THE CONTRACTARIAN JOINT VENTURE

Carla L. Reyes & Christine Hurt

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Carla L. Reyes & Christine Hurt***

In 2015, a group of entrepreneurs pooled their money together for the purpose of investing in other businesses. The entrepreneurs could have undertaken this activity through a traditional venture capital firm, but they wanted to cut out the middleman, reduce fees, and retain more control over their capital, so they chose to undertake their investing on their own. The group of entrepreneurs chose not to form an entity. Instead, they attempted to limit their business and liability risk by conducting their activity entirely via software. Unfortunately, the software contained a bug, and an insider siphoned off millions of dollars belonging to the fund. When affected investors started wondering who they could sue, some pointed out that by choosing not to form an entity, the would-be venture capital fund probably defaulted to a general partnership. Meanwhile, the U.S. Securities and Exchange Commission opined that the investment tool the entrepreneurs used to contribute funds to the venture via software was probably an investment contract and subject to securities laws.

The entrepreneurs called the venture capital fund "The DAO" because they intended it to be a model for decentralized autonomous organizations (DAOs) that others would later create. Although it spectacularly imploded before it could ever make a single investment, The DAO does stand as a model of the liability and regulatory risks faced by nearly every DAO since: how to form an entity that limits personal owner liability but avoids triggering securities regulation. In an attempt to avoid classification of DAO-related tokens as securities that trigger the costly securities-regulation regime, many DAOs end up creating general partnerships. The general partnership—the most ancient form of business entity—features several traps for the unwary: unintentional formation, personal liability for owners, and default fiduciary duty standards. Because of the liability risks posed by these partnership features, general partnership law generally adheres to a key premise: with this magnitude of risks looming, trust is paramount, and a person gets to choose their partners.

Occasionally, however, courts see disputes in scenarios that look a lot like a partnership and analogize to partnership law. Two emerging areas of business—joint ventures and DAOs—have recently ignited a debate as to when contracting parties act sufficiently like partners to analogize to partnership law and whether such analogy is ever warranted at all. This Article is the first to connect the two discussions, arguing that recent legal developments in Delaware joint venture law provide a new risk-mitigation tool for DAOs facing liability and regulatory uncertainty. Specifically, this Article uncovers recent case law that enables the development of purely common-law-of-contract joint venture entities. Such contractarian joint ventures, beholden to no state entity statute, can create a separate governance regime without statutorily imposed limitations.

Ultimately, this Article argues that, under certain circumstances, recognizing a purely contractarian joint venture may better uphold the policy aims that underlie business-entity statutes than general partnership law. Indeed, this Article aims to open a dialogue as to whether a purely contractarian joint venture might advance other important policy objectives as well. In particular, using open-source software-development communities in the cryptocurrency space as a case study, this Article uncovers the far-reaching and important impacts that recognition of a purely contractual joint venture could have for technology policy and innovation, suggests areas for legal reform, and unveils a new tool for the business lawyer's toolbox.

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INTRODUCTION

Imagine that you are a young artist. You are still in art school, and you know you need to build your resume and art portfolio. You find an online repository of murals seeking contributors. In the repository, you propose your contribution to a mural, and the larger community of artists votes to include your proposal in the larger work, which is in progress in a heavily trafficked area in downtown Dallas. You paint your section of the mural and other artists add other contributions that the community approved by vote. When the mural is complete, you add your contribution to your resume and take a photo for inclusion in your art portfolio. Over time, the mural is a huge success, and you later find that your participation in it caused the value of your new art to go up. Some years later, you receive notice of a lawsuit pending against you, alleging the mural infringes another person's copyright. Upon close examination, you find that the allegations relate to a portion of the mural completely unrelated to your contribution. Nevertheless, a court later finds that you may still be on the hook for damages caused by copyright infringement because you were a partner in a general partnership that managed the venture that resulted in the mural. You are shocked and hope that your right to freedom of expression provides some shield against the allegations. Legal commentators, however, mostly jeer at you and wish you luck.

This story seems outrageous, right? Now, replace the artist with a software developer.[1] Imagine the repository is GitHub,[2] and your contribution was a short bit of code that people sometimes refer to as a smart contract.[3] The computer program you wrote is just a small part of a bigger set of computer code that together builds an application. The computer code and application are completely open source, free, and available for anyone to use or copy. You never received payment for coding the small bit of software, and you do not operate the software as a service for anyone. In fact, no one operates the software as a service. The software just sort of sits out there, like the mural sits on the streets of Dallas, waiting for anyone to interact with it. Indeed, like the artist, you only wrote the code and published it on GitHub as an opportunity

1. The following story loosely follows the facts of the U.S. Department of Treasury's Office of Foreign Asset Control (OFAC)'s sanction against the Tornado Cash software. *See U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash*, U.S. DEP'T OF TREASURY (Aug. 8, 2022), https://home.treasury.gov/news/press-releases/jy0916 [https://perma.cc/4GMC-BGHZ].

