



## **Crypto-Enforcement Around the World**

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### *Abstract*

*The blockchain revolution in capital and financial markets attracted the attention of enforcement agencies in many jurisdictions. This Article elaborates the results of an international enforcement survey of the Blockchain and Fintech Research Program of the Rutgers Center for Corporate Law and Governance. It provides a detailed analysis of enforcement in major crypto-market jurisdictions. The data suggest that, despite an extended network of agreements facilitating international cooperation, the United States Securities and Exchange Commission (“SEC”) maintains its historically active enforcement posture. The SEC brings more enforcement actions against cryptoasset issuers, broker-*

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*dealers, crypto-exchanges, and other digital-asset market participants than most other major crypto-jurisdictions, as well as the United States Commodity Futures Trading Commission. SEC enforcement results in considerably more serious penalties.*

*Our data raise theoretical questions on regulation via enforcement, its effect on financial innovations, and regulatory competition. The U.S. does not have a separate regulation designed for the decentralized ledger technology industry and related financial markets, which effectively creates a pure regulation via enforcement environment. To the extent that the U.S. agencies pursue actions not only against domestic companies but also foreign firms, which raise only part of their capital from United States investors, their actions impact global crypto-markets and raise regulatory competition concerns.*

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## **A. Introduction**

The blockchain revolution in capital and financial markets has attracted the attention of enforcement agencies in many jurisdictions. We elaborate the results of the Enforcement Survey of the Blockchain and Fintech Collaboratory of the Rutgers Center for Corporate Law and Governance and provide a detailed overview of enforcement in major crypto-market jurisdictions.

We find that the United States Securities and Exchange Commission (“SEC” or “Commission”) brings more enforcement actions against digital-asset issuers, broker-dealers, exchanges, and other crypto-market participants than most other major

crypto-jurisdictions. By the same token, its enforcement entails more serious penalties. In addition to the review of the international data, we provide detailed comparisons of the United States Commodity Futures Trading Commission (“CFTC”) and SEC actions. Whereas SEC enforcement has been relatively stable, the CFTC cases have been trending up. By contrast, enforcement in foreign jurisdictions seems to be subsiding.

We provide data that raise theoretical questions on regulation via enforcement, its effect on financial innovation, and regulatory competition. Despite an extended network of agreements facilitating international cooperation,<sup>6</sup> the SEC has opted for an active enforcement posture.<sup>7</sup> To the extent that the Commission pursues actions not only against domestic companies but also foreign issuers, which raise only part of their capital from United States investors,<sup>8</sup> its actions impact global crypto-markets and raise regulatory competition concerns. Moreover, the United States does not have a regulatory framework designed for crypto-markets, which effectively creates a pure regulation via enforcement environment.

The Article proceeds as follows: Part B discusses the challenges of this research, regulation by enforcement, its consequences for innovation, and regulatory arbitrage. Part C describes the methodology of the research. Part D presents the main findings. Part E discusses and contrasts SEC and CFTC enforcement data. Part F covers foreign common law jurisdictions, while Part G reviews civil law countries. Part H concludes the Article.

## **B. Regulation by Enforcement**

Regulators, including the SEC and the CFTC, may be risk averse in their policies.<sup>9</sup> In addition, the U.S. agencies both have cumbersome and bureaucratic review processes for enforcement actions, which, among other factors, may hinder enforcement activity.<sup>10</sup> Scholarship suggests that regulatory and enforcement choices may also be molded by reputational benefits of the staff, agencies’ resource constraints, and the objectives to signal what practices are desirable and compliant with law.<sup>11</sup>

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<sup>6</sup> See generally Roger Silvers, *The Effects of Cross-Border Cooperation on Enforcement and Earnings Attributes* 10-11 (Oct. 4, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3047913>; Roger Silvers, *The Influence of Cross-Border Cooperation on Market Quality* 5-6 (Nov. 19, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3073831>.

<sup>7</sup> See *infra* notes 6, 7, 13 & 14, and accompanying text.

<sup>8</sup> See, e.g., SEC v. Telegram Grp. Inc., No. 19-cv-9439 (PKC), 2020 U.S. Dist. LEXIS 53846 (S.D.N.Y. 2020).

<sup>9</sup> See, e.g., Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2216-18 (2010).

<sup>10</sup> James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115 (2012).

<sup>11</sup> *Id.*; see, e.g., Eric J. Pan, *Understanding Financial Regulations*, 2012 UTAH L. REV. 1897 (2012); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL’Y 639, 645 (2010); Stephen J. Choi & A.C. Pritchard, *The SEC’s Shift to*

Agencies do not prosecute all possible actions but economize on their resources and carefully select cases.<sup>12</sup>

National enforcers can also refer cases to their foreign homologues.<sup>13</sup> The SEC and the CFTC, for instance, rely on international soft law and the expanding framework of Memoranda of Understanding (“MOUs”), the Multilateral MOU among securities regulators, the International Organization of Securities Commissions (“IOSCO”),<sup>14</sup> and various cooperative arrangements.<sup>15</sup>

Despite these factors, comparative research suggests - at least with respect to the SEC - that the U.S. has one of the most active securities and financial law enforcement agencies in world.<sup>16</sup> Our results are in accord with these studies, as well as with the research on national enforcement and the post-financial-crisis policies of United States regulators in general.<sup>17</sup>

In 2006, La Porta, Lopez-de-Silanes, and Shleifer (“LLS”) constructed the public enforcement index measuring enforcement intensity.<sup>18</sup> The United States was at the head of the pack. In 2009, Jackson and Roe, using LLS’s index, established a correlation between public enforcement and stock market development.<sup>19</sup> They also observed that “securities markets that have been most successful in attracting new listings in recent decades—the United Kingdom, Hong Kong, Luxembourg, and, until recently, the United States—dedicate high levels of resources to securities enforcement.”<sup>20</sup>

Professor Jackson, comparing enforcement in the U.S., including actions brought by the SEC, other federal regulators, and state agencies, found that the intensity of enforcement in the United States was significantly higher than in several other main financial centers.<sup>21</sup> Professor Coffee, assessing Jackson’s data, discussed the differences between the softer approach of the United Kingdom Financial Services

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*Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1 (2017); Yuliya Guseva, *The SEC, Game Theory, and Digital Assets*, J. CORP. L. (forthcoming, 2020) [hereinafter Guseva, *Game Theory*].

<sup>12</sup> See generally Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149 (1990); see also CFTC DIV. OF ENF’T., ENFORCEMENT MANUAL (2020).

<sup>13</sup> See, e.g., sources cited, *supra* note 6; Howell E. Jackson, *The Impact of Enforcement: A Reflection*, 156 U. PA. L. REV. PENNUMBRA 400 (2008) [hereinafter *Impact of Enforcement*].

<sup>14</sup> See Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405 (2013); sources cited *supra* note 6; *Cooperative Arrangements with Foreign Regulators*, SEC (updated Mar. 14, 2017), [https://www.sec.gov/about/offices/oia/oia\\_cooparrangements.shtml](https://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml).

<sup>15</sup> See, e.g., Memorandum from the CFTC on International MOUs (<https://www.cftc.gov/International/MemorandaofUnderstanding/index.htm#:~:text=The%20CFTC%20cooperates%20with%20authorities,%2C%20supervisory%2C%20and%20other%20purposes.&text=The%20CFTC%20makes%20and%20receives,to%20and%20from%20other%20authorities>).

<sup>16</sup> Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FIN. 1 (2006).

<sup>17</sup> See, e.g., PIERRE-HUGUES VERDIER, *GLOBAL BANKS ON TRIAL* 7 (2020).

<sup>18</sup> La Porta et al., *supra* note 16.

<sup>19</sup> Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009).

<sup>20</sup> *Id.*

<sup>21</sup> Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REG. 253 (2007).

Authority (which was the main securities regulator in the U.K. at the time his article was written) and the SEC. According to Professor Coffee, “intensity of enforcement may be the factor that best distinguishes the United States from other international market centers...”<sup>22</sup> The SEC, “with its very different emphasis on litigation, deterrence, and high penalties, appears to stand apart” among its peer-regulators.<sup>23</sup> Our data are in accord with this conclusion.

As Jackson’s response to Coffee demonstrates, however, comparative work is inherently complex. For one, “the means by which regulators enforce legal requirements may well differ materially around the world.”<sup>24</sup> Secondly, comparative empirical studies are fraught with the risk of miscoding and inaccuracies in comparing regulatory practices.<sup>25</sup> We have encountered precisely these issues in the course of our survey.

We have attempted to overcome comparative and methodological discrepancies by using a granular categorization of various types of actions. As discussed in the Methodology Section, our data segregate court actions, warnings, blacklisting, and other types of enforcement into separate categories.

Another main challenge for our study was that, as is common for U.S. enforcement, the SEC and the CFTC often file charges against multiple defendants/respondents in one sweeping action. Clearly, regulators achieve significant cost-savings and economies of scale by bringing one action based on a single investigation and by filing one complaint against multiple parties.<sup>26</sup> This practice is rational and enables the agencies to economize on their resources and maximize efficiency: the same staff members would work on a specific case and use the same evidence to implicate not only the firms involved but also the individuals orchestrating the schemes. At the same time, to a comparatist, this approach poses the challenges highlighted by Coffee, Jackson, and Spamann.

Foreign regulators in our sample have mainly provided warnings or blacklisting notifications to specific individuals and companies. We classified those documents as separate actions. We used the blacklisted and/or warned firms and individuals as the unit of analysis. These raw data could not be directly juxtaposed and compared with the U.S. data because the results would either understate or overstate enforcement intensity in the U.S.

Namely, having the data for the U.S. sorted by multi-defendant actions could lead to an understating of the overall enforcement activity in the United States. The

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<sup>22</sup> John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229 (2007).

<sup>23</sup> *Id.*

<sup>24</sup> *Impact of Enforcement*, *supra* note 13.

<sup>25</sup> Holger Spamann has unearthed multiple problems with quantitative cross-country studies. *See, e.g.*, Holger Spamann, *Large Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797 (2009); Holger Spamann, *On the Insignificance And/Or Endogeneity of La Porta et al.’s ‘Anti-Director Rights Index’ Under Consistent Coding*, Harvard Law School John M. Olin Center Discussion Paper No. 7, ECGI - Law Working Paper No. 67/2006 (Apr. 4, 2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=894301](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=894301), Holger Spamann, *‘Law and Finance’ Revisited*, Harvard Law School John M. Olin Center Discussion Paper No. 12 (July 30, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1095526](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1095526).

<sup>26</sup> Pitt & Shapiro, *supra* note 12.

opposite could be true as well: counting every defendant and/or respondent in SEC and CFTC actions could possibly overstate U.S. enforcement activity because it would ignore the discussed above cost-savings and economies in multi-defendant actions.

To resolve this dilemma, we have done the following: The unit of analysis for non-U.S. agencies is entities and individuals. To avoid overstating or understating our results for the United States, we provide two sets of data grouped by: (1) the count for the defendants/respondents; and (2) the count for the number of actions. Both are then compared with non-U.S. enforcement. Regardless of the approach, it is undisputable that the United States agencies, particularly the SEC, are the leaders in terms of the number of actions and the seriousness of enforcement penalties. Our results illustrate how the U.S. agencies regulate the crypto-market via enforcement.

Our data call for additional research on the efficiency of regulation via enforcement and the possible effect of regulation by enforcement on financial innovations. There is a long-standing scholarly debate concerning regulation by enforcement that dates back several decades.<sup>27</sup> Without providing a normative assessment of the U.S. policies, this Article adds a new wrinkle to this scholarship. Specifically, the SEC remains the most active enforcer in crypto and tends to impose the highest penalties on crypto-firms in its crosshairs even though the U.S. does not have a separate law or regulation for the decentralized-ledger-technology industry and crypto-markets. Parts F and G below demonstrate that this is not the case in many other jurisdictions.

In terms of the effect on innovations, more research is needed. In capital markets, the multifaceted statutory objectives of the SEC, which is simultaneously charged with protecting investors and supporting efficient and competitive markets, including financial innovations, put the Commission in a tricky situation.<sup>28</sup> On the one hand, regulation, particularly regulation via enforcement, may stifle innovations.<sup>29</sup> On the other hand, investors need to be protected from the animal spirits of infinitely ingenious financial entrepreneurs, including crypto-firms.

The third dimension of this problem is that regulatory agencies cannot prosecute every possible violation and must choose actions that have the highest programmatic importance and thereby send policy signals to the financial industry.<sup>30</sup> In doing so, the agencies profoundly affect their target industries, including cryptoasset markets. The outcome may be positive, such as taming fraud and channeling an unruly fast-evolving market towards a more orderly infrastructure.<sup>31</sup> The counterarguments to this approach range from the procedural requirements of

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<sup>27</sup> See, e.g., Guseva, *Game Theory*, *supra* note 11 (summarizing the principal papers in this debate).

<sup>28</sup> See, e.g., Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235 (2019).

<sup>29</sup> Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, *Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization* (Feb. 6, 2020), <https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06>.

<sup>30</sup> See Pitt & Shapiro, *supra* note 12; see also James J. Park & Howard H. Park, *Regulation by Selective Enforcement: The SEC and Initial Coin Offerings*, 61 WASH. U. J.L. & POL'Y 99 (2020); Guseva, *Game Theory*, *supra* note 11.

<sup>31</sup> See, e.g., Frank Partnoy, *The Right Way to Regulate from Behind*, 18 N.C. BANKING INST. 113, 118 (2013).

administrative law and dictating policies through enforcement to the possible obsolescence of the enforced rules, which leads to wasteful compliance and fewer innovations.<sup>32</sup> Another underlying concern is the possibly deleterious regulatory competition forcing crypto-firms to migrate to other jurisdictions.<sup>33</sup>

We cannot rule out the possibility that the SEC and the CFTC have become active enforcers because of the sheer size of the United States financial markets. Yet, this explanation is incomplete. For instance, Singapore had a sizeable share of Initial Coin Offerings (“ICOs”),<sup>34</sup> which were the focus of the SEC enforcement efforts in 2017-2019. However, Singapore does not seem to have a similarly intensive enforcement program.<sup>35</sup> We would like to avoid drawing unnecessarily far-reaching conclusions. Instead, our findings suggest that crypto-markets represent an important case study that merits further research on regulation via enforcement, enforcement intensity, and regulatory competition.

### C. Research Methodology and Data Collection

#### 1. Overview

The first step in identifying enforcement actions was to search for the financial or securities regulators in the jurisdictions in our sample and review their public websites. Most international jurisdictions have at least one regulator, which can be found searching the Library of Congress’ survey on cryptocurrency regulation around the world.<sup>36</sup> Once on their website, if the regulator had a search bar, the following keywords were used to search for crypto-related enforcement actions and warnings issued:

Crypto  
Cryptocurrencies  
Blockchain  
Token  
Digital Asset  
Coin

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<sup>32</sup> See, e.g., Yuliya Guseva, *Cryptoassets: A Cost-Benefit Analysis of Enforcement Actions and Securities Regulation* (Aug. 27, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3547787](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547787).

<sup>33</sup> See, e.g., Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387 (2001); Stephen J. Choi, *Promoting Issuer Choice in Securities Regulation*, 41 VA. J. INT’L L. 815 (2001). For ICO data, see *ICO Market Monthly Analysis November 2019*, ICOBENCH (2019), at 21, [https://icobench.com/reports/ICOBench\\_ICO\\_Market\\_Analysis\\_November\\_2019.pdf](https://icobench.com/reports/ICOBench_ICO_Market_Analysis_November_2019.pdf) (last visited June 28, 2020); *Top countries and ICOs*, ICOBench, <https://icobench.com/stats> (last visited June 28, 2020).

<sup>34</sup> See sources showing ICO data *supra* note 28.

<sup>35</sup> *Infra* Section F(6).

<sup>36</sup> *Regulation of Cryptocurrency Around the World*, LIBR. OF CONG., <https://www.loc.gov/law/help/cryptocurrency/world-survey.php> (last visited July 9, 2020).

Digital Coin  
Initial Coin Offering | ICO  
Security Token Offering | STO  
Initial Exchange Offering | IEO  
Simple Agreement for Future Tokens | SAFT  
Bitcoin

Bloomberg Law was also used for its ICO Tracker feature. Bloomberg Law's ICO Developments Tracker provides a list of U.S. and global enforcement actions and regulations; however, it is presently not updated and does not include more recent actions.

If the search results did not yield any enforcement actions or warnings issued, the next course of action was to manually browse enforcement publications by year. The only jurisdiction that had a separate category for crypto-related entities was France's Autorité des Marchés Financiers ("AMF").

To identify SEC actions, we have reviewed all enforcement actions brought by the SEC against cryptoasset issuers, "crypto-gatekeepers" (*i.e.*, crypto-exchanges, attorneys, broker-dealers, and rating agencies), and investment funds operating in digital-asset markets between July 2017 and April 2020. The starting point was the Cyber Enforcement Actions reported on the SEC's website. Dockets were manually searched for additional data. We reviewed all complaints and final decisions.<sup>37</sup> To find CFTC actions against crypto-related entities, we reviewed the CFTC Enforcement Actions<sup>38</sup> and searched Bloomberg Law. We filtered the enforcement actions to identify crypto-related actions. The actions were then added to the dataset. We entered the data for the SEC and the CFTC based on the dates of the respective press releases, which mainly coincided with the dates when the respective actions were brought in federal courts, the dates of settlements, or the dates of trading suspensions.

