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INTERPRETING THE SEC AND CFTC'S RECENT GUIDANCE ON DIGITAL ASSETS: CLASSIFICATION, INTERMEDIARIES, AND MARKET STRUCTURE

Historically, federal oversight of digital assets proceeded largely through enforcement, under statutes that predate distributed ledger technology and with no single regulator holding undisputed authority. This article explores how the SEC and CFTC are now rebuilding that framework jointly across three areas, namely the classification of crypto assets, the regulation of intermediaries, and market structure, and considers how much of the new architecture is likely to endure.

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For more than a decade, federal oversight of digital assets proceeded largely through enforcement, under statutes drafted long before distributed ledger technology and with no single regulator holding undisputed authority over the asset class. Three recent developments changed that, namely a joint SEC and CFTC interpretation sorting crypto assets into five categories (only one of which is inherently a security), the GENIUS Act's comprehensive regime for payment stablecoins, and the pending CLARITY Act's proposed allocation of jurisdiction. Surrounding these are staff positions on broker-dealer custody, net capital, and non-custodial software, together with a wave of market infrastructure approvals. This article examines the emerging architecture along three axes, namely how digital assets are classified, how intermediaries are regulated, and how the assets trade and settle, distinguishing throughout among the tiers of authority in play.

I. FROM ENFORCEMENT TO FRAMEWORK

To date, the federal regulation of digital assets has never rested on statutory provisions that were written for, or even contemplated, that purpose. The Securities and Exchange Commission ("SEC") administers federal securities laws, which collectively encompass the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the Investment Company Act of 1940. The Commodity Futures Trading Commission ("CFTC") administers the Commodity Exchange Act (originally enacted in 1936), which increased in significance after the adoption of the Dodd-Frank Act. The Office of the Comptroller of the Currency ("OCC") supervises national banks under laws whose lineage runs to the National Bank Act of 1864.

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