2. With over 420 million code repositories, GitHub is a platform commonly used to publish and collaborate on open-source software code. *See About*, GITHUB, https://github.com/about [https://perma.cc/Z6RZ-477M9].

3. A smart contract is a computer program that says, "if data is received that X has occurred, Y will execute." Carla L. Reyes, *A Unified Theory of Code Connected Contracts*, 46 J. CORP. L. 981, 987 (2021) [hereinafter Reyes, *Code-Connected Contracts*]. For a deeper discussion of smart contracts see *infra* Section I.A.

to publicly display your skill and to improve your resume.[4] Instead of being sued for copyright infringement like the artist, however, you and several others are indicted for operating an unlicensed money-transmission business,[5] which is a federal crime,[6] and the U.S. Department of Treasury's Office of Foreign Asset Control (OFAC) listed your software code on the Specially Designated Nationals and Blocked Persons List (SDN List), effectively banning its use in the United States.[7]

When you challenge the designation of your code as a sanctioned person or entity,[8] the judge decides that you, other unidentified software developers you have never met, community members that voted on necessary improvements to the software, and certain infrastructure providers, formed a partnership and operated a money-transmission business together.[9] Like the artist, you are shocked, you hope the First Amendment can help you,[10] and you do not understand how general partnership law fits your activities of writing and posting code on the internet.[11] Although you acknowledge to yourself that you are only a software developer and not a lawyer, you always thought that if you ever did want to form a partnership, it would be in relation to a venture

4. *See* Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L.J. 369, 424–25 (discussing reputation gains and later consulting contracts as reasons to contribute to open-source software projects).

5. Sealed Indictment at 31–35, United States v. Storm, No. 23-CR-430 (S.D.N.Y. Aug. 23, 2023) (charging two of the software developers who began the Tornado Cash open-source software project with conspiracy to commit money laundering, operating an unlicensed money-transmission business, and sanctions violations).

6. 18 U.S.C. § 1960(a) ("Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.").

7. *Cyber-related Designation: Specially Designated Nationals List Update*, U.S. DEP'T OF TREASURY: OFF. OF FOREIGN ASSETS CONTROL (Aug. 8, 2022), https://ofac.treasury.gov/recent-actions/20220808 [https://perma.cc/3MWM-D98B].

8. Complaint, Van Loon v. Dep't of Treasury, 688 F. Supp. 3d 454 (W.D. Tex. 2023) (No. 1:23-CV-00312).

9. *Van Loon*, 688 F. Supp. 3d at 467, *rev'd*, 122 F.4th 549 (5th Cir. 2024).

10. Brief of Amicus Curiae Elec. Frontier Found. in Support of Plaintiffs' Motion for Partial Summary Judgment, Van Loon v. Dep't of Treasury, 688 F. Supp. 3d 454 (W.D. Tex. 2023) (No. 1:23-cv-00312-RP) (arguing that the First Amendment protects the development and publication of Tornado Cash on GitHub, and OFAC's designation of the software as a sanctioned entity is an impermissible restriction on speech); PETER VAN VALKENBURGH, COINCENTER, ELECTRONIC CASH, DECENTRALIZED EXCHANGE, AND THE CONSTITUTION 33–45 (2019), https://www.coincenter.org/app/uploads/2020/05/e-cash-dex-constitution.pdf [https://perma.cc/5VZK-U7CA] (arguing that open-source software development of privacy-enhancing digital-finance software is an exercise of protected speech).

11. *See, e.g.*, Carla L. Reyes, *If Rockefeller Were a Coder*, 87 GEO. WASH. L. REV. 373, 390–400 (2019) [hereinafter Reyes, *Rockefeller*] (demonstrating the extremely bad fit between partnership law and open-source software-development structures, such as protocol (Layer 1) governance communities, smart-contract development communities, and DAO-governance communities).

seeking to reap a profit[12] and that you would get to pick your partners[13]—neither of which fit your experience building this open-source software.