## 2. Data Collection "Pain Points"

Comparing actions taken by regulators in multiple jurisdictions and finding a common denominator are difficult tasks, as Professor Jackson and other scholars have highlighted.<sup>39</sup> It has been difficult to measure the enforcement intensity and the data published by each regulator. Many agencies presented their reports and data in different formats, which made it challenging to analyze the data and run point-by-point comparisons.<sup>40</sup>

The approaches each foreign agency has taken vary. Whereas several defendants or respondents were named in a single action by the SEC or the CFTC,

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<sup>37</sup> The detailed results on SEC enforcement are presented in Guseva, *Game Theory*, *supra* note 11.

<sup>38</sup> Enforcement Actions, CFTC, <https://www.cftc.gov/LawRegulation/Enforcement/EnforcementActions/index.htm> (last visited Sept. 7, 2020).

<sup>39</sup> *Impact of Enforcement*, *supra* note 13.

<sup>40</sup> For examples and relevant analysis, see Spamann, *Large Sample & On the Insignificance*, *supra* note 25.

non-U.S. agencies often brought actions or issued warnings against a single individual or entity. Only 16 non-U.S. actions named multiple defendants or respondents, which comprised 5% of all non-U.S. actions. By contrast, 43 U.S. cases were brought against multiple defendants or respondents (52% of the U.S. actions).

We have split the data into two sets based on (1) the number of defendants or respondents, and (2) the number of actions. This dichotomous approach allows us to compare the disparity between U.S. regulators and non-U.S. regulators using substantially similar units of analysis.

Furthermore, this research involves multiple international sources from jurisdictions publishing data not only in English but also in foreign languages. The relevant pain point was the quality of translation in some cases. Without being able to search in native languages, it is possible that the meaning and reasons for some regulatory actions may have been lost.

Additionally, the search function on many regulatory agencies' websites did not function as anticipated. This Article includes the data primarily from regulators that provided sufficient search capabilities. Unfortunately, some regulators, such as China's Securities Regulatory Commission, did not yield any results after searching with our selected keywords and, therefore, no results were added therefrom.

France's AMF was a standout regulator in terms of search functionalities. The AMF website has a separate category within its advanced search bar for crypto-related entities. It is likely that we have been able to find more activity from the AMF compared to other regulators because of this search function.

Another major obstacle was the insufficiently detailed information provided by the regulators. For example, Australian Transaction Report and Analysis Center kept the details of the actions anonymous, while Switzerland's FINMA did not provide dates when entities were added to its warning list. Although France and the United Kingdom had robust lists of blacklisted and warning-listed entities, they did not provide adequate details as to why those entities and individuals had been added. The parties listed on the blacklists and warning lists often did not have live websites. This made it difficult to search for the reasons as to why they were included on the blacklists and warning lists. In some cases, a "scam website" was able to be identified through third-party review websites that provided some information on these blacklisted entities. Unlike the SEC and the CFTC, there were not many non-U.S. press releases related to administrative or judicial actions against crypto-related entities, which made it difficult to trace the activities of the regulated entities.

### 3. Definitions Used in This Article

Throughout this Article, the term "enforcement action" means a regulatory action against a crypto-related entity that resulted in some formal proceeding. An enforcement action may or may not have resulted in a monetary fine, penalty or disgorgement. The other commonly-used terms are as follows:

- “Blacklist” is not defined by the regulators, and, therefore, we are unable to clarify the regulators’ intentions in labeling such action as a blacklist.
- “Investigation” means there was a formal investigation commenced. It does not mean that the investigation has concluded or resulted in penalties.
- “Other” has multiple meanings, and we hope it is clear by context. “Other” may mean “unknown” because of the lack of data about an entity. This occurred mostly in the warning lists provided by the United Kingdom, France, and Switzerland. “Other” may also mean a crypto-related company that is not a broker-dealer, crypto-exchange, or an ICO Issuer. Generally, “Other” crypto-related companies were private funds and wallet service providers.
- “Pending” means there is an ongoing investigation or proceeding.
- “Settlement” means that after an initial or several proceedings, the entity settled with the regulator and may or may not have been subject to fines, other penalties, and/or disgorgement.
- “Warning” means an official warning from a regulator against a crypto-related entity. Generally, warnings were directed to the investing public and not to the entities themselves for cases of non-compliance.
- “Cryptoassets” and “digital assets” include tokens and coins that are classified as digital-asset securities, digital-asset commodities and/or payment-related assets<sup>41</sup> that fall within the jurisdiction of financial, securities, and commodity regulators.

#### **D. Major Empirical Findings**

Out of the 23 financial market jurisdictions<sup>42</sup> researched, only 14 countries have either commenced enforcement actions or issued official warnings. Except the United States, many countries have pursued a lenient enforcement approach in crypto despite the media attention and press releases stating their intentions to harshly pursue any violations of law.<sup>43</sup> Tables 1 and 1.1 present a general overview of our results. The Tables cover all enforcement actions brought in-house, *i.e.*, in administrative proceedings, complaints filed in courts, warnings, and blacklists. The distinction

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<sup>41</sup> For definitions *see infra* note 167 and accompanying text.

<sup>42</sup> The targeted jurisdictions researched included: United States, Australia, Bermuda, China/HK, Dubai, India, South Korea, Luxembourg, Malta, Netherlands, Singapore, Switzerland, United Arab Emirates, United Kingdom, Russia, France, South Africa, Kenya, Canada, Argentina, Russia, Mexico, and Cayman Islands.

<sup>43</sup> *See SFC warns of cryptocurrency risks*, Secs. & Futures Comm’n (H.K.) (Feb. 9, 2018), <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=18PR13>; *see also Swiss regulator cracks down on fraudulent crypto activities*, FINMA (Switz.) (Apr. 2, 2020), [https://www.swissinfo.ch/eng/finma-annual-report\\_swiss-regulator-cracks-down-on-fraudulent-crypto-activities/45663186](https://www.swissinfo.ch/eng/finma-annual-report_swiss-regulator-cracks-down-on-fraudulent-crypto-activities/45663186); *Criminals to face fresh crackdown in fight against dirty money*, HM Treasury & Home Office (U.K.) (July 12, 2019), <https://www.gov.uk/government/news/criminals-to-face-fresh-crackdown-in-fight-against-dirty-money>.

between court cases and administrative enforcement proceedings (“Enforcement Action” in the Tables) is mainly applicable to the U.S. agencies and Canadian agencies.

The Tables demonstrate that the CFTC and the SEC have brought the highest number of enforcement actions, which is in line with the previous studies on the comparative intensity of capital market enforcement.<sup>44</sup> Table 1 provides the data using the actions as units of analysis. Table 1.1. gives a more detailed look into multi-defendant actions by providing the number of defendants/respondents. In most multidefendant cases, either several affiliated entities were charged or the officers and directors of crypto-firms were charged together with the firms.

Table 1 – Type of Action per Jurisdiction (By Action)<sup>45</sup>

Types of Action per Jurisdictions (by count of action)									
Countries/Agency	Court	Enforcement Action	Warning / Blacklisted	ICO Halted	Pending	Investigation	Registration Cancelled	Registration Refused	Trading Suspension
SEC	25	25							16
CFTC	3	4			8				
Australia		5		7			4	3	
Canada	1	2	28		4				
Cayman Islands			2						
France			149						
HK / China			14	1					
Kenya						1			
Luxembourg			3						
Malta			12						
Singapore			2	9					
South Korea						7			
Switzerland		2	34			1			
UAE			3						
United Kingdom			40		1				
Grand Total	29	38	287	17	13	9	4	3	16

Table 1.1 – Type of Action per Jurisdiction (By Defendants/Respondents)

Types of Action per Jurisdictions (by count of defendant)									
Countries/Agency	Court	Enforcement Action	Warning / Blacklisted	ICO Halted	Pending	Investigation	Registration Cancelled	Registration Refused	Trading Suspension
SEC	73	45							22
CFTC	6	9			24				
Australia		5		7			4	3	
Canada	1	2	29		4				
Cayman Islands			2						
France			153						
HK / China			14	1					
Kenya						1			
Luxembourg			3						
Malta			17						
Singapore			2	9					
South Korea						7			
Switzerland		5	34			1			
UAE			3						
United Kingdom			50		1				
Grand Total	80	66	307	17	29	9	4	3	22

Tables 2 and 2.1 track all enforcement actions by year and demonstrate that the peak of SEC enforcement was in 2018-2019, which mainly represented ICO-

<sup>44</sup> La Porta et al., *supra* note 16; Jackson & Roe, *supra* note 19.

<sup>45</sup> The column “Trading Suspension” in Tables 1 and 1.1 includes one order revoking the registration of securities.

related cases.<sup>46</sup> By contrast, the number of CFTC actions increased sharply in 2019-2020.

France seems to stand apart. However, cross-checking of the data in Tables 1 and 1.1 and Tables 2 and 2.1 demonstrates that France mainly issued warnings and backlisted certain entities. As discussed in more detail below, the U.S. agencies imposed substantial fines and brought more cases in court and in-house administrative proceedings.

Table 2 – Actions by Year per Jurisdiction (By Action)

Actions by Year per Jurisdiction (by count of action)						
Country / Agency	2017	2018	2019	2020	N/A	Grand Total
SEC	11	25	22	8		66
CFTC	1	5	5	4		15
Australia		7	11	1		19
Canada	1	11	14	9		35
France	1	117	22	9		149
HK / China		15				15
Kenya			1			1
Luxembourg		1	2			3
Malta	1	3	8			12
Singapore		10	1			11
South Korea		7				7
Switzerland		1		1	35	37
UAE					3	3
United Kingdom	1	14	14	12		41
Cayman Islands			2			2
Grand Total	16	216	102	44	38	416

Table 2.1 – Actions by Year per Jurisdiction (By Defendants/Respondents)

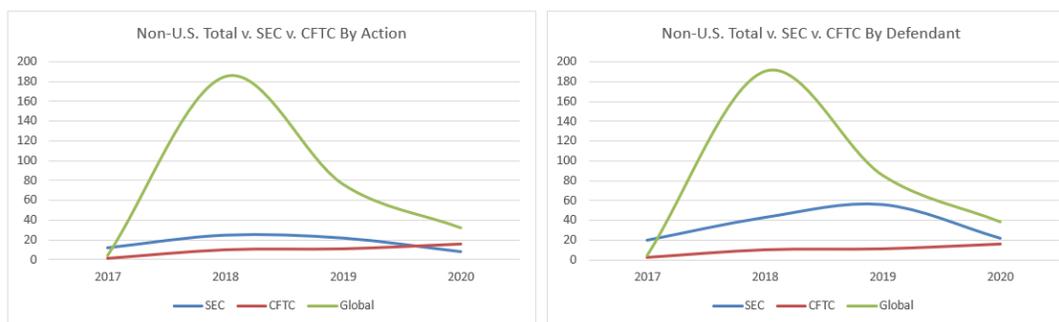
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<sup>46</sup> ICOs acquired an unsavory reputation despite the validity of many ICOs. *See, e.g.*, SATIS Group, *Cryptoasset Market Coverage Initiation: Network Creation* 25-26 (July 11, 2018), [https://research.bloomberg.com/pub/res/d28giW28tf6G7T\\_Wr77aU0gDgFQ](https://research.bloomberg.com/pub/res/d28giW28tf6G7T_Wr77aU0gDgFQ); Dirk A. Zetsche et al., *The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators*, 60 HARV. INT'L L.J. 267 (2019).

Actions by Year per Jurisdiction (by count of defendants)						
Country / Agency	2017	2018	2019	2020	N/A	Grand Total
SEC	19	43	56	22		140
CFTC	2	10	11	16		39
Australia		7	11	1		19
Canada	1	12	14	9		36
France	1	117	22	13		153
HK / China		15				15
Kenya			1			1
Luxembourg		1	2			3
Malta	1	3	13			17
Singapore		10	1			11
South Korea		7				7
Switzerland		1		1	38	40
UAE					3	3
United Kingdom	1	18	18	14		51
Cayman Islands			2			2
Grand Total	25	244	151	76	41	537

Figure 1 illustrates that most enforcement actions, including light-touch warnings, across the world clustered around 2018 and have subsided since. 2018 was a very active year for regulators. The only rising trend line in 2020 denotes CFTC enforcement.

Figure 1 – Total Actions by Year



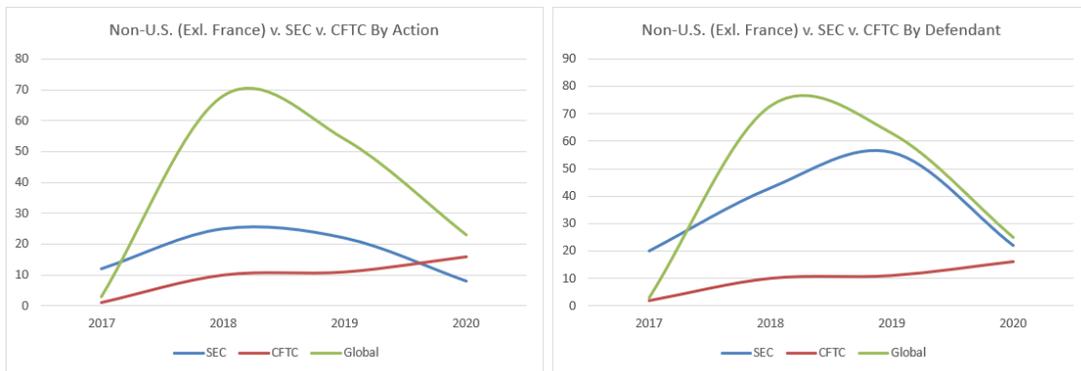
We have identified two issues that may have disproportionately affected the global trend line in Figure 1. First, Switzerland and the UAE did not provide the dates when various entities were added to their warning lists. This omission may have distorted the 2019 data. Second, France’s warnings list skews the trend line toward 2018 because AMF released a large set of warnings in 2018.<sup>47</sup> Because we could not be entirely sure if our data on these three jurisdictions were properly assigned to the corresponding years, Figure 2 presents the global trend lines without the enforcement data from France, Switzerland, and the UAE.

Figure 2 demonstrates that the global actions were falling at a steeper rate than the number of SEC actions, whereas CFTC actions were slowly rising. Together, the

<sup>47</sup> France’s AMF has a search function that allows a user to search for only crypto-related information, which produced more relevant results for France.

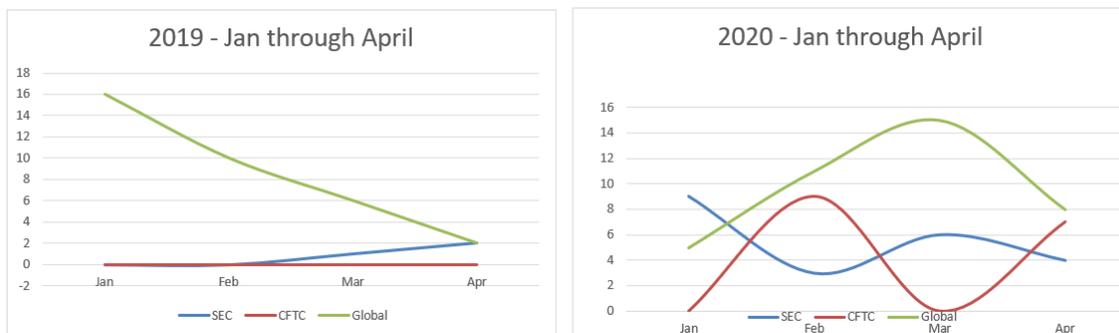
SEC and the CFTC exhibited strong enforcement activity as of April 30, 2020. Only the CFTC, however, demonstrated increasing enforcement intensity. This may be explained by the fact that SEC enforcement in 2017-2019 was already strong. If SEC enforcement is the baseline, the CFTC, which is the smaller agency of the two, is “catching up.”

Figure 2 – Total Actions by Year (Excl. France)



Our dataset covers enforcement actions between 2017 and the end of April 2020. It is hard to make predictions as to the future enforcement activity or compare annual trends. The Covid-19 epidemic has been an important exogenous shock that possibly affected enforcement. In an attempt to draw parallels and find enforcement patterns, we provide comparisons of the following time periods: January through April 2019 and January through April 2020. The trend lines in Figure 3 suggest that the CFTC had a slow start in commencing enforcement actions but has had more activity in 2020. Global and SEC data illustrate a slowdown or a lull in enforcement.

Figure 3 – Parallel Trends in the First Quarter of 2019 and of 2020



## E. The United States

### 1. The Securities Exchange Commission

The SEC has been relying on the pre-crypto regulations in its digital-asset enforcement actions. In mid-2017, it published the first pronouncement on cryptoassets in the form of a section 21(a) report of investigation, commonly known as “the DAO Report.”<sup>48</sup> A slew of enforcement actions ensued.<sup>49</sup> The cases were large and small, with several actions against issuers in multimillion-dollar international offerings.<sup>50</sup>

In enforcing pre-crypto securities law against crypto-firms, the SEC relies on the broad interpretation of the definition of “security” aided by the Supreme Court *Howey* test.<sup>51</sup> The Commission has explained the application of the 1946 *Howey* case to cryptoassets in recently-developed guidelines, such as the 2019 Framework for “Investment Contract” Analysis of Digital Assets.<sup>52</sup> Venues trading crypto-securities and institutions offering securities advice and related services, including ratings, are also within the SEC’s bailiwick.<sup>53</sup>

Table 3 outlines the results. The SEC filed more crypto-related cases in federal district courts than in administrative actions. Charges for the violations of the antifraud provisions of the securities statutes<sup>54</sup> were more often brought in courts than in “in-house” administrative proceedings. Overall, complicated cases involving the antifraud provisions of the Securities Act of 1933 and Securities Exchange Act of 1934 as well as various registration violations under both Acts<sup>55</sup> were more often brought in court.

An important distinctive feature of crypto-enforcement is that the SEC often brings cases not only against entities operating in the cryptoasset markets but also against the individuals behind these firms, including directors, officers, and founders. The figures in parentheses in Table 3 indicate the number of insiders charged in administrative and court cases.

