and meetups, or online banner ads and Tweets. The new regime also includes communications to high-net-worth and sophisticated investors. How these communications may be made and what they must contain is governed by complex rules; given that breaching the financial promotion restriction is a criminal offence, with penalties for noncompliance including fines and potential imprisonment, strict adherence to the rules is a must.

What the FSMA 2023 regime does **not** do, however, is to follow the American securitarian impulse to the same degree: critically, it leaves spot crypto trading, the principal source of liquidity for and transactions in the cryptocurrency markets, more or less alone. Peer to peer use of cryptocurrency – its original intended use – or the manner in which users interact with spot crypto exchanges for the better part of a decade, should be able to continue largely without interruption for UK residents. FSMA 2023 also does not require exchanges to register with the government as securities exchanges over and above existing rules, nor indeed for any purpose other than AML compliance, as has been the case for half a decade. The law is, for the moment, also silent on communications which are not financial promotions, and communications made otherwise than in the course of business. This means that UK residents will likely continue to be free to discuss, buy, sell, and trade spot crypto much in the way that American cryptocurrency communities could prior to the US’ post-2018 enforcement drive, and much as they could in the 2013, 2017, and 2020 bull markets. Contrast this position with the United States, where the SEC takes the position that, since most cryptocurrencies are in its view securities, they cannot be publicly traded without re-inserting the full range of traditional intermediaries including broker-dealers, transfer agents, and registered national securities exchanges; rules which are not only difficult to comply with, but if complied with in full, deprive any cryptocurrency which is locked up in such a system of much of its utility, chiefly that it is pseudonymous, censorship-resistant, immutable, and irreversible. Putting cryptocurrency on a share ledger with a transfer agent defeats the entire purpose for using the technology to begin

³³ Announcements, *Notice on Exit from the United Kingdom Market* (September 22, 2023), <https://announcements.bybit.com/en-US/article/announcement-bybit-to-suspend-services-in-the-uk-bl1286daa9208c8f3aa/>.

³⁴ Elizabeth Howcroft, *PayPal to halt UK crypto sales until 2024* (August 16, 2023), Reuters <https://www.reuters.com/technology/paypal-halt-uk-crypto-sales-until-2024-2023-08-16/>.

THE FUTURE: SALUS POPULI SUPREMA LEX ESTO

The United Kingdom shows American regulators that there is another way to regulate cryptocurrency: one which recognizes that cryptocurrency, despite the availability of a Supreme Court case from 1946 which gives those regulators grounds to argue otherwise, is not, in any meaningful sense, a security in the same sense that Congress intended it when it enacted America's securities laws 90 years ago and, despite being capable of being treated as an investment, is, increasingly, used in ways that no investment ever has.

Regulators are tasked with enforcing the law as it is; other practitioners have the luxury and privilege, if they wish, to peek over the horizon. In the current environment of extremely rapid technological innovation, to the extent there are critics who currently think cryptocurrency does not yet have product-market fit, and/or that the Securities Act of 1933 is the right long-term regulatory regime for the asset class, and to the extent those critics are currently right based on present technology levels, it is unlikely that they will be right for much longer. If it were true that in 2009 nobody needed the double-spending problem fixed, or that in 2014 nobody needed cryptographically secure state machines with money to execute contractual obligations, or that today anyone needs their transactions encrypted and hidden from AI-powered surveillance bots run by criminals or foreign threat actors, by 2029, it is entirely possible, even probable, that everyone will. These are functions that no stock, nor bond, nor evidence of indebtedness, nor any investment contract has ever performed, but are ones at which cryptocurrencies of various kinds routinely excel. We are already at a point where machines and software are so advanced, so capable of portraying human voices, faces, and emotions, that, among other things, soon we will not even be able to trust our eyes when having video calls with our own loved ones or speeches from our leaders, due to so-called "deepfakes." This is a world where authentication, "proof of human," and, in particular, strong cryptography, will become exceedingly important. This alone should be enough for America to realize that a course correction is necessary.

There is still time for America to come to its senses and win the future. In a world where jurisdictions like the UK are its competition, that window is closing. Accepting that the fundamental difference between the United States and much of the rest of the world lies in the securitization of cryptocurrency is a necessary prerequisite for attacking – politically – the current, unfit-for-purpose regulatory regime, and crafting solutions that will provide us with a robust crypto industry for years to come. In the U.S., we should understand that incremental legislative measures will be insufficient to overcome the overbroad powers wielded, fairly or not, by the SEC, and that we should be more radical in our proposed policy prescriptions. Offshore, lawyers should take advantage of America's folly, encourage legislators to "let crypto be crypto" within their borders, and be sure – above all – to not try to shoehorn crypto into securities law regimes for which it is not suited, regimes which will harm consumers by denying them access to an asset class and technologies which may well be required to maintain their security and privacy.

How we Americans should change our law, if at all, is, ultimately, a matter for Congress to decide.

35 "The cost of mediation increases transaction costs, limiting the minimum practical transaction size and cutting off the possibility for small casual transactions... What is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party." Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008)

We should not hesitate to point out to Congress that the United Kingdom has had a more permissive regime than ours for years, and that after these reforms it continues to have one more permissive. It was not, and is not, a securitarian regulatory regime, and this permissiveness has not led to, as Senator Elizabeth Warren fears, some kind of “disaster.”³⁶

As a result of avoiding America’s securitarian trap, despite the new restraints on financial promotions, the UK remains far better positioned to exploit the crypto revolution than the United States. The key to the UK’s future in crypto, going forward, is whether the regulators can exercise restraint. If so, there is a good possibility UK could dominate the decentralized web for decades to come. Whether the country’s leadership has the ability, or the wisdom, to resist the temptation to over-regulate remains to be seen.

³⁶ Elizabeth Warren, *Senator Warren Calls for Answers from Silicon Valley Bank CEO* (March 14, 2023), <https://www.warren.senate.gov/oversight/letters/senator-warren-calls-for-answers-from-silicon-valley-bank-ceo-following-collapse>.