These issues lie at the heart of a recent case—*Van Loon v. Department of Treasury*[14]—and threaten to change the trajectory of open-source software development. Though not as terrifying, courts have also designated unaffiliated contributors to software, miners of digital assets, and holders of digital assets as partners in a general partnership in order to impose unlimited personal liability on each of these participants.[15] Open-source software forms the basis of the internet, public cloud computing platforms, VPN technology, email encryption, and other key technologies that individuals and businesses use daily.[16] For over half a century, the law has battled the open-source software-development community.[17] Research that helped lawyers understand the open-source software-development community eventually helped usher in a period of relative peace between the law and open-source software developers.[18] Who knew that relative peace would be shattered by something as ancient[19] and commonplace as partnership law?[20]

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12. REV. UNIF. P'SHIP ACT § 202(a) (UNIF. L. COMM'N 1997) (defining a partnership, in relevant part, as involving an "association of two or more persons to carry on as co-owners a business for profit").

13. Herrick K. Lidstone, Jr. & Allen Sparkman, *Pick Your Partner Versus the United States Bankruptcy Code*, 46 TEX. J. BUS. L. 23, 23 (2015) ("Partnership law from the beginning contained provisions implementing what has come to be known as the 'pick your partner' principle, reflecting the early development of the partnership law provision that admission of a partner to a partnership requires unanimous consent of the partners."); Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 SUFFOLK U. L. REV. 587, 589–90 (2009) ("The 'pick your partner' principle has always been at the core of U.S. partnership law. . . . Partnership is a voluntary association, resting on a contract (express or implied) to co-own a business. That contract co-exists with, and the business depends on, a relationship of trust and confidence among the co-owners who choose to co-associate.").

14. Van Loon v. Dep't of Treasury, 688 F. Supp. 3d 454 (W.D. Tex. 2023), *rev'd*, 122 F.4th 549 (5th Cir. 2024).

15. Sarcuni v. bZx DAO, 664 F. Supp. 3d 1100, 1118 (S.D. Cal. 2023) (denying motion to dismiss because users sufficiently alleged that a general partnership existed among the BZRX tokenholders).

16. Carla L. Reyes, *Law's Detrimental Reliance on Intermediaries*, 92 GEO. WASH. L. REV. 1343, 1385 (2024) [hereinafter Reyes, *Detrimental Reliance*] (citing Amanda Brock, *What Is Open Source, and Why Does It Matter Today?*, OPEN ACCESS GOV'T (Feb. 8, 2022), https://www.openaccessgovernment.org/open-source-technology/129261/ [https://perma.cc/7XS3-EUWA]); Hila Lifshitz-Assaf & Frank Nagle, *The Digital Economy Runs on Open Source. Here's How to Protect It.*, HARV. BUS. REV. (Sept. 2, 2021), https://hbr.org/2021/09/the-digital-economy-runs-on-open-source-heres-how-to-protect-it [https://perma.cc/E47R-V5K9].

17. Brad Bourque, *The Crypto Wars and the Future of Financial Privacy*, FORDHAM J. CORP. & FIN. L.: BLOG (Mar. 31, 2023), https://news.law.fordham.edu/jcfl/2023/03/31/the-crypto-wars-and-the-future-of-financial-privacy/ [https://perma.cc/W62Q-WMQB] ("The present attack on privacy-enhancing technologies is not a new phenomenon, but rather a continuation of the U.S. government's decades-long effort to limit and criminalize the use and distribution of such technologies by its citizens.").

18. *See, e.g.*, Benkler, *supra* note 4.

19. *See* Harwell Wells, *The Personification of the Partnership*, 74 VAND. L. REV. 1835, 1838–39 (2021) (tracing the history of partnership law from the "societas of ancient Rome" through its standardization in the nineteenth century to the modern-day uniform acts).

20. Ok, well, maybe one of the authors of this Article predicted that failure to create governance contracts that at least organized blockchain-related open-source software communities using governance paradigms that were familiar to courts and regulators would lead to increased regulatory action and

Ironically, the trend in blockchain communities to adopt partnership-like characteristics may be the result of a desire not to have the activities of its participants regulated by a different body of law: securities law.[21] Federal securities law has long characterized certain "investment contracts" as securities, but interests in general partnerships generally escape that categorization if they retain substantial aspects of co-management by the partners.[22] By granting participants co-management rights, however, developers may be creating a general partnership with rights and unlimited personal liability for all.