Table 3 - SEC Cases: Federal Courts and Administrative Proceedings

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<sup>48</sup> U.S. SEC. & EXCH. COMM., REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934: THE DAO (July 25, 2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf>.

<sup>49</sup> For a review of enforcement actions, *see, e.g.*, Guseva, *Game Theory*, *supra* note 11.

<sup>50</sup> SEC v. Telegram Grp. Inc., No. 19-cv-9439 (PKC), 2020 U.S. Dist. LEXIS 53846 (S.D.N.Y. 2020); Complaint, SEC v. KIK Interactive Inc, 19-cv-5244-AKH (June 4, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-87.pdf>.

<sup>51</sup> SEC v. W. J. Howey Co., 328 U.S. 293 (1946).

<sup>52</sup> U.S. SEC. & EXCH. COMM’N, THE STRATEGIC HUB FOR INNOVATION AND FINANCIAL TECHNOLOGY, FRAMEWORK FOR “INVESTMENT CONTRACT” ANALYSIS OF DIGITAL ASSETS (Apr. 3, 2019), <https://www.sec.gov/files/dlt-framework.pdf> [hereinafter THE FRAMEWORK].

<sup>53</sup> *See, e.g.*, U.S. SEC. & EXCH. COMM., DIVISION OF CORPORATION FINANCE, DIVISION OF INVESTMENT MANAGEMENT, AND DIVISION OF TRADING AND MARKETS, STATEMENT ON DIGITAL ASSET SECURITIES ISSUANCE AND TRADING (Nov. 16, 2018), <https://www.sec.gov/news/public-statement/digital-asset-securites-issuance-and-trading>; In the Matter of ICO Rating, U.S. Sec. & Exch. Comm’n, Release No. 10673 (August 20, 2019), <https://www.sec.gov/litigation/admin/2019/33-10673.pdf>.

<sup>54</sup> 15 U.S.C. §§ 77q & 78j; 17 C.F.R. § 240.10b-5.

<sup>55</sup> 15 U.S.C. §§ 77e, 78e & 78o.

Violations	Administrative Proceedings	Complaints Filed in Federal Courts
Standalone Antifraud Cases (§10(b), SEA; Rule 10b-5; §17, SA)	5 (1)	2 (2)
Cases Combining Fraud and Other Violations	3 (3)	22 (19)
Standalone Registration Violations (§ 5, SA)	10	2
Securities and Exchange Act Registration Violations (§ 5, SA; § 5 SEA, §15 SEA)	4 (2)	3 (2)
<b>Total</b>	<b>22 (6)</b>	<b>29 (23)</b>

\* “SA” stands for the Securities Act of 1933; “SEA” stands for the Securities Exchange Act of 1934.

The penalties and disgorgement sought by the SEC were considerable, with the higher amounts received in the cases filed in federal district courts.

Table 4 - Penalties and Disgorgement in SEC Cases

Total Fines, Disgorgement and Prejudgment Interest	Administrative Proceedings	District Court Cases	Total
2017		\$6,911,613	\$6,911,613
2018	\$2,504,430	\$4,470,975	\$6,975,405
2019	\$24,910,552	\$1,314,348,527	\$1,339,259,078
2020	\$830,449	\$0	\$830,449
<b>Grand Total</b>	<b>\$28,245,431</b>	<b>\$1,325,731,114</b>	<b>\$1,353,976,545</b>

These sums are skewed because of the \$1,224,000,000 disgorgement and the \$18,500,000 civil penalty against Telegram.<sup>56</sup> However, even without this case, the total civil penalties and disgorgement of ill-gotten gains obtained in court were almost three times higher than those in administrative proceedings.

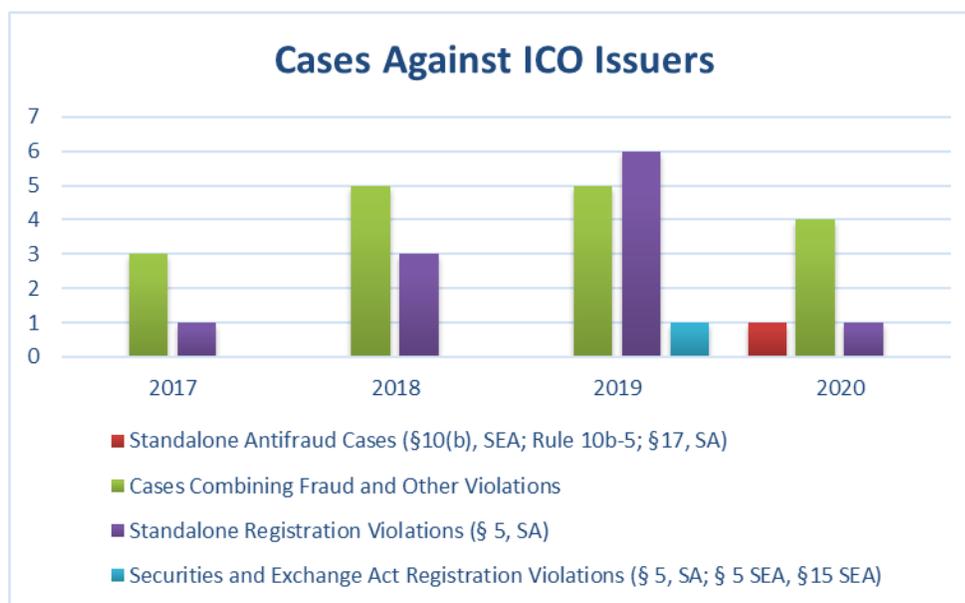
This finding is consistent with previous research on SEC enforcement. For example, Choi and Pritchard find that “administrative proceedings following Dodd-Frank tended to be weaker (*i.e.*, less likely to prevail) and less salient (*i.e.*, less likely to garner media attention).”<sup>57</sup> The difference in our dataset is that, except for the 15 cases that were pending as of the time of this writing, the Commission was successful in all cases regardless of the venues, *i.e.*, it is impossible to conclude that the administrative cases were markedly “weaker” than the court cases. At the same time, in-house enforcement did involve lower amounts of fines and disgorgement paid by the respondents.

<sup>56</sup> Press Release, U.S. Sec. & Exch. Comm’n, Telegram to Return \$1.2 Billion to Investors and Pay \$18.5 Million Penalty to Settle SEC Charges, 2020-146 (June 26, 2020), <https://www.sec.gov/news/press-release/2020-146>.

<sup>57</sup> Choi & Pritchard, *supra* note 11, at 4.

The businesses of the defendants and respondents varied. Following the ICO boom of 2017-2018, the majority of the cases in our dataset concerned ICO issuers. Many enforcement actions against digital-asset issuers and their insiders focused on failure to either register securities under Securities Act Section 5<sup>58</sup> or comply with an exemption from registration. The majority of charges, however, also involved violations of the antifraud provisions of the Exchange Act and the Securities Act, *i.e.*, Sections 10(b) and Rule 10b-5 and Section 17, respectively.<sup>59</sup> The only case in the category “Securities and Exchange Act Registration Violations” in 2019 involved both an ICO issuer and a broker-dealer selling the ICO securities.

Figure 4 - ICO Issuers



\* “SA” stands for the Securities Act of 1933; “SEA” stands for the Securities Exchange Act of 1934.

The SEC also paid close attention to the crypto-market infrastructure and its gatekeepers.<sup>60</sup> One notable target was broker-dealers which were not registered with

<sup>58</sup> 15 U.S.C. §§ 77q & 78j; 17 C.F.R. § 240.10b-5.

<sup>59</sup> *Id.*

<sup>60</sup> For a discussion on the role of gatekeepers in cryptoasset markets, see Yuliya Guseva, *A Conceptual Framework for DAOs, DAPPs, Coins and Tokens: New Trends and Conflicts in Securities Law*, MD. L. REV. (forthcoming 2020) [hereinafter Guseva, *DAOs, DAPPs*]. “Gatekeepers are broadly understood to be private actors that can prevent companies’ misconduct in a specific market.” Elisabeth de Fontenay, *Private Equity Firms as Gatekeepers*, 136 REV. BANKING & FIN. L. 115, 136 (2013) (citing Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 54 (1986)). See also John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge*

the SEC and/or violated other regulations, including investment suitability requirements under federal and state law.<sup>61</sup> There were three cases against online trading platforms commonly known as “crypto-exchanges” and/or their insiders. While one case involved a simple violation of the exchange registration requirements of the Securities Exchange Act,<sup>62</sup> in the other two instances, the SEC also charged the crypto-exchanges with fraud under the Securities Exchange Act<sup>63</sup> and the Securities Act,<sup>64</sup> as well as violations of the registrations provisions of the Securities Act.<sup>65</sup>

As many as six cases were filed against various investment funds issuing securities related to crypto-investments and/or their insiders. In five cases,<sup>66</sup> the charges were serious and concerned violations of the antifraud provisions of the Securities Act and Securities Exchange Act,<sup>67</sup> as well as the Investment Advisers Act.<sup>68</sup> Only one out of the six cases did not involve fraud and was brought for violation of the registration provisions of the Securities Act.<sup>69</sup>

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*of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 308-12 (2004) (outlining the types of gatekeepers).

<sup>61</sup> In the Matter of Daniel Levine, U.S. Sec. & Exch. Comm’n, Release No. 86962 (Sept. 13, 2019), <https://www.sec.gov/litigation/admin/2019/34-86962.pdf>; In the Matter of TokenLot, LLC, Lenny Kugel, and Eli L. Lewitt, U.S. Sec. & Exch. Comm’n, File No. 3-18739 (Sept. 11, 2018), <https://www.sec.gov/litigation/admin/2018/33-10543.pdf>; In the Matter of Neil Maxwell, U.S. Sec. & Exch. Comm’n, Release No. 5211 (Mar. 13, 2019), <https://www.sec.gov/litigation/admin/2019/ia-5211.pdf>; SEC v. 1Pool Ltd. a.k.a. 1Broker and Patrick Brunner, U.S. Sec. & Exch. Comm’n, Release No. 24330 (Nov. 1, 2018), <https://www.sec.gov/litigation/litreleases/2018/lr24330.htm>; In the Matter of XBT Corp. SARL d/b/a First Global Credit, U.S. Sec. & Exch. Comm’n, Release No. 10723 (Oct. 31, 2019), <https://www.sec.gov/litigation/admin/2019/33-10723.pdf>; Complaint, U.S. Sec. & Exch. Comm’n v. Joseph P. Willner (Oct. 30, 2017), 1:17-cv-06305 (EDNY), <https://www.sec.gov/litigation/complaints/2017/comp-pr2017-202.pdf>.

<sup>62</sup> 15 USC 78(e); *see* In the Matter of Zachary Coburn, U.S. Sec. & Exch. Comm’n, Release No. 84553 (Nov. 8, 2018), <https://www.sec.gov/litigation/admin/2018/34-84553.pdf> (Coburn is the founder of Etherium).

<sup>63</sup> 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

<sup>64</sup> 15 U.S.C. § 77q.

<sup>65</sup> 15 U.S.C. § 77e; *see* Complaint, U.S. Sec. & Exch. Comm’n v. BitFunder and Jon E. Montroll, (Feb. 21, 2018), 1:18-cv-01582-PGG (SDNY), <https://www.sec.gov/litigation/complaints/2018/comp24078.pdf> <https://www.sec.gov/litigation/litreleases/2018/lr24078.htm>; SEC v. Bitqyck, Inc., Bruce E. Bise, and Samuel J. Mendez, 3:19-cv-2059 (Aug. 29, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-164.pdf>.

<sup>66</sup> In the Matter of Crypto Asset Management, LP and Timothy Enneking, U.S. Sec. & Exch. Comm’n, Release No. 10544 (Sept. 11, 2018), <https://www.sec.gov/litigation/admin/2018/33-10544.pdf>; In the Matter of NextBlock Global Ltd. and Alex Tapscott, U.S. Sec. & Exch. Comm’n, Release No. 10638 (May 14, 2019), <https://www.sec.gov/litigation/admin/2019/33-10638.pdf>; In the Matter of Mutual Coin Fund LLC and Usman Majeed, U.S. Sec. & Exch. Comm’n, Release No. 10624 (Apr. 1, 2019), <https://www.sec.gov/litigation/admin/2019/33-10624.pdf>; SEC v. Brenda A. Smith, Broad Reach Capital, LP, Bristol Advisors, LLC, Broad Reach partners, LLC, 2:19-cv-17213-MCA-LDW (Aug. 27, 2019), <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-162.pdf>; SEC v. Michael W. Ackerman, 1:20-cv-01181 (Feb. 11, 2020), <https://www.sec.gov/litigation/complaints/2020/comp-pr2020-32.pdf>.

<sup>67</sup> 15 U.S.C. §§ 77q & 78j; 17 C.F.R. § 240.10b-5.

<sup>68</sup> 15 U.S.C. § 80b-6.

<sup>69</sup> In the Matter of CoinAlpha Advisors LLC, U.S. Sec. & Exch. Comm’n, Release No. 10582 (Dec. 7, 2018), <https://www.sec.gov/litigation/admin/2018/33-10582.pdf>.

Finally, the SEC has also been active in bringing actions against individual celebrities for promoting ICOs without disclosing that they were compensated for their efforts in violation of Section 17 of the Securities Act. In 2018, DJ Khaled and Floyd Mayweather were promoters for Centra Tech, Inc., which led to the SEC imposing fines and disgorgements as shown below. In 2020, the SEC charged actor Steven Seagal with unlawfully touting a digital-asset offering. These charges came after the SEC’s statement on celebrity-backed ICOs, which had warned the investing public of celebrities and others using social media to encourage the public to purchase stocks and other investments in violation of the Securities Act.<sup>70</sup>

Table 5 - SEC Cases against Celebrities

Celebrity	Fine / Penalties	Disgorgement	Additional Disgorgement
DJ Khaled	100,000	50,000	2,725.72
Floyd Mayweather	300,000	300,000	14,775.67
Steven Seagal	157,000	157,000	16,448.76
Grand Total	557,000	507,000	33,950

An important, and second largest, category of actions targeted crypto-related firms. We classified firms as “crypto-related” when they either invested in crypto-assets, were involved in crypto-based schemes without engaging in ICOs, or made public statements about changing their business models to crypto, engaging in crypto-markets, or conducting ICOs. Many of those firms were smaller reporting issuers. As words such as “blockchain” and “DLT” became particularly appealing to investors in 2017-2018,<sup>71</sup> some firms rushed to take advantage of it. The SEC suspended trading in the securities of several of such firms and in one case revoked the registration of

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<sup>70</sup> Statement, Sec. & Exch. Comm’n, SEC Statement Urging Caution Around Celebrity Backed ICOs (Nov. 1, 2017), <https://www.sec.gov/news/public-statement/statement-potentially-unlawful-promotion-icos>.

<sup>71</sup> See, e.g., Lisa Pham, *This Company Added the Word ‘Blockchain’ to Its Name and Saw Its Shares Surge 394%*, BLOOMBERG, (Oct. 27, 2017), <https://www.bloomberg.com/news/articles/2017-10-27/what-s-in-a-name-u-k-stock-surges-394-on-blockchain-rebrand>.

the issuer's securities.<sup>72</sup> We also identified three crypto-related firms that were involved in Ponzi schemes and/or acquired blockchain entities.<sup>73</sup>

Overall, our data demonstrate that the SEC has positioned itself as an exceptionally active enforcer in the digital-assets market. Its actions span the complete spectrum of crypto-market participants: from issuers and individuals to various gatekeepers. In crypto-enforcement the Commission relies on a mixture of principles-based doctrines, such as the investment contract definition, and on prescriptive rules on capital market institutions and limited exemptions.

## 2. The Commodity Futures Trading Commission

As an independent U.S. government agency, the CFTC<sup>74</sup> regulates the commodity futures and options markets,<sup>75</sup> as well as crypto-financial instruments that are commodities.<sup>76</sup> In written testimony, CFTC Chairman J. Christopher Giancarlo

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<sup>72</sup> 15 U.S. Code § 78l(j)&(k); U.S. Sec. & Exch. Comm'n, Release No. 81639 (Sept. 18, 2017), <https://www.sec.gov/litigation/suspensions/2017/34-81639.pdf>; U.S. Sec. & Exch. Comm'n, Release No. 81481 (Aug. 24, 2017), <https://www.sec.gov/litigation/suspensions/2017/34-81481.pdf>; U.S. Sec. & Exch. Comm'n, Release No. 81474 (Aug. 23, 2017), <https://www.sec.gov/litigation/suspensions/2017/34-81474.pdf>; U.S. Sec. & Exch. Comm'n, Release No. 81367 (Aug. 9, 2017), <https://www.sec.gov/litigation/suspensions/2017/34-81367.pdf>; In the Matter of Strategic Global Investments, Inc., U.S. Sec. & Exch. Comm'n, Release No. 81314 (Aug. 3, 2017), <https://www.sec.gov/litigation/suspensions/2017/34-81314-o.pdf>; In the Matter of Blockchain Solutions, Inc. and Universal Resources (f/k/a Global Immune Technologies Inc.), U.S. Sec. & Exch. Comm'n, Release No. 87242 (Oct. 7, 2019), <https://www.sec.gov/litigation/admin/2019/34-87242.pdf>; U.S. Sec. & Exch. Comm'n, Release No. 83518 (June 25, 2018), <https://www.sec.gov/litigation/suspensions/2018/34-83518.pdf>; In the Matter of HD View 360 Inc., U.S. Sec. & Exch. Comm'n, File No. 500-1 (Mar. 1, 2018), <https://www.sec.gov/litigation/suspensions/2018/34-82800-o.pdf>; In the Matter of PDX Partners, Inc., U.S. Sec. & Exch. Comm'n, File No. 500-1 (Feb. 15, 2018), <https://www.sec.gov/litigation/suspensions/2018/34-82725-o.pdf>; U.S. Sec. & Exch. Comm'n, Release Nos. 82724; 82725; 82726 (Feb. 15, 2018), <https://www.sec.gov/litigation/suspensions/2018/34-82724.pdf>; U.S. Sec. & Exch. Comm'n, Release No. 80435 (Apr. 11, 2017), <https://www.sec.gov/litigation/suspensions/2017/34-80435.pdf>; U.S. Sec. & Exch. Comm'n, Release No. 82452 (Jan. 5, 2018), <https://www.sec.gov/litigation/suspensions/2018/34-82452.pdf>; In the Matter of Victura Construction Group, Inc., U.S. Sec. & Exch. Comm'n, File No. 500-1 (Feb. 15, 2018), <https://www.sec.gov/litigation/suspensions/2018/34-82726-o.pdf>.