This Article explores the liability and regulatory risks faced by open-source software-development communities when they organize through blockchain-based systems. Increasingly, such communities find themselves designated a general partnership by courts and regulators, resulting in serious and unexpected consequences for the participants in the open-source software project.[23] The alternative, however, is just as dire: to be seen as an issuer of securities.[24] Though the new Chairperson of the Securities and Exchange Commission (SEC), Paul Atkins, has signaled that the SEC is interested in rulemaking that will create more certainty as to which digital assets are securities, currently the outlook is hopeful, but still uncertain. This Article considers the ways that such designations are incompatible with the policy aims and purposes of general partnership law, considers the entity alternatives most commonly used by blockchain-related open-source software teams, and uncovers the ways those alternatives do not achieve their intended goals. The Article then offers a new solution that takes into account recent legal developments and the resulting shortcomings of the current commonly used

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suboptimal regulatory outcomes. And maybe the other author of this Article warned start-ups of the potential impact of partnership law on start-up ventures. The authors can't help it if nobody listened. *See* Carla L. Reyes, *(Un)Corporate Crypto-Governance*, 88 FORDHAM L. REV. 1875, 1879 (2020) [hereinafter Reyes, *(Un)Corporate Crypto-Governance*] ("Despite its contributions to technological innovation and the economy, the open-source software development movement is currently under attack. . . . [A] legal movement is afoot that purportedly seeks to punish individual blockchain developers for a broad swath of undefined behavior without considering the broader impact on, or the culture and context of, the open source software movement. . . . To allow open-source blockchain projects to retain governance mechanisms endogenous to their unique cultures and visions and to protect open-source software development communities more broadly, this Article argues that blockchain communities should consider looking to corporate law for models of governance that will be respected by the law yet remain customizable."); Christine Hurt, *Startup Partnerships*, 61 B.C. L. REV. 2487 (2020) (exploring the role of default partnership law on startup enterprises generally).

21. The fight over whether some or all digital tokens issued by a blockchain protocol are securities is complex and ongoing, with many types of digital assets being classified as securities. *See infra* Section III.A.

22. *See* Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. May 1981) (stating that though "an investor who claims his general partnership or joint venture interest is an investment contract has a difficult burden to overcome," an investor could overcome this presumption by a showing that "he was so dependent on the promoter or on a third party that he was in fact unable to exercise meaningful partnership powers."); *see also* Christine Hurt, *Extra Large Partnerships*, *in* FIDUCIARY OBLIGATIONS IN BUSINESS 40–56 (Arthur B. Laby & Jacob Hale Russell eds., 2023).

23. *See infra* Section I.

24. *See infra* Section II.

entities: threading the needle between partnership law and securities law and creating a contractarian joint venture.

In August 2021, the Delaware Court of Chancery held in *Symbiont.io Inc. v. Ipreo Holdings, LLC*, that the parties had formed a joint venture.[25] Though courts historically have applied general partnership law to joint ventures, complete with unlimited liability and fiduciary duties, the court recognized that the detailed joint venture agreement had waived all fiduciary duties, and the sophisticated venturers did not owe one another the duty of loyalty.[26] The court did not analyze the dispute under partnership fiduciary duty law, but under the law of the venture designed by the joint venture agreement.[27] What if this contractarian joint venture approach could be made more generalizable? What if, by adopting formalized governance contracts,[28] blockchain-based open-source software-development projects could form a purely contract-based entity that avoids the pitfalls of general partnership law, such as personal liability and fiduciary duty, while also falling outside securities laws?

This Article demonstrates in four parts the powerful potential for using contractarian joint ventures to protect open-source software development. Part I introduces the common liability risks that blockchain-related open-source software-development communities attempt to mitigate in a variety of ways. Indeed, recognizing some of the unique difficulties faced by such communities in crafting an appropriate vehicle for their work, some states amended their entity statutes in an attempt to improve the available entity options.[29] Part II exposes the regulatory risks that open-source software-development communities must contend with when considering entity formation. Part III analyzes the precarious position open-source software-development communities in the blockchain space face when they choose to operate through blockchain-based organizations that form no entity at all and end up receiving treatment as a general partnership, whether such treatment fits the policy aims and expectations of that law or not. Part III further considers the failures of commonly employed alternatives to the general partnership to help blockchain-based organizations mitigate their risks well while also empowering them to pursue their core values and vision. Part IV proposes two entity alternatives that previously received scant attention: the limited partnership and the contractarian joint venture. Ultimately, the Article sets out an improved framework for using entity law itself to combat the liability and regulatory risks

25. Symbiont.io, Inc. v. Ipreo Holdings, LLC, No. 2019-0407, 2021WL 3575709, at *1 (Del. Ch. Aug. 13, 2021).

26. *Id.* at *8.

27. *Id.* at *25.