<sup>73</sup> SEC Adds Fraud Charges Against Purported Cryptocurrency Company Longfin, CEO, and Consultant, U.S. Sec. & Exch. Comm'n, Release No. 24492 (June 6, 2019), <https://www.sec.gov/litigation/litreleases/2019/lr24492.htm>; SEC v. Natural Diamonds Investment Co., et. al., 9:19-cv-80633-RLR (May 13, 2019), <https://www.sec.gov/litigation/complaints/2019/comp2019-72.pdf>; SEC v. Eric J. "EJ" Dalius, Professional Realty Enterprises, Inc., Saivian LLC, Savings Network APP LLC, 2:18-cv-08497-CJC-E (Oct. 3, 2018), <https://www.sec.gov/litigation/complaints/2018/comp24345.pdf>.

<sup>74</sup> CFTC, <https://www.cftc.gov> (last visited July 9, 2020).

<sup>75</sup> James Chen, *Commodity Futures Trading Commission (CFTC)*, INVESTOPEDIA (Apr. 9, 2019), <https://www.investopedia.com/terms/c/cftc.asp>.

<sup>76</sup> *Id.*; see also *CFTC Jurisdiction Over Cryptocurrency – Implications for Industry Participants*, WHITE & CASE LLP (Nov. 11, 2019), <https://www.whitecase.com/publications/alert/cftc-jurisdiction->

noted, for instance, that “the CFTC does have both regulatory and enforcement jurisdiction under the CEA over derivatives on virtual currencies traded in the United States.”<sup>77</sup> The CFTC and its staff have made numerous statements on crypto. The CFTC has also issued a final interpretive guideline on actual delivery of digital assets “colloquially known as ‘virtual currencies.’”<sup>78</sup> There is, however, no separate regulation on crypto at the moment.

Figures 1 through 3 demonstrate<sup>79</sup> a notable upward trend in CFTC crypto-related actions: the number of actions has been steadily rising since 2019. It is possible that this increased activity is related to the general changes in the enforcement strategies of the CFTC. Namely, on May 20, 2020, for the first time since 1994, the CFTC Division of Enforcement issued a new Civil Monetary Penalty Guidance.<sup>80</sup>

The Guidance renews the CFTC’s “strong commitment to transparency and to the CFTC’s enforcement mission.”<sup>81</sup> It also explicates the CFTC’s “three pronged approach” focusing on “(1) the ‘gravity of the violation’; (2) ‘mitigating and aggravating circumstances’; and (3) ‘other considerations.’”<sup>82</sup> We do not want to draw unnecessary parallels between the new enforcement Guidance and the rise of crypto-related actions, although there is a clear temporal connection.

In enforcement, the CFTC relies on its authority under the Commodity Exchange Act (CEA) and the CFTC regulations.<sup>83</sup> The three main provisions that the CFTC has cited in its cases against crypto-entities were §6c(a), §9(1), and Rule

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over-cryptocurrency-implications-industry; IN CASE YOU MISSED IT: Chairman Tarbert Comments on Cryptocurrency Regulation at Yahoo! Finance All Markets Summit, CFTC, Release No. 8051-19 (Oct. 10, 2019), <https://www.cftc.gov/PressRoom/PressReleases/8051-19>; CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 498 (D. Mass. 2018) (citing CFTC v. McDonnell, 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018)).

<sup>77</sup> Chairman J. Christopher Giancarlo, Written Testimony before the Senate Banking Comm., Washington, D.C., (Feb. 6, 2018), CFTC, <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo37>; see also CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets, CFTC (Jan. 4, 2018), [https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder\\_virtualcurrency01.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/backgrounder_virtualcurrency01.pdf) (detailing the CFTC’s authority regarding “federal oversight of and jurisdiction over virtual currencies”).

<sup>78</sup> CFTC Issues Final Interpretive Guidance on Actual Delivery for Digital Assets, CFTC Release No. 8139-20 (Mar. 24, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8139-20>. The release should assist crypto-market participants to better understand the regulations on the delivery of digital assets. See, e.g., Andrew Cross et al., CFTC Finalizes Guidance on Digital Assets in the Context of the Retail Commodity Transactions, JDSUPRA (May 1, 2020), <https://www.jdsupra.com/legalnews/cftc-finalizes-guidance-on-digital-90663/> (stating “the Guidance provides small accommodations that make it operationally possible for businesses to test the waters with margined purchases of virtual currency, while clarifying in no uncertain terms that these businesses are still not permitted to offer margin trading to retail customers more broadly off of a CFTC-registered exchange.”).

<sup>79</sup> See *supra* Figures 1-3.

<sup>80</sup> CFTC Division of Enforcement Issues Civil Monetary Penalty Guidance, CFTC Release No. 8165-20 (May 20, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8165-20>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See 17 CFR § 1.2 et seq. (2020).

180.1.<sup>84</sup> We have reviewed all available data on CFTC enforcement mid-2017 through April 2020.<sup>85</sup> Many actions were brought for violations of fraud and misappropriation of client funds provisions of the commodities regulations.<sup>86</sup>

In terms of the penalties, the CFTC’s standard toolbox consists of injunctions along with monetary penalties and disgorgement.<sup>87</sup> In all of the cases within the research timeframe, the CFTC requested permanent injunctions against defendants, restitution, and civil penalties.<sup>88</sup> The largest penalty assessed against a crypto-firm was \$2.5 million. All of the cases were brought in court except one settlement that resulted from a consent judgment with Joseph Kim. Kim settled for \$1,146,000 for “misappropriated approximately 980 Litecoins and 339 Bitcoins from his employer to cover personal trading losses in his own personal virtual currency trading accounts.”<sup>89</sup> The defendants’ businesses mainly were cryptocurrency trading services, commodity pool operators, as well as an ICO issuer promising access to a proprietary exchange trading algorithm.

Table 6 - Summary of the CFTC Actions

COMPANY NAME	COUNTRY OF DOMICILE/HEADQUARTERS	Total Penalties and Disgorgement	Statute and Violations		Year of the Action
			7 U.S.C. §9(1)	17 C.F.R. §180.1(a)	
Gelfman Blueprint, Inc and Nicholas Gelfman	USA	\$2,408,734.48	√	√	2017
The Entrepreneurs Headquarters Limited and Dillon Michael Dean	UK, USA	\$1,929,976.91	√	√	2018

<sup>84</sup> See 7 U.S.C. §§ 6c & 9 (2020); 17 CFR § 180.1 (2020).

<sup>85</sup> Our data collection followed the guidelines in *CFTC Jurisdiction Over Cryptocurrency*, *supra* note 76.

<sup>86</sup> See, e.g., *CFTC v. Gelfman Blueprint, Inc.*, No. 17-7181 (PKC), 2018 U.S. Dist. LEXIS 205706 (S.D.N.Y. 2018); *CFTC v. Saffron*, No. 2:19-cv-01697-JAD-DJA, 2019 U.S. Dist. LEXIS 177312 (D. Nev. 2019); *CFTC v. Kantor*, Civil Action No. 18-cv-2247-SJF-ARL, 2019 U.S. Dist. LEXIS 221126 (E.D.N.Y. 2019).

<sup>87</sup> See, e.g., Order for Final Judgment, *CFTC v. Gelfman Blueprint, Inc.*, No. 17-7181 (PKC) (Oct. 15, 2018), <https://www.cftc.gov/sites/default/files/2018-10/enfgelfmanfinaljudgment101618.pdf>; Order and Default Judgment, *CFTC v. Dean et al.*, No. 18-cv-00345-SJF-A YS (July 9, 2018), <https://www.cftc.gov/sites/default/files/2018-07/enfmichaeldeanorder070918.pdf>.

<sup>88</sup> See Fig. 2.1.

<sup>89</sup> In re Joseph Kim, CFTC Docket No. 19-02 (Oct. 29, 2018), <https://www.cftc.gov/sites/default/files/2018-10/enfjosephkimorder102918.pdf>.

Morgan Hunt d/b/a Diamonds Trading Investment House, and Kim Hecroft d/b/a First Options Trading	USA	\$395,989.14	√	√	2018
Joseph Kim	USA	\$1,146,000	√	√	2018
Patrick K. McDonnell, Cabbageteck, Corp. d/b/a Coin Drop Markets	USA	\$1,161,717.16	√	√	2018
Randall Crater, Mark Gillespie, and My Big Coin Pay, Inc*	USA		√	√	2018
David Gilbert Saffron and Circle Society, Corp*			√	√	2019
Blake Harrison Kantor (USA), Nathan Mullins (USA), Blue Bit Banc (UK), Blue Bit Analytics, Ltd. (Turks and Caicos, Mercury Cove, Inc (USA), and G. Thomas Client Services (USA)	USA, UK, and Turks and Caicos	\$2,500,000.00	√	√	2019
Blue Wolf Sales Consultants	USA	\$463,097.00	√	√	2019
Control-Finance Limited and Benjamin Reynolds*	UK		√	√	2019
Jon Barry Thompson*	USA		√	√	2019
Q3 Holdings, LLC and Q3 I, LP and their principal, Michael Ackerman. *	USA		√	√	2020
Breonna Clark, of Denver, Colorado, and Venture Capital Investments Ltd.,*	USA		√	√	2020
Joshua Christian McDonald and his company, Perfection PR Firm LLC (PPR)*	USA		√	√	2020

Alan Friedland of Florida, Fintech Investment Group, Inc. (Fintech) and Compcoin LLC,*	USA		√	√	2020
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\* Pending actions

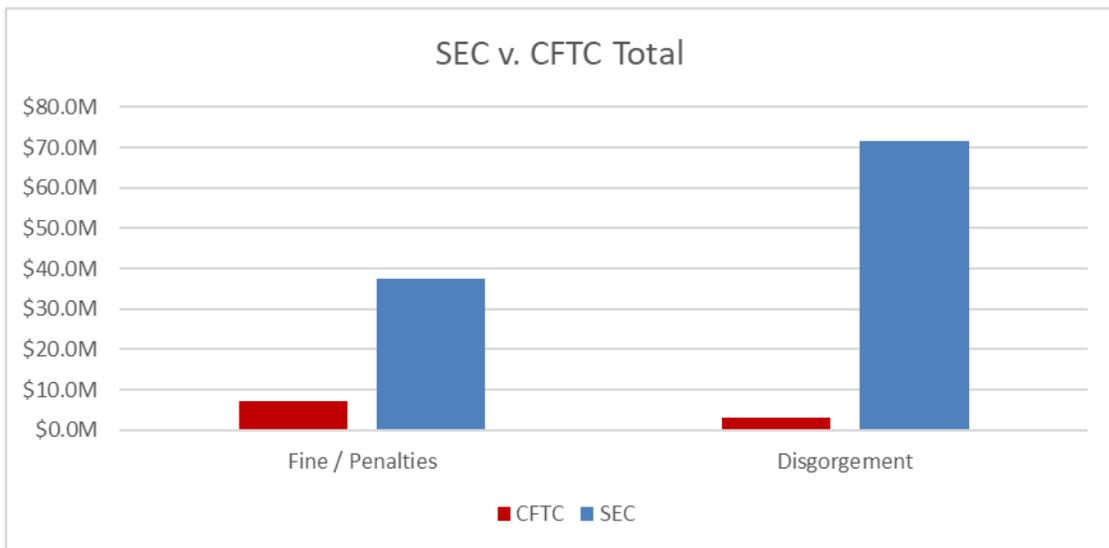
3. The SEC and the CFTC: A Side-by-Side Comparison

The following Figures compare the enforcement actions of the SEC and the CFTC, as well as the total penalties (mainly including fines, disgorgement, and prejudgment interest), sought by the two Commissions. The comparison emphasizes important differences. First, SEC penalties are much more significant, with disgorgement being noticeably higher.

In the cumulative data presented in Figures 1 through 3, we included disgorgement as part of the total penalties.<sup>90</sup> Here, Figures 6 and 7 separate out disgorgement, as a form of equitable relief, from penalties. We underscore this distinction in light of the Supreme Court decisions in *Kokesh* and *Liu*.<sup>91</sup> Counting disgorgement as a separate category also enables us to underscore that this form of relief is a “weapon of choice” of the SEC.

These Figures exclude the *Telegram* case that resulted in a \$1.224 billion disgorgement.<sup>92</sup> The sheer magnitude of the settlement makes this case an outlier. Even without *Telegram*, the results illustrate the strong preference of the SEC for penal policies vis-à-vis that of the CFTC. All data are grouped based on the years when the respective actions were filed.

Figure 5 - SEC v. CFTC Total

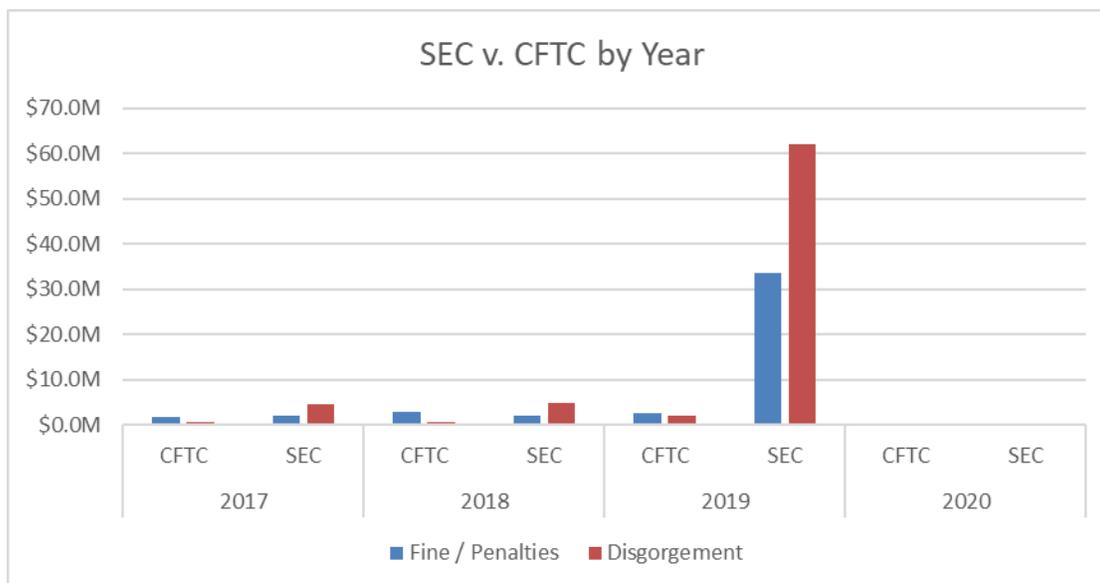


<sup>90</sup> Cf. Table 1 with Figures. 6-7.

<sup>91</sup> *Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Liu v. SEC*, 140 S. Ct. 1936 (2020).

<sup>92</sup> Press Release, *supra* note 56.

Figure 6 - SEC v. CFTC, Annual Comparison



Another distinction is that, despite the recent rise in CFTC crypto-enforcement, the CFTC has brought fewer actions against crypto-related entities than the SEC. Table 7 compares the annual numbers of the actions for each Commission and highlights the different levels of enforcement intensity. The difference is particularly strong in terms of the number of individual defendants and respondents. The SEC’s grand total was 141, while the CFTC’s total was only 39.

Table 7 – A Comparison of the Crypto-related Actions: the CFTC and the SEC

Actions by Year per Jurisdiction (by count of defendant/respondent)				
Country / Agency	2017	2018	2019	2020
SEC	19	43	56	22
CFTC	2	10	11	16

The numbers can be interpreted in several ways to explain the differences in enforcement intensity. First, there may be more digital-asset securities (such as, *e.g.*, tokens issued via ICOs) within the jurisdiction of the SEC than virtual currencies within the jurisdiction of the CFTC. Consequently, the size of digital securities markets and the respective number of participants could be larger than those in digital commodity markets.

Second, the SEC may be extending its authority over some virtual-currency-commodities by relying on the broad principles of the *Howey* test. The third possible alternative is that the SEC, as a larger agency, traditionally took a more aggressive

enforcement stance. If this third explanation is correct, then the enforcement numbers merely show the path-dependent behavior of the Commissions.<sup>93</sup>

Finally, cryptocurrencies-commodities may be less amenable to fraud than digital-asset securities because virtual currencies, their circulation, trading, and operation are more transparent, decentralized, and overall “independent” of the original developers.<sup>94</sup> We believe that these open questions call for further research.

## F. Non-U.S. Common Law Jurisdictions

This Part provides a brief overview of all common law jurisdictions in our sample. It does not analyze all regulatory frameworks in detail. The objective is to assist the reader in assessing the major empirical findings reported in Parts D and E. Many of the jurisdictions in the sample are leaders in ICO capital raising. Some have strong enforcement agencies,<sup>95</sup> and some have class action regimes similar to that in the U.S.<sup>96</sup> Consequently, their regulators can rely on supplementing enforcement by the “private attorney general”<sup>97</sup> to ferret out fraud and protect investors in capital markets.

### 1. Australia

The primary regulators in Australia are the Australian Securities and Investment Commission (“ASIC”)<sup>98</sup> and the Australian Transaction Report and Analysis Center (“AUSTRAC”).<sup>99</sup> The statutes<sup>100</sup> and regulations applicable to the crypto-market and its participants are comparatively up-to-date. The AUSTRAC, for instance, published a guide for digital currency providers on the compliance policies with Anti-Money Laundering (“AML”) and Counter-Terrorism Financing as early as

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<sup>93</sup> On the relationship between financial innovations and enforcement, *see, e.g.*, Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785 (2009); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 469, 538 (2009).

<sup>94</sup> On the autonomous nature of cryptoassets, *see, e.g.*, Patrick Murck, *Who Controls the Blockchain?*, HARV. BUS. REV. (April 19, 2017), <https://hbr.org/2017/04/who-controls-the-blockchain>; Carla L. Reyes, *(Un)Corporate Crypto-Governance*, 88 FORDHAM L. REV. 1875 (2020); Carla L. Reyes, *If Rockefeller Were a Coder*, 87 GEO. WASH. L. REV. 373(2019).

<sup>95</sup> La Porta et al., *supra* note 16.

<sup>96</sup> On the rise of collective and class actions, *see, e.g.*, John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, And Incentives*, 165 U. PA. L. REV. 1895 (2017).

<sup>97</sup> *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

<sup>98</sup> Australian Sec. & Investments Comm’n (Austi.), <https://asic.gov.au/> (last visited \_\_\_\_\_, 2020).

<sup>99</sup> AUSTRAC (Austi.), <https://www.austrac.gov.au/> (last visited \_\_\_\_\_, 2020).

<sup>100</sup> The major applicable laws include: the Corporations Act of 2001, the Australian Securities and Investments Commission Act of 2001, and the Anti-Money Laundering and Counter-Terrorism Financing Act of 2006.

2018.<sup>101</sup> The ASIC has also released an updated guideline on cryptocurrencies and related activities such as ICOs and mining.<sup>102</sup>

If miners and transaction processors are part of clearing and settlement for tokens that are viewed as financial products, relevant laws apply.<sup>103</sup> If a firm offers cryptoassets or services in relation to cryptoassets, it must verify that it is in compliance with relevant Australian laws.<sup>104</sup> The regulations apply extraterritorially, meaning that assets that originated in foreign jurisdictions may fall under the jurisdiction of the Australian agencies.<sup>105</sup> When an offered cryptoasset qualifies as a financial product, the offering firm may need to receive a financial services license.<sup>106</sup>

In the context of other areas of securities law, such as insider trading, Australia has made use of criminal sanctions, where available, and has taken a strict approach in policing white-collar crimes.<sup>107</sup> By the same token, criminal actions have been brought against bad actors using cryptocurrencies in connection with unlawful activities. For example, the AUSTRAC, the ASIC, and local authorities arrested three individuals for cryptocurrency-related crimes.<sup>108</sup> The cases involved unlawful transactions, including an attempt to launder ill-gotten funds from illegal activities through a cryptocurrency and transfer the funds back to Australia.<sup>109</sup>

The ASIC in particular has been relatively active in pursuing crypto-violators. Figure 1 in Part D summarizes the data and illustrates that the Australian authorities have brought several cases in court, halted ICOs, and denied registration to crypto-

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<sup>101</sup> AUSTRAC, A guide to preparing and implementing an AML/CTF program for your digital currency exchange business, <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/guide-preparing-and-implementing-amlctf-program-your-digital-currency-exchange-business>.

<sup>102</sup> <https://asic.gov.au/regulatory-resources/digital-transformation/initial-coin-offerings-and-crypto-assets/> (last visited \_\_\_\_\_, 2020).

<sup>103</sup> See generally Jim Bulling & Michelle Chasser, *Digital Currency Exchange Providers, Do you Need to Register with AUSTRAC?*, LEXOLOGY: K&L GATES LLP, (Jan. 25, 2018) <https://www.lexology.com/library/detail.aspx?g=ed29b1e4-d23f-4a2a-a237-db0a74c33a4d>.

<sup>104</sup> *Id.*; see also *AUSTRAC Releases AML/CTF Guide for Digital Currency Exchange Providers*, GILBERT + TOBIN (Apr. 30, 2018), <https://www.gtlaw.com.au/insights/austrac-releases-amlctf-guide-digital-currency-exchange-providers>.

<sup>105</sup> See *Digital currency exchange provider*, AUSTRAC, <https://www.austrac.gov.au/glossary/digital-currency-exchange-provider> (last visited \_\_\_\_\_, 2020).

<sup>106</sup> AUSTRAC, RG 1 AFS Licensing Kit: Part 1 – Applying for and varying an AFS licence (Apr. 1, 2020), <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-1-afs-licensing-kit-part-1-applying-for-and-varying-an-afs-licence/>.

<sup>107</sup> Lev Bromberg et. Al., *Similar insider trading laws, different enforcement reality: An evaluation of Australian and Singaporean enforcement approaches*, 32 AUSTRI.. J. OF CORP. L.283 (2017).

<sup>108</sup> Press Release, AUSTRAC, One man charged and two cryptocurrency businesses suspended following 28 apscott 28 crime investigation (Mar. 8, 2019), <https://www.austrac.gov.au/one-man-charged-and-two-cryptocurrency-businesses-suspended-following-organised-crime-investigation>.

<sup>109</sup> The respective press releases did not name the individuals involved, although the names were available in other online sources. See, e.g., Thomas Allums, *21-year-old Australian involved in a million-dollar crypto scam granted bail*, CHAINTIMES (Sept. 17, 2019), <https://chaintimes.com/21-year-old-australian-million-dollar-crypto-scam-granted-bail/>; Yessi Bello Perez, *Aussie 'E-Crime Squad' arrests crypto exchange owner, seizing his Bitcoin ATM*, HARD FORK (Nov. 12, 2019), <https://thenextweb.com/hardfork/2019/11/12/aussie-e-crime-squad-arrests-crypto-exchange-owner-seizing-his-bitcoin-atm/>.

firms. Several crypto-exchanges and ICO issuers have been either fined, stopped, or forced into liquidation.<sup>110</sup> Some entities have received warnings or have been placed on the warning list. The numbers, however, are modest compared with those in the U.S. Byte Power, for example, has been issued a small fine in the amount of \$33,000 AUD.<sup>111</sup>

Table 8 - Cases in Australia by Year

Year	Month	BROKER-DEALER	CRYPTO-EXCHANGE	ICO ISSUER	OTHER
2018	Sep			5	
	Dec		2		
2019	Jan		1		
	Feb		1		
	May	1		1	
	Sep		3		1
	Nov		2		1
2020	Mar		1		
Grand Total		1	10	6	2

## 2. Canada

Research on Canada posed a number of unique challenges. First, the United States and Canada have a close relationship. This proximity is thought to have affected the Canadian regulatory framework.<sup>112</sup> Second, Canada is one of the unique jurisdictions in this research that does not have a central securities regulator.<sup>113</sup>

Primary crypto-regulators in Canada are the provincial authorities and the Canadian Securities Administrators (“CSA”).<sup>114</sup> The CSA consists of several individual agencies for each province and territory of Canada.<sup>115</sup> The following discussion highlights several major policy statements and guidelines on crypto that came from the CSA.

First, the CSA has released Staff Notice 46-307, which clarifies how cryptocurrencies are handled and regulated.<sup>116</sup> In the CSA Business Plan for 2019-2022, various Canadian regulators stated that one of the major regulatory goals was to educate investors and increase Canadians’ awareness of emerging matters such as

<sup>110</sup> Press Release, AUSTRAC, 18-274MR ASIC acts against misleading Initial Coin Offerings and crypto-asset funds targeted at retail investors (Sept. 20, 2018), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-274mr-asic-acts-against-misleading-initial-coin-offerings-and-crypto-asset-funds-targeted-at-retail-investors/>.

<sup>111</sup> *ASIC Issued A Legal Notice To Byte Power Group Limited*, CRYPTO NEWS AUSTRI. (FEB. 17, 2019), <https://www.btcwires.com/c-buzz/asic-issued-a-legal-notice-to-byte-power-group-limited/>.

<sup>112</sup> *Impact of Enforcement*, *supra* note 13.

<sup>113</sup> See, e.g., Can. Secs. Admins., CSA/ACVM, <https://www.securities-administrators.ca/> (last visited \_\_\_\_\_, 2020) (“The Canadian Securities Administrators (CSA) is an umbrella organization of Canada’s provincial and territorial securities regulators whose objective is to improve, coordinate and harmonize regulation of the Canadian capital markets.”).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Cryptocurrency Offerings*, Ont. Secs. Comm’n (Can.), Notice 46-307 (Aug. 24, 2017), [https://www.osc.gov.on.ca/en/SecuritiesLaw\\_csa\\_20170824\\_cryptocurrency-offerings.htm](https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20170824_cryptocurrency-offerings.htm).

cryptocurrencies.<sup>117</sup> The CSA is considering changes to the current regulatory framework to combat the unique challenges in regulating cryptocurrencies, cryptoasset trading platforms,<sup>118</sup> requirements for custodians of cryptoassets, capital raising, as well as the disclosure requirements for ICO or Security Token Offerings (“STO”) issuers.<sup>119</sup>

A bird’s eye view of the regulatory landscape suggests that the Canadian approach to crypto resonates with the strategy of the SEC. For instance, similar to the *Howey* test and the SEC Framework for “Investment Contract” Analysis,<sup>120</sup> the January 2020 CSA Staff Notice 21-327<sup>121</sup> indicates that there is no bright-line test for determining whether a cryptoasset falls within the securities framework. The Notice also specifies that if a transaction does not result in an obligation to make and take delivery of the cryptoasset, it may be subject to securities law.<sup>122</sup> A transaction may be considered immediately delivered if there is a transfer of ownership and control of the asset, and there is no further involvement or reliance on the platform issuing the cryptoasset.<sup>123</sup> This approach appears similar to the “central enterprise” and “efforts of another” prongs of the *Howey* test – the users of cryptoassets should not be exposed to the risks of or depend on the performance of cryptoasset issuers.<sup>124</sup>

We have found that several of the Canadian regulatory agencies have either concluded enforcement actions, filed cases in the courts of Canada, placed unregistered and dubious entities on public warning lists, or currently have pending enforcement actions.<sup>125</sup> For example, the Ontario Securities Commission brought an action against Nextblock resulting in fines of over one million Canadian dollars for misleading investors that certain blockchain experts were associated with Nextblock as advisors.<sup>126</sup> And the British Columbia Securities Commission maintains a warning list for potentially fraudulent and/or unregistered entities, including several blockchain-based schemes.<sup>127</sup> Table 9 summarizes the results.

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<sup>117</sup> CAN. SECS. ADMIN., CSA/ACVM, CSA BUSINESS PLAN 2019-2022 (May 28, 2019), [https://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSA\\_Business\\_Plan\\_2019-2022.pdf](https://www.securities-administrators.ca/uploadedFiles/General/pdfs/CSA_Business_Plan_2019-2022.pdf).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> THE FRAMEWORK, *supra* note 52.

<sup>121</sup> Guidance on the Application of Securities Legislation to Entities Facilitating the Trading of Crypto Assets, Can. Secs. Admins., CSA/ACVM, CSA Staff Notice 21-327 (Jan. 16, 2020), [https://www.osc.gov.on.ca/documents/en/Securities-Category2/csa\\_20200116\\_21-327\\_trading-crypto-assets.pdf](https://www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20200116_21-327_trading-crypto-assets.pdf).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Among the immediate delivery factors is whether the user is not, “exposed to insolvency risk, fraud risk, performance risk or proficiency risk on the part of the platform.” *Id.*

<sup>125</sup> See Table 7.

<sup>126</sup> *Alex Tapscott and NextBlock Global Limited to pay \$1M for misleading investors*, ONT. SECS. COMM’N (May 14, 2019), [https://www.osc.gov.on.ca/en/NewsEvents\\_20190514\\_tapscott-and-nextblock-to-pay-for-misleading-investors.htm](https://www.osc.gov.on.ca/en/NewsEvents_20190514_tapscott-and-nextblock-to-pay-for-misleading-investors.htm).

<sup>127</sup> *Investment Caution List*, B.C. SECS. COMM’N (Can.), <https://www.bccsc.bc.ca/enforcement/early-intervention/investment-caution-list> (last visited \_\_\_\_\_, 2020).

Table 9 – Actions in Canada

Type of Action	2017	2018	2019	2020
Court			1	
Enforcement Action		1	1	
Pending			2	2
Warning	1	10	10	7

An investigation summary report was released by the Ontario Securities Commission in June 2020 regarding QuadrigaCX.<sup>128</sup> The report was not included in the data reported in this research. QuadrigaCX was an extreme case of fraud that highlighted that cryptoasset trading platforms involves unique risks.

### 3. Cayman Islands

The main regulator in the Caymans is the Cayman Islands Monetary Authority (“CIMA”).<sup>129</sup> Many “tax havens,” jurisdictions with favorable tax and regulatory regimes, have gradually become “hotspots” for blockchain entrepreneurs and enthusiasts.<sup>130</sup> The Cayman Islands is no exception due to its less burdensome tax and regulatory frameworks.

The Cayman Islands has not enacted new legislation concerning cryptocurrencies and other digital assets and relies on the pre-crypto statutory and regulatory foundations.<sup>131</sup> The CIMA, however, has published a guidance on the applicability of the existing frameworks for virtual-asset service providers (“VASP”).<sup>132</sup> The guidance particularly focuses on VASPs’ responsibilities under the AML and money services laws.

<sup>128</sup> ONT. SECS. COMM’N, A REVIEW BY STAFF OF THE ONTARIO SECURITIES COMMISSION: QUADRIGACX (June 11, 2020), <https://www.osc.gov.on.ca/quadrigacxreport/>.

<sup>129</sup> Cayman Is. Monetary Auth., <https://www.cima.ky/> (last visited June 24, 2020).

<sup>130</sup> Omri Marian, *Blockchain Havens and the Need for Their Internationally-Coordinated Regulation*, 20 N.C. J.L. & TECH. 529 (2019).

<sup>131</sup> See, e.g., Securities Investment Business Law (2015 Revision) (Cayman Is.); The Proceeds of Crime Law (2017 Revision), Anti-Money Laundering Regulations (2018 Revision) (Cayman Is.); Money Services Law (2010 Revision) (Cayman Is.) ; Electronic Transactions Law (2003 Revision) (Cayman Is.).

<sup>132</sup> Cayman Is. Monetary Auth., Guidance Notes (Amendments) on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands (February 2020), [https://www.cima.ky/upimages/commonfiles/1580934234GuidanceNotesAmendments-VirtualAssetServiceProvider\\_1580934234.pdf](https://www.cima.ky/upimages/commonfiles/1580934234GuidanceNotesAmendments-VirtualAssetServiceProvider_1580934234.pdf). Under the guidance, the CIMA characterizes the following type of businesses as VASPs: virtual asset exchanges, wallet service providers, providers of financial services relating to the issuance, offer or sale of virtual assets, professionals that facilitate the issuance of or assist parties in setting up ICOs, financial service providers that deal with virtual assets for or on behalf of another person, and financial service providers that have customers that deal with virtual assets. *Id.*

The CIMA proactively warned crypto-companies that they needed to adhere to the anti-money laundering rules.<sup>133</sup> The regulator also has warnings and blacklists. For instance, MyCryptoBank, a blockchain banking system, and Genesys Private Fund were added to CIMA’s warning/blacklist for securities violations and for Genesys’ attempts at bypassing AML requirements.<sup>134</sup>

We attempted to locate Genesys Private Fund. Genesys Private Fund does not seem to be operational. A Google search crawl of the website indicates that Genesys may have been using Monero’s XMR, which is primarily a privacy token used to transfer tokens with complete anonymity. Additionally, we could not locate information regarding MyCryptoBank, which we presume to have also discontinued its business.

#### 4. Hong Kong / China

The primary regulator for cryptocurrencies in Hong Kong is the Securities and Futures Commission (“SFC”).<sup>135</sup> In regulation, the SFC has followed a broad approach somewhat similar to the policies of the U.S. agencies. The SFC relies on pre-crypto law<sup>136</sup> and has issued a statement that, depending on the facts and circumstances of an ICO, digital tokens may be defined as “securities” under the Securities and Futures Ordinances. In that case, the offerings and the issuers would be subject to the securities laws of Hong Kong.<sup>137</sup>

As Figure 1 demonstrates, enforcement actions in Hong Kong were mostly limited to warnings. Even when the SFC halted an ICO by Black Cell Technology Ltd. and compelled the company to unwind the ICO transactions for Hong Kong investors,<sup>138</sup> it did not impose a fine or another penalty. The SFC issued official warnings to seven crypto-exchanges and seven ICO issuers. The warnings required compliance with the laws and regulations.<sup>139</sup> The seven exchanges and seven ICO

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<sup>133</sup> Pedro Goncalves, *Cayman tells crypto services to comply with AML rules*, INTERNATIONAL INVESTMENT (Nov. 25, 2019), <https://www.internationalinvestment.net/news/4007308/cayman-tells-crypto-services-comply-aml-rules>.

<sup>134</sup> Cayman Is. Monetary Auth., *Websites with Cayman Addresses Not Registered nor Licensed in the Cayman Islands* (June 18, 2019), [https://www.cima.ky/upimages/noticedoc/WebsiteswithCaymanAddressesNotRegisterednorLicensed\\_1560895404.pdf](https://www.cima.ky/upimages/noticedoc/WebsiteswithCaymanAddressesNotRegisterednorLicensed_1560895404.pdf).