28. Reyes, *(Un)Corporate Crypto-Governance*, *supra* note 20.

29. *See* Gail Weinstein et al., *A Primer on DAOs*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 17, 2022), https://corpgov.law.harvard.edu/2022/09/17/a-primer-on-daos/ [https://perma.cc/N9QJ-Y9HS].

currently threatening open-source software communities in the blockchain ecosystem.

I. BACKGROUND: DAOS AND ENTITY SELECTION FOR LIABILITY RISK

Scholars and lawyers have been thinking about the intersection of decentralized autonomous organizations (DAOs) and entity law since as early as 2014.[30] Initial investigations considered whether existing entity law enables algorithmic entities,[31] and, relatedly, whether expected charter competition related to such entities would produce positive or negative results.[32] Then, in 2017, the SEC sharpened the inquiry by issuing a report on The DAO, a defunct venture capital fund intended to be operated through code.[33] The main findings of that report captured all the attention: The DAO tokens met the four-part *Howey* test for an investment contract.[34] However, those paying close attention also noted that in the report, the SEC referred to The DAO as a for-profit unincorporated association[35]—otherwise known as a general partnership. The SEC's seemingly off-hand comment spurred another round of discussion related to DAOs and entity law—namely, what entity-selection options are available to DAOs that allow them to maintain their endogenous priorities and unique goals? This Part reviews the literature, statutory developments, and practicing-attorney discourse related to DAO entity selection centered on mitigating liability risk. As part of that review, this Part points out gaps in existing entity law, in new DAO-related entity statutes, and in common legal discourse on the subject. This Part then argues that such gaps opened the gates for a judicial decision that a group of wholly unsuspecting and unintending, disperse and largely unknown individuals who never pursued profit together constituted partners in a general partnership listed on the Specially Designated and Blocked Persons List.[36]

30. *See, e.g.*, Shawn Bayern, *Of Bitcoins, Independently Wealthy Software, and the Zero-Member LLC*, 108 NW. U. L. REV. ONLINE 257, 267–70 (2014).

31. *See, e.g.*, *id.*; Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 19 STAN. TECH. L. REV. 93, 99 (2015); Matthew U. Scherer, *Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems*, 19 NEV. L.J. 259 (2018); Shawn Bayern, *Are Autonomous Entities Possible?*, 114 NW. U. L. REV. ONLINE 23, 24 (2019).

32. Lynn M. LoPucki, *Algorithmic Entities*, 95 WASH. U. L. REV. 887 (2018).

33. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207, 117 SEC Docket 745 (July 25, 2017) [hereinafter SEC 2017 Report].

34. *Id.* at 11–15.

35. *Id.* at 11–12.

36. Van Loon v. Dep't of Treasury, 688 F. Supp. 3d 454 (W.D. Tex. 2023), *rev'd*, 122 F.4th 549 (5th Cir. 2024).

A. Decentralized Autonomous Organizations: Code, Governance, and Sometimes People

Blockchain technology first emerged as a protocol[37] for tracking transactions in digital units of value[38] when the pseudonymous person or group of people Satoshi Nakamoto introduced the Bitcoin blockchain protocol in 2009.[39] Later, other blockchain protocols enabled greater functionality. For example, the Ethereum protocol operates a global virtual computer (the EVM),[40] which allows additional software to operate in a layered technology stack.[41] This means, more colloquially, that computer programs can be built on top of blockchain protocols like the Ethereum protocols.[42] One such computer program is a smart contract, which simply says "if data is received that X has occurred, Y will execute."[43] Developers can use smart contracts, or a group of interacting smart contracts, to create software that allows people who do not

37. Blockchain technology is a protocol technology. Reyes, (*Un)Corporate Crypto-Governance*, *supra* note 20, at 1895. A protocol, for its part, is "a set of instructions for the compilation and interaction of objects." ALEXANDER R. GALLOWAY, PROTOCOL: HOW CONTROL EXISTS AFTER DECENTRALIZATION 75 (2004). A network protocol is one that "sets the rules that allow networked computers—nodes—to communicate with each other." Reyes, *Detrimental Reliance*, *supra* note 16, at 11 (citing Will Warren, *The Difference Between App Coins and Protocol Tokens*, MEDIUM: 0X BLOG (Feb. 2, 2017), https://medium.com/@willwarren89/the-difference-between-app-coins-and-protocol-tokens-7281a428348c [https://perma.cc/8Y8A-44HH]).

38. In particular, the Bitcoin blockchain protocol tracks the spending of unspent transaction outputs (UTXOs). ARVIND NARAYANAN ET AL., BITCOIN AND CRYPTOCURRENCY TECHNOLOGIES: A COMPREHENSIVE INTRODUCTION 51–52 (2016).

39. SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM (2008), https://bitcoin.org/bitcoin.pdf [https://perma.cc/5B47-6J7K]. Note that although the paper was published in 2008, the first block was mined in January 2009. Julie Pinkerton, *The History of Bitcoin*, U.S. NEWS: MONEY (Feb. 18, 2025, 3:59 PM), https://money.usnews.com/investing/articles/the-history-of-bitcoin [https://perma.cc/2GFZ-DHKB].

40. ANDREAS M. ANTONOPOULOS & GAVIN WOOD, MASTERING ETHEREUM: BUILDING SMART CONTRACTS AND DAPPS 2 (2018).

41. Commonly, a blockchain protocol is referred to as Layer 1 in the blockchain technology stack, while Layer 2 is often used to refer to a software layer that operates on top of the Layer 1 protocol, and Layer 3 refers to the application layer. Dr. Thibault Schrepel, *Is Blockchain the Death of Antirust Law? The Blockchain Antirust Paradox*, 3 GEO L. TECH. REV. 281, 306 (2019) (describing Layer 2 as the software layer that sits on top of a Layer 1 blockchain protocol and Layer 3 as the application layer); Lewis Gudgeon et al., *SoK: Layer-Two Blockchain Protocols*, *in* FINANCIAL CRYPTOGRAPHY AND DATA SECURITY 201, 204 (Joseph Bonneau & Nadia Heninger eds., 2019) (describing Layer 2 as software that scales blockchain transactions without changing the underlying crypto-economics of the Layer 1 protocol and Layer 3 as the application layer).

42. Carla L. Reyes, *Autonomous Business Reality*, 21 NEV. L.J. 437, 445 (2021) [hereinafter Reyes, *ABR*]; *see also* HENNING DIEDRICH, ETHEREUM: BLOCKCHAINS, DIGITAL ASSETS, SMART CONTRACTS, DECENTRALIZED AUTONOMOUS ORGANIZATIONS 167 (2016) (explaining that smart contracts are decentralized computer code that executes after a condition is filled); Gideon Greenspan, *Why Many Smart Contract Use Cases Are Simply Impossible*, COINDESK (Sept. 11, 2021, 12:13 PM), https://www.coindesk.com/markets/2016/04/17/why-many-smart-contract-use-cases-are-simply-impossible [https://perma.cc/L3KS-CRE5] ("A smart contract is just a fancy name for code that runs on a blockchain, and interacts with that blockchain's state.").

43. Reyes, *Code-Connected Contracts*, *supra* note 3, at 987.

necessarily know each other, and who may be dispersed all over the world, to coordinate activity.[44] Such software is often referred to as a DAO.[45]

Many people can use the same term—DAO—and intend to mean very different concepts.[46] Some insist that all DAOs rest upon human activity.[47] Others focus on highly decentralized and extremely automated DAOs, to the exclusion of other models.[48] In other words, people often use the term DAO when they have a specific technical archetype in mind, but in reality, DAOs—both in terms of their technical architecture and purposes—are not monolithic.[49] Some of the confusion stems from the varying role of software in what people refer to as DAOs. Sometimes, people refer to DAOs when they are actually referring to a collection of interacting smart contracts.[50] In such

44. Primavera De Filippi & Samer Hassan, *Decentralized Autonomous Organization*, INTERNET POL'Y REV. (2021) ("A DAO is a blockchain-based system that enables people to coordinate and govern themselves mediated by a set of self-executing rules deployed on a public blockchain, and whose governance is decentralised (i.e., independent from central control).").

45. Primavera De Filippi & Samer Hassan, *Blockchain Technology as Regulatory Technology: From Code Is Law to Law Is Code*, 21 FIRST MONDAY (Dec. 2016) ("In some cases, a complex set of smart contracts is set up in such a way as to make it possible for multiple parties (SCs or humans) to interact with each other. This combination of smart contracts may be regarded as a distributed autonomous organization (or DAO)—a self-governed organization [] controlled only and exclusively by an incorruptible set of rules, implemented under the form of a SC.").

46. Indeed, the inconsistent use of terminology plagues the blockchain ecosystem in a variety of contexts. *See, e.g.*, Carla L. Reyes, *Emerging Technology's Language Wars: Cryptocurrency*, 64 WM. & MARY L. REV. 1193, 1248–50 (2023) [hereinafter Reyes, *Language Wars: Cryptocurrency*] (unveiling the widespread misuse of the terms cryptoassets, digital assets, cryptocurrency, tokens, and stablecoins); Carla L. Reyes, *Emerging Technology's Language Wars: Smart Contracts*, 2022 WIS. L. REV. FORWARD 86, 104–09 (2022) [hereinafter Reyes, *Language Wars: Smart Contracts*] (uncovering the frequent misunderstandings associated with the term smart contracts).