<sup>135</sup> Secs. & Futures Comm’n (H.K.), <https://www.sfc.hk/> (last visited May 22, 2020).

<sup>136</sup> *See, e.g.*, Secs. & Futures Comm’n, Cap. 571 Securities and Futures Ordinance L.N. 12 of 2003, <https://www.elegislation.gov.hk/hk/cap571>.

<sup>137</sup> Statement, Secs. & Futures Comm’n, *Statement on initial coin offerings* (Sept. 5, 2017), <https://www.sfc.hk/web/EN/news-and-announcements/policy-statements-and-announcements/statement-on-initial-coin-offerings.html>.

<sup>138</sup> Enforcement News, Secs. & Futures Comm’n, *SFC’s regulatory action halts ICO to Hong Kong public* (Mar. 19, 2018), <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=18PR29>.

<sup>139</sup> Press Release, Secs. & Futures Comm’n, *SFC warns of cryptocurrency risks* (Feb. 9, 2018), <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc%3FrefNo%3D18PR13>.

issuers were not named in the official warnings. Our understanding is that the warnings were privately issued.

SFC also announced new licensing guidelines for virtual-asset trading exchanges.<sup>140</sup> The market has heeded the call. In the race to be a fully licensed trading platform, Huobi,<sup>141</sup> one of the largest-by-volume crypto-exchanges founded in China but later incorporated in Singapore, has taken steps towards compliance.<sup>142</sup> In an effort to become Hong Kong's first registered cryptocurrency exchange, Huobi orchestrated a reverse takeover to become listed on Hong Kong's HKEX.<sup>143</sup>

Table 10 - Total Actions in Hong Kong

Type	CRYPTO-EXCHANGE	ICO ISSUER
Offering Halted	7	1
Warning/Blacklisted		7

Generally, Hong Kong and mainland China have worked closely on creating joint regulatory frameworks for securities regulation.<sup>144</sup> Yet, in contrast to Hong Kong's more enabling approach, China famously banned ICOs in 2017 stating: (1) that token sales were illegal, and that relevant agencies would monitor developments and enforce the law by prosecuting suspects; (2) that no organization or individual was allowed to engage illegally in financing by issuing tokens; (3) that token exchanges should not engage in trading of legal tender and tokens or virtual currencies with one another, buy or sell tokens or virtual currency, or provide services such as pricing; (4) banks and non-bank financial institutions must not engage in business related to token sales; (5) the public should be highly vigilant of the potential risks of the sale and trading of tokens; and (6) industry organizations should fully perform their self-regulatory role.<sup>145</sup>

## 5. Kenya

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<sup>140</sup> Ashley Alder, Fintech: a regulatory strategy for a dynamic industry, Keynote Speech at H.K. FinTech Week 2019 (Nov. 6, 2019), [https://www.sfc.hk/web/EN/files/ER/PDF/Speeches/Ashley\\_FinTech\\_Week\\_speech.pdf](https://www.sfc.hk/web/EN/files/ER/PDF/Speeches/Ashley_FinTech_Week_speech.pdf).

<sup>141</sup> Huobi Global is the eighteenth largest crypto exchange by adjusted volume. *Top Cryptocurrency Spot Exchanges*, COINMARKETCAP, <https://coinmarketcap.com/rankings/exchanges/> (last visited April 20, 2020).

<sup>142</sup> Allen Scott, *Hong Kong Unveils New Rules for Cryptocurrency Exchanges*, COINTELEGRAPH (Nov. 6, 2019), <https://cointelegraph.com/news/hong-kong-regulator-to-unveil-new-cryptocurrency-exchange-rules>.

<sup>143</sup> David Pan, *Huobi Plans Backdoor IPO Attempt in Hong Kong, Document Suggests*, COINDESK (Sept. 12, 2019), <https://www.coindesk.com/huobi-plans-backdoor-ipo-attempt-in-hong-kong-document-suggests>.

<sup>144</sup> Flora Xiao Huang & Horace Yeung, *Regulatory Co-operation between Securities Commissions: A Reflection from Hong Kong*, 1 CHINESE J. COMP. L. 112 (2013).

<sup>145</sup> Press Release, China Banking Reg. Comm'n (China), About prevention in the name of "virtual currency" and "blockchain" (Aug. 24, 2018), <http://www.cbrc.gov.cn/chinese/newShouDoc/02DD1CADB1AC45DF948E3AD36F93BEDD.html>.

Kenya is one of Sub-Saharan Africa's leading players in the FinTech industry.<sup>146</sup> The main regulatory agencies in Kenya are the Capital Markets Authority ("CMA")<sup>147</sup> and the Central Bank of Kenya ("CBK").<sup>148</sup> We have found only one case in which the CMA publicly warned investors against a Kenicoin ICO offered by Wiseman Talent Ventures. The warning resulted in an unusual court case – the warned company brought suit against the CMA for damages related to the warning. The Kenyan high court, however, ruled in favor of the CMA on the grounds that Wiseman failed to establish a *prima facie* case.<sup>149</sup> The CMA has not brought an enforcement action against the company and is investigating further.

The CBK is the monetary authority of Kenya. We have not found any enforcement actions by the CBK. The CBK, however, did issue a general warning addressed to the public to exercise caution regarding Bitcoin and other virtual currencies.<sup>150</sup>

Kenya seems to have been slow in designing regulations related to FinTech, as is demonstrated by the regulatory actions concerning M-Pesa, a mobile phone-based money transfer service, payments, and micro-financing system.<sup>151</sup> M-Pesa initially launched in 2007, and the Central Bank of Kenya issued a letter of no objection which allowed M-Pesa to operate without regulation. The relevant statutes, the National Payment System Act and the National Payment Systems Regulations, were enacted only several years later - in 2011 and 2014, respectively.<sup>152</sup>

## 6. Singapore

Singapore has been very active in attracting crypto-related companies to incorporate in Singapore.<sup>153</sup> The main regulator in Singapore is the Monetary Authority of Singapore ("MAS").<sup>154</sup> The MAS has taken the position that token issuers, intermediaries, and platforms that facilitate ICOs and digital token trading are responsible for ensuring that they comply with the relevant laws. The MAS's leadership stated that while there is no regulation for ICOs specifically, if there are

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<sup>146</sup> Anton Didenko, *Regulating FinTech: Lessons from Africa*, 19 SAN DIEGO INT'L L.J. 311 (2018).

<sup>147</sup> Capital Markets Auth. (Kenya), <https://www.cma.or.ke/> (last visited May 22, 2020).

<sup>148</sup> Central Bank of Kenya (Kenya), <https://www.centralbank.go.ke/> (last visited May 22, 2020).

<sup>149</sup> Press Release, Capital Markets Auth., CMA warns against Kenicoin initial coin offering and trading (Jan. 3, 2019), [https://www.cma.or.ke/index.php?option=com\\_content&view=article&id=509:cma-warns-against-kenicoin-initial-coin-offering-and-trading&catid=12&Itemid=207](https://www.cma.or.ke/index.php?option=com_content&view=article&id=509:cma-warns-against-kenicoin-initial-coin-offering-and-trading&catid=12&Itemid=207).

<sup>150</sup> Kenya's CBK announced, for instance, in a statement that Bitcoin and other similar products are not legal tender and therefore not regulated. Public Notice, Central Bank of Kenya, Caution to the Public on Virtual Currencies such as Bitcoin (Dec. 2015), [https://www.centralbank.go.ke/images/docs/media/Public\\_Notice\\_on\\_virtual\\_currencies\\_such\\_as\\_Bitcoin.pdf](https://www.centralbank.go.ke/images/docs/media/Public_Notice_on_virtual_currencies_such_as_Bitcoin.pdf).

<sup>151</sup> See *infra* endnote 202202.

<sup>152</sup> *Id.*

<sup>153</sup> Mariela Naydenova, *MAS introduces new PSA framework for the crypto sector*, LEAPRATE.COM (JAN. 28, 2020), <https://www.leaprate.com/cryptocurrency/regulation-cryptocurrency/mas-introduces-new-psa-framework-for-the-crypto-sector/>.

<sup>154</sup> Monetary Auth. Of Singapore (Sing.), <https://www.mas.gov.sg/> (last visited June 28, 2020).

violations of the Securities and Futures Act (“SFA”),<sup>155</sup> the MAS “will take firm action.”<sup>156</sup>

On the cryptocurrency side, Singapore has enacted the 2020 Payments Services Act (“PSA”),<sup>157</sup> which enables Singapore’s Central Bank to control any payment systems it considers “crucial to financial stability.”<sup>158</sup> The PSA also provides for licensing and regulation of entities that fall under the PSA.<sup>159</sup>

There is yet to be an enforcement action against non-registered or illegally operating crypto-based companies under this new statute. It is also important to note potential jurisdictional overlaps resulting from the hybrid nature of some cryptoassets that may serve for payment purposes and represent securities.<sup>160</sup> Namely, while the PSA may capture many activities of cryptocurrencies, the MAS’s Guide to Digital Tokens Offering states that if a token or cryptocurrency falls under the definition of “capital markets products,” it will be subject to the SFA.<sup>161</sup>

On the white-collar-crime side, although Singapore has similar laws and regulations as Australia, its enforcement is vastly different.<sup>162</sup> For instance, Australia’s regulators tend to rely on criminal prosecution and relevant remedies. In contrast, Singapore enforces with civil penalties.<sup>163</sup>

The MAS has issued warnings against eight crypto-exchanges and one ICO issuer to comply with the laws and regulations. The eight crypto-exchanges and the ICO issuer were anonymous and remained unnamed in the press release and the following media releases. The MAS successfully halted a Security Token Offering for a regulatory breach until the issuer can meet the regulatory requirements.<sup>164</sup>

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<sup>155</sup> Securities and Futures Act, Chapter 289, <https://sso.agc.gov.sg/Act/SFA2001> (last visited Jan. 20, 2020).

<sup>156</sup> Press Release, Monetary Auth. Of Singapore, MAS warns Digital Token Exchanges and ICO Issuer (May 24, 2018), <https://www.iosco.org/library/ico-statements/Singapore%20-%20MAS%20-%20Warning%20Regarding%20Digital%20Token%20Exc-hanges%20and%20ICO%20Issuers.pdf>.

<sup>157</sup> Enacted in 2018, the PSA became effective on January 28, 2020. Payment Services Act of 2019 (Feb. 22, 2019), <https://sso.agc.gov.sg/Acts-Supp/2-2019/Published/20190220?DocDate=20190220>.

<sup>158</sup> Payment Services Bill: Bill No. 48/2018, SING. STATUSES ONLINE (Nov. 19, 2018), <https://sso.agc.gov.sg/Bills-Supp/48-2018/Published/20181119?DocDate=20181119>; *see also* Stephen O’Neal, *Singapore AML Framework Can Attract Crypto Businesses, Not Chase It Away*, COIN360 (Feb 6, 2020), <https://cointelegraph.com/news/singapore-aml-framework-can-attract-crypto-businesses-not-chase-it-away>.

<sup>159</sup> Press Release, Monetary Auth. Of Singapore, Payment Services Act Comes Into Force (Jan. 28, 2020) <https://www.mas.gov.sg/news/media-releases/2020/payment-services-act-comes-into-force>.

<sup>160</sup> On the hybrid nature of tokens, *see, e.g.*, Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets*, 70 HASTING L.J. 463, 470-85 (2019); Guseva, *DAOs, DAPPs*, *supra* note 54.

<sup>161</sup> Guidance, Monetary Auth. of Singapore, A guide to Digital Token Offerings (Dec. 23, 2019), <https://www.mas.gov.sg/-/media/MAS/Sectors/Guidance/Guide-to-Digital-Tokens-Offering---23-Dec-2019.pdf>.

<sup>162</sup> Bromberg et. al., *supra* note 107.

<sup>163</sup> *Id.*

<sup>164</sup> Press Release, Monetary Auth. of Singapore, MAS halts Securities Token Offering for regulatory breach (Jan. 24, 2019), <https://www.mas.gov.sg/news/media-releases/2019/mas-halts-securities-token-offering-for-regulatory-breach>.

Table 11 - Total Actions in Singapore

Type	ICO Issuer	STO Issuer
Offering Halted	9	1
Warning/Blacklisted		1

## 7. The United Kingdom

Previous research often compared the regulatory intensity in the United States and the United Kingdom.<sup>165</sup> Not only do the two jurisdictions share the same legal origin, but also both are major financial centers which include crypto-markets. The primary crypto regulator in the UK is the Financial Conduct Authority (“FCA”).<sup>166</sup> In its 2019 Guidance, the FCA taxonomized cryptoassets into three categories: exchange tokens, security tokens, and utility tokens.<sup>167</sup> As defined in the 2019 Guidance, exchange tokens are “not issued or backed by a central authority and are used as a means of exchange,” security tokens are tokens that “meet the definition of a specified investment and are within the perimeter,” and utility tokens “grant holders access to products or services and do not grant holders the same rights as those with security tokens.”<sup>168</sup>

Exchange tokens are usually outside the jurisdiction of the FCA, whereas security tokens are within its authority. According to the FCA’s website, exchange tokens are only regulated for purposes of preventing money laundering.<sup>169</sup> Otherwise, if they fall within the scope of the Financial Services and Markets Act,<sup>170</sup> exchange tokens will be regulated as securities. Utility tokens, depending on the facts and circumstances, may fall within the purview of the financial regulations.

The FCA has enforcement authority. For instance, it may conduct civil and criminal investigations regarding AML violations.<sup>171</sup> In crypto, according to some media outlets, the UK has taken a “watchful” approach.<sup>172</sup> The FCA created a warning

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<sup>165</sup> Coffee, *supra* note 17; *Impact of Enforcement*, *supra* note 13.

<sup>166</sup> Fin. Conduct Auth. (U.K.), <https://www.fca.org.uk/> (last visited May 6, 2020).

<sup>167</sup> Fin. Conduct Auth., *Guidance on Crypto Assets* (Jan. 2019), <https://www.fca.org.uk/publication/consultation/cp19-03.pdf>.

<sup>168</sup> *Id.*

<sup>169</sup> Fin. Conduct Auth., *Find out about the regulation of cryptoassets (including 'cryptocurrencies' such as Bitcoin and Litecoin) and the risks of investing*, FCA: CRYPTOASSETS (July 3, 2019), <https://www.fca.org.uk/consumers/cryptoassets>.

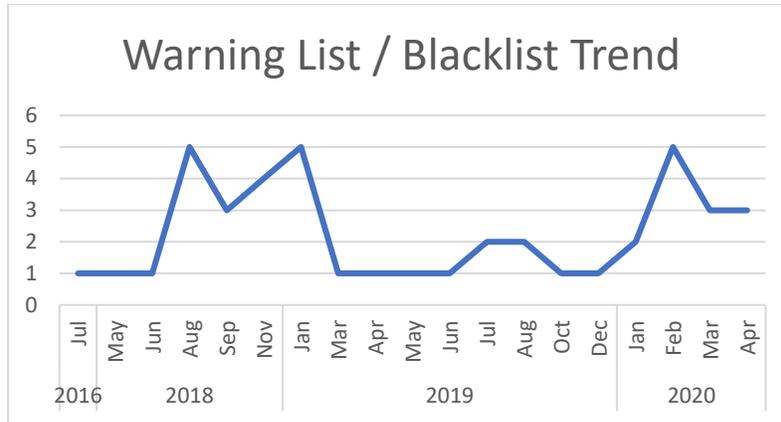
<sup>170</sup> Financial Services and Markets Act 2000, <http://www.legislation.gov.uk/ukpga/2000/8/contents>.

<sup>171</sup> Grania Langdon-Down, *Balancing Act*, L. SOCIETY GAZETTE (July 29, 2019), <https://www.lawgazette.co.uk/features/balancing-act/5071145.article>; Guidance, Fin. Conduct Auth., *Money Laundering Regulations* (Dec. 23, 2019), <https://www.fca.org.uk/firms/financial-crime/money-laundering-regulations>.

<sup>172</sup> Aziz Abdel-Qader, *FCA Approves Blockchain, Crypto Firms for 4th Cohort of Regulatory Sandbox*, FINANCE MAGNATES (Mar. 7, 2018), <https://www.financemagnates.com/cryptocurrency/innovation/fca-approves-blockchain-crypto-firms-4th-cohort-regulatory-sandbox/>.

list of unauthorized firms and individuals.<sup>173</sup> Among the identified entities are 43 firms that are related to cryptocurrencies.

Figure 7 - Warnings and Blacklisted Firms by Year



It is unclear based on the warning list whether any action has been brought against these entities. Our search for media articles resulted in news articles indicating that seven entities were either unregistered broker-dealers or acted in the capacity of a broker-dealer, and one entity, BitMex, was a crypto-exchange. Table 10 summarizes the results. Category “Other” mainly includes “clone firms” that falsely associated with registered firms.

Table 12 - Total Actions in the United Kingdom

Year	Month	BROKER-DEALER	CRYPTO-EXCHANGE	OTHER (SPECIFY IN COLUMN G)
2017	Jan			1
2018	May			1
	Jun			1
	Aug			6
	Sep			5
	Nov			5
	2019	Jan		
Mar				1
Apr				1
May				1
Jun				2
Jul				5
Aug		2		
Oct		1		
Dec		1		
2020	Jan	1		1
	Feb	1		4
	Mar		1	4
	Apr	1		2
Grand Total		7	1	45

<sup>173</sup> *Unauthorised Firms and Individuals*, FIN. CONDUCT AUTH., <https://www.fca.org.uk/consumers/unauthorised-firms-individuals> (last visited Jun 22, 2020).