47. Florence Guillaume, *Decentralized Autonomous Organizations (DAOs) Before State Courts: How Can Private International Law Keep Up with Global Digital Entities?*, *in* DECENTRALISED AUTONOMOUS ORGANISATION (DAO) REGULATION: PRINCIPLES AND PERSPECTIVES FOR THE FUTURE 135, 135 (Madalena Perestrelo de Oliveira & António Garcia Rolo eds., 2023) ("A Decentralized Autonomous Organization (DAO) is a social organization structure that allows several people to pool resources in order to achieve a common goal, with the characteristics of being an internet-native organization.").

48. *See, e.g.*, Reyes, *ABR*, *supra* note 42, at 473–75; Delphi Labs, *Assimilating the BORG: A New Framework for CryptoLaw Entities*, MEDIUM (Apr. 20, 2023), https://delphilabs.medium.com/assimilating-the-borg-a-new-cryptolegal-framework-for-dao-adjacent-entities-569e54a43f83 [https://perma.cc/P752-47P3].

49. Reyes, *ABR*, *supra* note 42, at 473 fig.6. Use of terminology to refer to one specific technical artifact when really many variations exist or when the term is a term of art in more than one discipline is a common problem in the areas of cryptocurrency and smart contracts more broadly as well. Reyes, *Language Wars: Cryptocurrency*, *supra* note 46, at 1248–49; Reyes, *Language Wars: Smart Contracts*, *supra* note 46, at 89–90.

50. Peter Van Valkenburgh, *There's No Such Thing as a Decentralized Exchange*, THE BLOCK (Oct. 3, 2020, 12:01 PM), https://www.theblock.co/post/79768/theres-no-such-thing-as-a-decentralized-exchange [https://perma.cc/8RTY-PTRA] ("First, if a decentralized exchange is *truly* decentralized . . . then grammatically it's an action not a thing, a verb and not a noun: *I make a decentralized exchange*; not, *I use a decentralized exchange*. When I use free software and an open blockchain network to trade one token for another directly with another trader, then I am engaged in decentralized exchange—an action, just as I might engage in running or paying. We have this habit of saying that a DEX is a thing rather than an action because we are stuck in a centralized services frame of mind. Coinbase is a thing, a business, a corporation. . . . There are no DEXs; there is just decentralized exchange, the action, taking place using software tools, open blockchains, and the internet.").

circumstances, the DAO is really software and only software.[51] In other circumstances, the DAO is the software and the community of people that can implement changes to the software.[52] Often, the community implements changes to software by voting on proposed code through tokens or some other mechanism.[53] Some DAOs do rely heavily upon human activity, while others are highly autonomous and only rely on humans for updates to the software that makes them operate properly.[54] Because these choices in technical design and purpose impact potential liability risk for human participants in the DAO,[55] this Section begins by unpacking key technical features of DAOs and discusses common uses to which they are put.

At a foundational technical level, a DAO is simply a collection of interacting smart contracts executed on a blockchain protocol—or even more simplistically, a DAO is a collection of interacting computer programs.[56] In this regard, even the most autonomous DAOs—where the interacting smart contracts do most of the work most of the time—require a community of developers to maintain the code that makes the software operate.[57] Members of the open-source software community that maintains the software in such DAOs—often referred to as protocol DAOs—typically own a token related to

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51. Alex Wade et al., *How Does Tornado Cash Work?*, COINCENTER (Aug. 25, 2022), https://www.coincenter.org/education/advanced-topics/how-does-tornado-cash-work/ [https://perma.cc/MT6Z-Y4FV] ("Tornado Cash is an open source software project that provides privacy protection for Ethereum's users. Like many such projects, the name does not refer to a legal entity, but to several open source software libraries that have been developed over many years by a diverse group of contributors. These contributors have published and made Tornado Cash available for general use as a collection of smart contracts on the Ethereum blockchain."); Matthias Nadler & Fabian Schär, *Tornado Cash and Blockchain Privacy: A Primer for Economists and Policymakers*, 105 FED. RSRV. BANK ST. LOUIS REV. 122, 124, 127 (2023) ("[N]on-custodial mixers can be created as an immutable and independent infrastructure, where no centralized entity can unilaterally control, alter, or delete the information. . . . Tornado Cash is a smart contract-based crypto asset mixer that uses zkSNARKs to create a decentralized privacy-enhancing protocol. The code is open source and has been deployed on various blockchains, most notably[,] Ethereum.").