## G. Civil Law Jurisdictions

### 1. France

In France, the AMF<sup>174</sup> is the organization that has been monitoring crypto-related entities. France adopted the Plan d'Action pour la Croissance et la Transformation des Entreprises (“PACTE” - Action Plan for Business Growth and Transformation) on April 11, 2019.<sup>175</sup> The PACTE aims to provide a regulatory framework to innovate, transform, grow, and create jobs.<sup>176</sup> The regulations provide for optional and mandatory licensing and specify the type of funds that can invest in cryptoassets. Broker-dealers, custodians and similar financial service providers can apply for optional licensing with the AMF, whereas service providers that sell digital assets in exchange for fiat or other legal tender are subject to mandatory registration.<sup>177</sup>

As part of the registration process, France’s AMF created a procedure for examination for ICO issuers to apply for approval.<sup>178</sup> The AMF granted its first approval in late 2019 to a French ICO that developed a platform for fundraising in cryptoassets.<sup>179</sup>

The AMF’s rulemaking is subject to approval by the Ministry of Finance and, consequently, allows the central government to control securities regulation.<sup>180</sup> Recall that, by contrast, the SEC and the CFTC are independent government agencies. Generally, in jurisdictions where the central government is dominant, there have been

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<sup>174</sup> Autorité Des Marchés Financiers (Can.), <https://lautorite.qc.ca/> (last visited June 24, 2020).

<sup>175</sup> Plan d'Action pour la Croissance et la Transformation des Entreprises (PACTE) (Fr.), *Action Plan for Business Growth and Transformation* (Apr. 12, 2019), <https://www.gouvernement.fr/action/pacte-le-plan-d-action-pour-la-croissance-et-la-transformation-des-entreprises>. AMF, Procedure for Examination of the Application and Establishment of an Information Document for Approval by the AMF of an Initial Coin Offering, DOC-2019-06 (Jun. 6, 2019) [https://doctrine.amf-france.org/en\\_US/Reglementation/Doctrine/Doctrine-list/Doctrine?docId=workspace%3A%2F%2FSpacesStore%2Faf1f24bd-6d7b-4386-aa4b-f1fb69ea877f&category=I+-+Issuers+and+financial+disclosure](https://doctrine.amf-france.org/en_US/Reglementation/Doctrine/Doctrine-list/Doctrine?docId=workspace%3A%2F%2FSpacesStore%2Faf1f24bd-6d7b-4386-aa4b-f1fb69ea877f&category=I+-+Issuers+and+financial+disclosure); see generally CFA INST., INITIAL COIN OFFERINGS – TOO SOON OR TOO LATE? (Nov. 2019), <https://www.cfainstitute.org/-/media/documents/article/position-paper/initial-coin-offerings.ashx>.

<sup>176</sup> See PACTE, Action Plan for Business Growth and Transformation, *supra* (detailing the plan to grow jobs by “removing all the barriers that complicate... the means to innovate to succeed.”).

<sup>177</sup> Baptiste Gelpi & Marie-Agnes Guillemare-Grilo, *European Union: The Pacte Act: Changes Impacting French Financial Law*, MONDAQ (July 12, 2019), <https://www.mondaq.com/commoditiesderivativesstock-exchanges/825254/the-pacte-act-changes-impacting-french-financial-law>.

<sup>178</sup> Autorité Des Marchés Financiers, *Procedure for Examination of the Application and Establishment of an Information Document for Approval by the AMF of an Initial Coin Offering* (June 6, 2019), file:///C:/Users/kgscu/Downloads/Procedure%20for%20examination%20of%20the%20application%20and%20establishment%20of%20an%20information%20document%20for%20approval%20by%20the%20AMF%20on%20an%20initial%20coin%20offering.pdf.

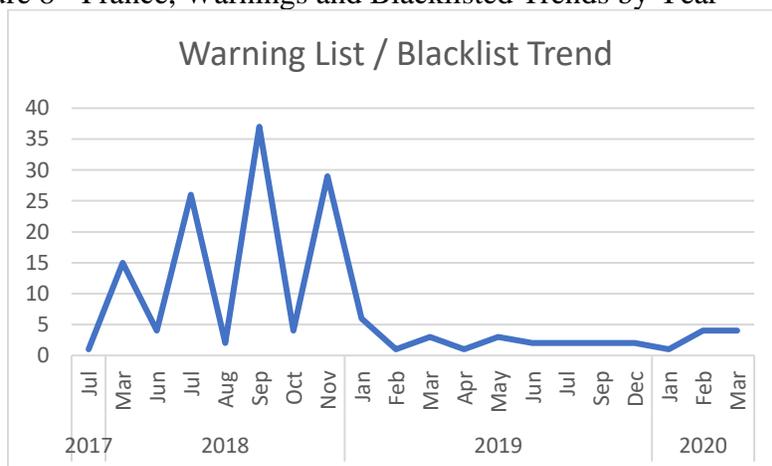
<sup>179</sup> Press Release, Autorité Des Marchés Financiers, *The AMF grants its first optional approval to an initial coin offering (ICO)* (Dec. 19, 2019), <https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/amf-grants-its-first-optional-approval-initial-coin-offering-ico>.

<sup>180</sup> Stavros Gadinis & Howell E. Jackson, *Markets as Regulators: A Survey*, 80 S. Cal. L. Rev. 1239 (2007).

fewer enforcement actions brought by regulators.<sup>181</sup> Our data suggest a similar conclusion with regards to AMF’s crypto-related actions: instead of enforcement actions, the AMF’s primary tool for deterring securities violations has been warning lists.<sup>182</sup>

Although the AMF has issued numerous warnings to investors regarding unauthorized and unregulated foreign exchanges, there were no cases or administrative procedures that resulted in fines, other penalties, or disgorgements.<sup>183</sup> The AMF is actively adding unauthorized companies and websites, that include potential scams and potentially harmful websites, on its warnings and blacklists page.<sup>184</sup>

Figure 8 - France, Warnings and Blacklisted Trends by Year



The AMF does not specify the difference between a warning and a blacklist. However, the URLs of a majority of the warning/blacklisted entities are no longer in operation. The list may have affected the companies’ website closings, or it may simply be because the scams were no longer active. In addition, the reasons for being placed on the list are unclear. Many of the entities and/or websites are no longer operational, making it difficult to identify the reason for being added to the list.

As shown in Table 3.1 and Figure 3, there were 121 entities added to the list that we were unable to identify by either their websites or media releases relating to specific entities. Our data also illustrate that the AMF’s additions to the warning/blacklist were higher in 2018 and slowed down in 2019-2020. Of the researched regulatory agencies for any jurisdiction, the AMF was the only regulator that had a separate search function for crypto-related companies. Table 13 details the types of entities included in the warnings and blacklists.

<sup>181</sup> Gadinis & Jackson, *supra* note 180.

<sup>182</sup> See Figure 9.

<sup>183</sup> See, e.g., Autorité Des Marchés Financiers, Warnings and blacklists of unauthorized companies and websites: Forex, binary options, miscellaneous goods, crypto-assets derivatives, usurpations, <https://www.amf-france.org/en/warnings/warnings-and-blacklists> (last visited \_\_Jun. 6, 2020).

<sup>184</sup> *Id.*

Table 13 – Autorite des Marches Financiers Chart by Type and Year.

Year	Month	BROKER-DEALER	CRYPTO-EXCHANGE	ICO ISSUER	OTHER
2017	Jul				1
	Mar		1		14
2018	Jun				4
	Jul				26
	Aug				2
	Sep	4	1		32
	Oct	1			3
	Nov	2	1	1	25
	Dec				
2019	Jan	3		1	2
	Feb	1			
	Mar	1			2
	Apr				1
	May	2			1
	Jun	2			
	Jul				2
	Sep	1	1		
	Dec	1	1		
2020	Jan				1
	Feb	3			1
	Mar				8
Grand Total		21	5	2	125

## 2. Luxembourg

Luxembourg’s Commission de Surveillance du Secteur Financier<sup>185</sup> is the government entity that is monitoring the financial sector. Although Luxembourg does not have any specific cryptocurrency laws, the country uses its already established market abuse regulation to control fraud and has updated its securities infrastructure regulations to enable the use of new technologies.<sup>186</sup> On February 14, 2019, Luxembourg’s parliament passed a bill creating a framework for blockchain and similar technology in financial markets.<sup>187</sup>

<sup>185</sup> Warning concerning the website <http://fundrockcrypto.com>, COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER (Lux.) (Oct. 22, 2019), <https://www.cssf.lu/en/2019/10/warning-concerning-the-website-http-fundrockcrypto-com/>.

<sup>186</sup> See, e.g., Regulation (EU) 596/2014 on market abuse on Commission de Surveillance du Secteur Financier: Regulatory Framework; *Luxembourg publishes draft law n°7637 on the issuance of dematerialized securities using distributed ledger technology*, DELOITTE (Aug. 6, 2020), <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/IM/lu-rna-luxembourg-draft-law-7637-issuance-dematerialized-securities.pdf> (detailing the contents of Bill 7363); see also *Bill 7637 – Luxembourg adds the missing piece for the issuance and circulation of blockchain securities*, ALLEN & OVERY LLP (Aug. 5, 2020), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/bill-7637-luxembourg-adds-the-missing-piece-for-the-issuance-and-circulation-of-blockchain-securities>.

<sup>187</sup> Chambre Des Députés Du Grand-Duché de Luxembourg (Lux.), *Securities Circulation via Blockchain*, (Feb. 14, 2019), [https://www.chd.lu/wps/portal/public/Accueil/Actualite/!ut/p/z1/04\\_Sj9CPykyssy0xPLMnMz0vMAfIj08ziXYxcwoI8TYwM\\_F2DzQyMjAOMHYOCjQwMDEz0wwkpiAJKG-AAjgZA\\_VFY1DgaOAUZORkbGLj7G2FVgGJGQW6EQaajoiIAzgGPSw!!/?1dmy&page=6\\_D2DVRI420G7Q402JEJ7USN38D6&uril=wcm%3Apath%3A%2Factualite.public.chd.lu%2Fst-www.chd.lu%2Fsa-actualites%2Fa27dec72-f1fa-4858-acf9-cf62ecbee781](https://www.chd.lu/wps/portal/public/Accueil/Actualite/!ut/p/z1/04_Sj9CPykyssy0xPLMnMz0vMAfIj08ziXYxcwoI8TYwM_F2DzQyMjAOMHYOCjQwMDEz0wwkpiAJKG-AAjgZA_VFY1DgaOAUZORkbGLj7G2FVgGJGQW6EQaajoiIAzgGPSw!!/?1dmy&page=6_D2DVRI420G7Q402JEJ7USN38D6&uril=wcm%3Apath%3A%2Factualite.public.chd.lu%2Fst-www.chd.lu%2Fsa-actualites%2Fa27dec72-f1fa-4858-acf9-cf62ecbee781).

The Commission de Surveillance du Secteur Financier appears to be open to market experimentation, testing, and piloting.<sup>188</sup> This enabling approach is supported by the rare instances of warnings. Although, similar to France, Luxembourg has been warning its citizens<sup>189</sup> about investing in unauthorized and unregulated crypto-related entities, the country did not have any cases or any administrative proceedings against crypto-entities between mid-2017 and April 2020.

Figure 9 - Warnings in Luxembourg

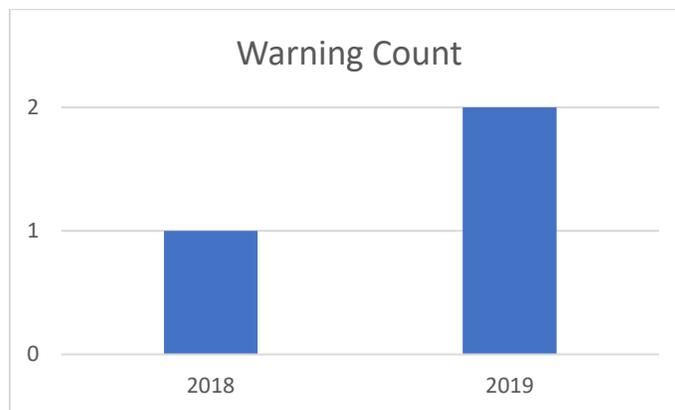


Table 14 - Warnings in Luxembourg by Year and Types of Entities

Year	Month	CRYPTO-EXCHANGE
2018	Aug	1
2019	Aug	1
	Oct	1
Grand Total		3

### 3. Malta

Malta is another leading crypto-jurisdiction. The primary regulator in the country is the Malta Financial Services Authority (“MFSA”).<sup>190</sup> The country has been at the forefront of legislative innovations addressing blockchain technology and

<sup>188</sup> Jelena Madir, *Should all regulators set up a regulatory sandbox?*, 11 JIBFL 710 (2018).

<sup>189</sup> Warning, Commission de Surveillance du Secteur Financier (Oct. 22, 2019), [http://www.cssf.lu/fileadmin/files/Protection\\_consommateurs/Avertissements/W\\_fundrockcrypto\\_22\\_1019\\_en.pdf](http://www.cssf.lu/fileadmin/files/Protection_consommateurs/Avertissements/W_fundrockcrypto_22_1019_en.pdf).

<sup>190</sup> Malta Fin. Services Auth. (Malta), <https://www.mfsa.mt/> (last visited June 22, 2020).

cryptocurrencies.<sup>191</sup> It is also one of the major markets for cryptocurrency and cryptocurrency trading.<sup>192</sup>

In 2018, the Parliament of Malta enacted the Virtual Financial Assets Act (“VFA”).<sup>193</sup> The VFA sets forth the regulatory framework for ICOs and addresses blockchain technology and cryptocurrencies.<sup>194</sup> Part of the VFA requires that (1) initial VFA offerings be preceded by registration of a whitepaper that complies with the requirements of the Act, (2) the issuer appoint a “VFA agent” to address regulatory issues, who can be a lawyer, accountant, or auditor authorized in Malta or in another recognized jurisdiction, or from any other class of persons deemed to possess suitable expertise, and (3) VFAs be traded on a “VFA exchange” operating in or from Malta, which is licensed, on which only VFAs may be transacted.<sup>195</sup> The statutory goal of the VFA is to assist issuers and investors.<sup>196</sup>

The MFSA also came out with the “Financial Instrument Test,”<sup>197</sup> which is used to determine “whether a Distributed Ledger Technology (‘DLT’) asset falls under: (1) the existing Financial Services legislation (e.g. MiFID), (2) the proposed Virtual Financial Assets Act (‘VFAA’) or, (3) is otherwise exempt.”<sup>198</sup> Moreover, the MFSA has established a registration system for agents, whitepapers, and VFA Service Providers.<sup>199</sup>

Despite its legislative and regulatory reforms, Malta’s enforcement was much more lenient than in the U.S. and a number of other jurisdictions discussed in this Article. The MFSA has issued numerous warnings against foreign crypto-

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<sup>191</sup> Malta Digital Innovations Authority Act (http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29080&l=1); Malta Innovative Technology Arrangements and Services Act (http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12874&l=1); Malta Virtual Financial Assets Act (http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12872&l=1); See MALCOLM FALZON & ALEXIS VALENZIA, BLOCKCHAIN & CRYPTOCURRENCY REGULATIONS 2020, MALTA, (Global Legal Insights, 2020), <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/malta>.

<sup>192</sup> See generally Aaron Hankin, *This Country Leads the World in Crypto Trading- and It Isn't the One You Think*, MARKETWATCH (Jan. 17, 2019), <https://www.marketwatch.com/story/this-country-leads-the-world-in-crypto-trading-and-it-isnt-the-one-you-think-2019-01-17>.

<sup>193</sup> Nru. 44 (May 5, 2018), <https://parlament.mt/media/94209/bill-44-virtual-financial-assets-bill.pdf>.

<sup>194</sup> *Id.*

<sup>195</sup> Vanessa Villanueva Collao, & Verity Winship, *The New ICO Intermediaries*, 5 ITALIAN L. J. 731 (2019), University of Illinois College of Law Legal Studies Research Paper No. 20-12 (Feb. 18, 2020), <https://ssrn.com/abstract=3540250>.

<sup>196</sup> *Virtual Financial Assets*, Malta Fin. Services Auth., <https://www.mfsa.mt/fintech/virtual-financial-assets/> (last visited \_\_\_\_\_, 2020).

<sup>197</sup> *Financial Instrument Test Guidelines*, Malta Fin. Services Auth., [https://www.mfsa.mt/wp-content/uploads/2019/05/VFAG\\_FITest\\_1.02.pdf](https://www.mfsa.mt/wp-content/uploads/2019/05/VFAG_FITest_1.02.pdf).

<sup>198</sup> Francesco Sultana et al., *Malta: The Financial Instrument Test*, MONDAQ (Aug. 28, 2018), <https://www.mondaq.com/fin-tech/731004/the-financial-instrument-test>.

<sup>199</sup> See Table 7.

exchanges<sup>200</sup> but has not filed complaints or commenced administrative proceedings against any entities. The following Table summarizes the types of entities against whom the MFSA issued the warnings.

Table 15 - Annual Warnings in Malta, Types of Entities

Row Labels	2018	2019	Grand Total
Crypto-Exchange		2	2
ICO Issuer	1	1	2
Broker-Dealer		5	5
Grand Total	1	8	9

#### 4. South Korea

South Korea is another important crypto-jurisdiction. Its primary regulators are the Financial Supervisory Services (“FSS”),<sup>201</sup> the Financial Services Commission (“FSC”),<sup>202</sup> and the Korea Financial Intelligence Unit (“KoFIU”).<sup>203</sup> The main applicable laws and regulations are the Act on Reporting and Using Specified Financial Transaction Information<sup>204</sup> and the Financial Investment Services and Capital Markets Act.<sup>205</sup>

On March 5, 2020, South Korea passed an amendment to the Act on Reporting and Use of Specific Financial Information with the purpose to provide a framework for reporting and use of specified financial transactions, *i.e.*, cryptoassets, to help prevent financial crimes, promote a transparent financial system, and prevent money laundering and terrorist financing.<sup>206</sup>

Although it took nearly two years of deliberation, the Act is promising in being able to provide a stable framework.<sup>207</sup> Crypto-exchanges, wallet providers, and ICO issuers are required by law to use the principals’ actual names in a verification process

<sup>200</sup> See Table 9; see also *Investor Alerts Portal*, Int’l. Org. of Secs. Comm’n, [https://www.iosco.org/investor\\_protection/?subsection=investor\\_alerts\\_portal](https://www.iosco.org/investor_protection/?subsection=investor_alerts_portal) (last visited \_\_\_\_\_, 2020) (listing warnings against crypto-related entities from Malta); see, e.g., *MFSA Warning- Crypto Foxtrades- Unlicensed Exchange*, Malta Fin. Services Auth. (Mar. 25, 2020), <https://www.mfsa.mt/news-item/mfsa-warning-crypto-foxtrades-unlicensed-exchange/>.

<sup>201</sup> Fin. Supervisory Services (S. Kor.), <http://www.fss.or.kr/fss/eng/main.jsp> (last visited June 28, 2020).

<sup>202</sup> Fin. Secs. Comm’n (S. Kor.), <http://meng.fsc.go.kr/?c=main> (last visited June 28, 2020).

<sup>203</sup> Korea Fin. Intelligence Unit (S. Kor.), <https://www.kofiu.go.kr/eng/sub1/1.jsp> (last visited June 28, 2020).

<sup>204</sup> See Section F(6).

<sup>205</sup> Financial Investment Services and Capital Markets Act, Act No. 8635 (Aug. 3, 2007), as amended by Act No. 8852, Feb. 29, 2008 (S. Kor.), translated in Korea Legislation Research Institute online database, <https://www.fsc.go.kr/downManager?bbsid=BBS0087&no=106389>.

<sup>206</sup> Act on Reporting and Using Specified Financial Transaction Information, Act No. 14839 (Jul. 26, 2017), [https://elaw.klri.re.kr/kor\\_service/lawView.do?lang=ENG&hseq=44449](https://elaw.klri.re.kr/kor_service/lawView.do?lang=ENG&hseq=44449).

<sup>207</sup> Brian Newar, *Last Full Session for Amendment to Special Reporting Act Tomorrow*, THE NEWS ASIA (Mar. 4, 2020), <https://thenews.asia/last-full-session-for-amendment-to-special-reporting-act-tomorrow/>.

with a bank that has been approved by the regulators.<sup>208</sup> Additionally, crypto-related businesses must be certified by the Korea Information Security Agency (“KISA”). The KISA will provide information security management system certifications.

Before the amendment, Korea’s FSC and FSS took the stance that ICOs and crypto-lending were prohibited.<sup>209</sup> Yet, South Korea’s FSS and KoFIU were not distinctly active in commencing enforcement actions. They did, however, start an investigation of six commercial banks, as shown in the Table below, involved in cryptocurrency exchanges regarding whether they had certain internal controls and risk assessment procedures concerning money laundering. Local authorities also investigated/raided UpBit, one of largest-by-volume crypto-exchanges in the world. However, no charges were brought against the entity.<sup>210</sup>

Historically, South Korea’s regulatory agencies and legislation have relied on criminal and enforcement mechanisms, including breach of fiduciary duty as a criminal action.<sup>211</sup> And South Korea’s agencies have involved police authorities in crypto-related enforcement cases.

Table 15 - List of Actions in South Korea

Organization	Action	Result
NH Bank	Investigation by KoFIU and FSS	No action taken. Investigation Complete
Industrial Bank of Korea	Investigation by KoFIU and FSS	No action taken. Investigation Complete
Shinhan Bank	Investigation by KoFIU and FSS	No action taken. Investigation Complete
Kookmin Bank	Investigation by KoFIU and FSS	No action taken. Investigation Complete
Woori Bank	Investigation by KoFIU and FSS	No action taken. Investigation Complete
Korea Development Bank	Investigation by KoFIU and FSS	No action taken. Investigation Complete
UpBit	Investigation by local authorities	Raided corporate offices. No charges.

South Korean regulators have also focused on stricter AML compliance and have explored blockchain solutions in enforcing AML procedures.<sup>212</sup> Among the solutions is the use of the Sentinel Protocol, which includes the Interactive

<sup>208</sup> Korea’s regulators have also stated that their intention to have banks involved in the process in order to identify bad actors through their real name, which is apparent by the new amendment. Press Release, Fin. Services Comm’n, Financial Measures to Curb Speculation in Cryptocurrency Trading (Jan. 23, 2018), [http://meng.fsc.go.kr/common/pdfjs/web/viewer.html?file=/upload/press1/20180129185559\\_dd6b4ef5.pdf](http://meng.fsc.go.kr/common/pdfjs/web/viewer.html?file=/upload/press1/20180129185559_dd6b4ef5.pdf).

<sup>209</sup> Yuji Nakamura & Sam Kim, *Cryptocurrencies Drop as South Korea Bans ICOs, Margin Trading*, BLOOMBERG (Sept. 27, 2017), <https://www.bloomberg.com/news/articles/2017-09-29/cryptocurrencies-drop-as-south-korea-bans-icos-margin-trading>.

<sup>210</sup> Press Release, Fin. Services Comm’n, KoFIU and FSS Inspect Banks Over Cryptocurrency Trading Accounts (Jan. 8, 2020), <https://www.fsc.go.kr/downManager?bbsid=BBS0048&no=122667>; see also Kem, *South Korea to Cooperate with China and Japan on Regulation*, CRYPTONEWS (Feb. 6, 2018) <https://www.crypto-news.net/south-korea-to-cooperate-with-china-and-japan-on-regulation/>.

<sup>211</sup> Young-Cheol David K. Jeong, *Charting Corporate and Financial Governance in Korea in the New Decade*, 2 JINDAL GLOBAL L. REV. 99 (2011).

<sup>212</sup> Sentinel Protocol Team, *The new ‘Crypto-AML Solution’ has been launched via collaboration between Sentinel Protocol and OCTA Solution*, MEDIUM (June 3, 2019), <https://medium.com/sentinel-protocol/the-new-crypto-aml-solution-has-been-launched-via-collaboration-between-sentinel-protocol-and-cfd9564b0f2d>.

Cooperation Framework (ICF) API 2.0 and Crypto Analysis Transaction Visualization (CATV) tool.<sup>213</sup> The ICF API<sup>214</sup> will essentially allow regulators to access ICF’s risk management tools for cryptocurrency AML, regulatory compliance, and cybersecurity, which includes crowdsourced blacklisted digital-asset addresses of reported fraudsters. A software that has integrated the ICF API will automatically include and block these blacklisted digital-asset addresses, which would help enforcers trace the public blockchain ledger for the nefarious actors the regulators are targeting. The effect of these developments on future enforcement is indeterminable at this time.

## 5. Switzerland

In September 2017, the Swiss Financial Market Supervisory Authority (“FINMA”)<sup>215</sup> observed that ICOs varied in structure and that some aspects of ICOs could be covered by the existing regulations, including AML and terrorist financing regulations, banking law, securities trading regulation, and collective investment scheme legislation.<sup>216</sup>

The FINMA has been active in providing guidance on whether a cryptocurrency or token falls under the Swiss laws and regulations. The FINMA supplemented its 2017 guidance by issuing the 2018 Guidelines that provided further clarification.<sup>217</sup> The 2018 Guidelines outline the situations where a cryptocurrency or token may fall under the existing laws, such as when a cryptocurrency can be defined as a security under the Financial Market Infrastructure Act.

The FINMA also stated that it would begin investigating ICOs to determine if regulatory provisions were violated. In its guidelines on ICO procedures, the FINMA indicated that ICOs would be reviewed case by case:

ICOs raise a variety of legal issues for which there is no relevant case law and no consistent legal doctrine, and that FINMA will categorize tokens issued in ICOs into three types based on the underlying economic function of the token. These categories are not mutually exclusive, and hybrid forms are possible.<sup>218</sup>

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<sup>213</sup> *Id.*

<sup>214</sup> Application Programming Interface or “API” is a computing interface that allows interactions and integrations of different software to allow certain data can be called or requested between different software.

<sup>215</sup> *Swiss Financial Market Supervisory Authority*, FINMA, <https://www.FINMA.ch/en/> (last visited June 20, 2020).

<sup>216</sup> Guideline, FINMA, Regulatory treatment of initial coin offerings (September 29, 2017), <https://www.FINMA.ch/en/~media/FINMA/dokumente/dokumentencenter/myFINMA/4dokumentation/FINMA-aufsichtsmittelungen/20170929-FINMA-aufsichtsmittelung-04-2017.pdf?la=en&hash=9DCC5C1FF8F61C9AA9412FAD2D7C70533F341EF2>.

<sup>217</sup> *Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)*, FINMA (February 16, 2018), <https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf?la=en>.

<sup>218</sup> *Id.*

In 2018, the FINMA also announced that Fintech licenses could be obtained to allow firms to accept public deposits.<sup>219</sup> It issued a guidance to clarify the purpose and application process for obtaining the license.<sup>220</sup> The objective of the application process is to enable the FINMA to ascertain whether a proposed business plan fits within the existing and potential regulations. Scholars have observed that the FINMA pursues a “Do No Harm” approach with cryptocurrencies and that it is consistent with its “established tradition recognizing the importance of self-regulation as a tool beneficial for the markets.”<sup>221</sup>

Overall, the FINMA was one of the first regulators to establish a clear regulatory framework for cryptocurrencies.<sup>222</sup> Its regulatory framework spans the Financial Market Infrastructure Act,<sup>223</sup> the Banking Act,<sup>224</sup> the Collective Investment Schemes Act,<sup>225</sup> and the Anti-Money Laundering Act.<sup>226</sup>

Although the regulatory framework is clear, we cannot determine the intensity and magnitude of FINMA enforcement. On the one hand, the Swiss agency has been active in identifying shady firms and adding them to a large warning list.<sup>227</sup> On the other hand, three factors prevent us from drawing definitive conclusions on enforcement. First, the FINMA’s website does not release any details of the actions. Second, specific dates when the “warned” entities were added to the list were unavailable. Finally, when we attempted to identify the status of the entities on the warning list, we discovered that many of those firms had either dissolved or halted operations.

We attempted to find more information on the Internet using the keywords indicated in Section C and the FINMA’s warning list. We identified 37 of the warned entities as relating to cryptocurrencies and/or unlicensed financial services involving cryptocurrencies. Table 16 lists the identified types of businesses that were placed on the FINMA’s warning list.

Table 16 - Actions in Switzerland by Type of Entities

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<sup>219</sup> *To boost innovative financial companies, the Swiss parliament has introduced the new FinTech licence - a licence with relaxed requirements. FINMA is responsible for granting this licence*, FINMA, <https://www.FINMA.ch/en/authorisation/fintech/fintech-bewilligung/> (last visited June 22, 2020).

<sup>220</sup> Guideline, FINMA, For FinTech license applications pursuant to article 1b of the Banking Act (December 3, 2018) [https://www.FINMA.ch/en/~media/FINMA/dokumente/dokumentencenter/myFINMA/1bewilligung/fintech/w\\_bewilligungfintech\\_20181203\\_de.pdf?la=en](https://www.FINMA.ch/en/~media/FINMA/dokumente/dokumentencenter/myFINMA/1bewilligung/fintech/w_bewilligungfintech_20181203_de.pdf?la=en).

<sup>221</sup> Marco Dell’Erba, *From Inactivity to Full Enforcement: The Implementation of the “Do No Harm” Approach in Initial Coin Offerings*, 26 MICH. TECH. L. REV. 175 (2020).

<sup>222</sup> *Id.*

<sup>223</sup> See FinMIA, June 19, 2015, SR 958.1 (Switz.).

<sup>224</sup> See BankG, November 8, 1934, BBL 952.0 (Switz.).

<sup>225</sup> See CISA, June 23, 2006, SR 951.31 (Switz.).

<sup>226</sup> See AMLA, October 10, 1997, SR 955.0 (Switz.).

<sup>227</sup> Warnings List, FINMA, Public warning: is this provider authorised?, <https://www.FINMA.ch/en/FINMA-public/warning-list/> (last visited June 20, 2020).

Role	Count
Broker-Dealer	5
Crypto-Exchange	5
ICO Issuer	9
Other	18
Total	37

Among the 37, we were unable to find any information on the Internet about as many as 18 entities other than the FINMA warning. WHOIS<sup>228</sup> searches indicated that the entities were no longer in operation and the domains had been forfeited or domain registration had lapsed. Many of the entities listed on the FINMA’s warning list were either scams or unregistered entities. Media articles and broker scam websites, which review broker-dealers and other private funds for authenticity, have done private investigations with regard to the reliability of these firms and have reported that nearly all of the entities were unregistered and had false claims on their websites.<sup>229</sup>

The FINMA has not only issued a warnings list but also published its enforcement actions. For instance, it began a proceeding against Envion AG’s EVN Token. Envion accepted funds amounting to approximately 100 million francs from more than 30,000 investors. Details of any fines/penalties have not been found. However, Envion’s website states that the Swiss Cantonal Court of Zug has dissolved Envion AG and ordered its liquidation in order to compensate the investors.<sup>230</sup>

## 6. United Arab Emirates / Dubai

The primary crypto regulators in the UAE and Dubai are the Securities and Commodities Authority (“SCA”)<sup>231</sup> and the Abu Dhabi Global Market (“ADGM”).<sup>232</sup> The country’s regulatory framework has been modified to account for crypto-related developments.<sup>233</sup> In 2018, the ADGM’s crypto framework codified the governance,

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<sup>228</sup> WHOIS is a query and response protocol that is widely used for querying databases that store the registered users or assignees of an Internet resource, such as a domain name.

<sup>229</sup> *Cryptos Planet review - SCAM alert!*, TBBOB (August 15, 2019), <https://tbbob.com/scams/cryptos-planet-review-scam-alert>.

<sup>230</sup> *FINMA ascertains illegal activity by envion AG*, FINMA (March 27, 2019), <https://www.FINMA.ch/en/news/2019/03/20190327---mm---envion/>.

<sup>231</sup> Secs. & Commodities Auth. (U.A.E.), <https://www.sca.gov.ae/en/home.aspx> (last visited June 23, 2020).

<sup>232</sup> Abu Dhabi Global Market (ADGM) (U.A.E.), <https://www.adgm.com/> (last visited June 23, 2020).

<sup>233</sup> The main regulations provided by the Financial Services Regulatory Authority (FSRA) include Operating a Crypto Asset Business (OCAB). *Guidance – Regulation of Crypto Asset Activity in ADGM*, Fin. Services Reg. Auth. (U.A.E.) (June 25, 2018), <https://www.iosco.org/library/ico-statements/Abu%20Dhabi%20-%20FSRA%20-%20Guidance%20-%20Regulation%20of%20Crypto%20Asset%20Activities%20in%20ADGM.pdf>; *FSRA Regulations and FEES Rules (Virtual Assets)*, ADGM (February 24, 2020), <https://en.adgm.thomsonreuters.com/rulebook/24-february-fsra-regulations-and-fees-rules-virtual-assets>; *FSRA Rules (Virtual Assets)*, ADGM (February 24, 2020), <https://en.adgm.thomsonreuters.com/rulebook/24-february-2020-fsra-rules-virtual-assets>.

oversight, and need for transparency in crypto-related activities.<sup>234</sup> The guidance addresses the risks of cryptoassets and the concerns over money laundering, financial crimes, consumer protection, technology governance, custody, and exchange operations.

In February 2020, the ADGM updated its virtual asset regulatory framework to clarify some terminological issues. For instance, “Virtual Asset” is aligned with the global Financial Action Task Force standards.<sup>235</sup> The update also clarified the regulations concerning certain activities such as providing custody, operating a multilateral trading facility, and dealing in investments.

The SCA issued warnings against three ICO issuers, including Cryptobulls and two other unidentified companies.<sup>236</sup> One of the unidentified companies’ ICO was halted, which was followed by an official public warning against ICOs.<sup>237</sup> The press release and warnings lists associated with these three ICO issuers did not include any fines or penalties.

## H. Conclusion

Due to the nascency and global nature of decentralized ledger technology, it is to be expected that national regulators would have mixed reactions on how to regulate effectively and efficiently. As various regulators gain more experience and develop better strategies in approaching these evolving markets, the enforcement landscape may change accordingly.

Currently, the data unequivocally demonstrate that the U.S. regulators, the SEC and the CFTC, have been singularly active in commencing enforcement actions against a variety of crypto-firms. The long-term effects of this enforcement activity on capital formation, financial innovation, and regulatory competition are not yet clear. It is, however, indisputable that the magnitude of U.S. enforcement should profoundly affect regulatory choices and other decisions of crypto-firms. Overall, our data and analysis call for more research on the impact of enforcement on crypto-capital markets and crypto-firms.

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<sup>234</sup> *Guidance – Regulation of Crypto Asset Activity in ADGM*, Fin. Services Reg. Auth., *surpa* note 233.

<sup>235</sup> *Id.* Financial Action Task Force, *Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers*, Jun. 21, 2019, <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets.html>.

<sup>236</sup> Warnings, Secs. & Commodities Auth., <https://www.sca.gov.ae/en/open-data/warnings.aspx> (last visited June 23, 2020).

<sup>237</sup> Statement, Secs. & Commodities Auth., Public Warning Statement on Initial Coin Offerings (ICO), <https://www.sca.gov.ae/en/open-data/warnings/public-warning-statement-on-initial-coin-offerings-ico.aspx> (last visited June 23, 2020).