52. Aaron Wright, *The Rise of Decentralized Autonomous Organizations: Opportunities and Challenges*, 4 STAN. J. BLOCKCHAIN L. & POL'Y 152, 157–58 (2021) (discussing the use of participatory DAOs to manage open-source software projects).

53. *Id.* at 158.

54. Reyes, *ABR*, *supra* note 42, at 447–48.

55. Reyes, *Rockefeller*, *supra* note 11, at 398–400; Chris Brummer & Rodrigo Seira, Legal Wrappers and DAOs 3–4 (May 30, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123737.

56. Indeed, this is the source of much confusion related to the now infamous Tornado Cash software. Reyes, *Detrimental Reliance*, *supra* note 16, at 1381–83. Tornado Cash is a set of decentralized smart-contract software that enables enhanced privacy of transactions conducted via blockchain. Wade et al., *supra* note 51. The Department of Treasury mistook this software for a for-profit entity, when really it is just a set of software and a community of open-source software developers that maintain the code. Reyes, *Detrimental Reliance*, *supra* note 16, at 1382–83.

57. Examples of protocol DAOs include MakerDAO, Uniswap and Yearn.Finance. *See, e.g.*, Bud Hennekes, *The 8 Most Important Types of DAOs You Need to Know*, ALCHEMY (Apr. 6, 2022), https://www.alchemy.com/blog/types-of-daos [https://perma.cc/L7ZW-BSMZ]; Georgia Weston, *Know the Different Types of DAOs*, 101 BLOCKCHAINS (Apr. 29, 2022), https://101blockchains.com/types-of-dao/ [https://perma.cc/9GEX-N7C2].

the DAO that enables voting on decisions related to the software.[58] Such tokens do not usually represent an ownership interest in a venture the same way that a share in a company represents residual ownership of the company.[59] The tokenholders that participate in protocol software development often do not know the identity of the other tokenholders[60] and enter and exit the protocol community quite fluidly and frequently.[61] Importantly, even within the category of protocol DAOs, a wide variety of technical architectures exist.[62] In many protocol DAOs, even when tokenholders vote to make certain code-related changes, actually implementing such changes depends upon other actors in the protocol entirely,[63] meaning that even though they can provide input, tokenholders often have very little meaningful control over protocol DAOs.[64]

In other circumstances, a group of people decide to operate a business and use smart-contract software to coordinate their economic activity.[65] Such businesses, often referred to as investment or venture DAOs,[66] look more like a traditional business and just operate in a high-technology manner, implementing a flatter governance structure than is typical of traditional corporations.[67] Importantly, investment and venture DAOs themselves vary widely in terms of their technical architecture and business goals.[68] Examples of such venture DAOs include Krause House,[69] a group of basketball fans coordinating via smart contracts to pool capital with the aim of purchasing an

58. Reyes, *Language Wars: Cryptocurrency*, *supra* note 46, at 1217 ("A governance token is a nonintrinsic token that gives its holder some type of governance rights."); David Kerr & Miles Jennings, A Legal Framework for Decentralized Autonomous Organizations 16 (2022) (unpublished manuscript), https://api.a16zcrypto.com/wp-content/uploads/2022/06/dao-legal-framework-part-1.pdf [https://perma.cc/52XT-AGMS] ("Governance tokens are digital assets that represent voting power within a DAO and are integral to decentralization because they distribute powers and rights to users.").

59. Benedict George, *What Is a Governance Token*, COINDESK (May 11, 2023, 3:21 PM), https://www.coindesk.com/learn/what-is-a-governance-token/ [https://perma.cc/X23B-WHZF]; moreReese & DJ, *What Are Governance Tokens? How Token Owners Shape a DAO's Direction*, DECRYPT (Mar. 29, 2022), https://decrypt.co/resources/what-are-governance-tokens-how-token-owners-shape-dao [https://perma.cc/H94Y-2JTM].

60. *See* Wright, *supra* note 52, at 160–61.

61. Wright, *supra* note 52, at 156.

62. Kerr & Jennings, *supra* note 58, at 16 ("Although the mechanization of governance varies by protocol, in general, the primary functionality of a governance protocol is not to make profit, but to create and vote on governance proposals that control the smart contracts of an underlying protocol and direct the actions of the DAO treasury to foster the development and growth of a decentralized ecosystem.").

63. Reyes, *(Un)Corporate Crypto-Governance*, *supra* note 20, at 1886–88; Raina S. Haque et al., *Blockchain Development & Fiduciary Duty*, 2 STAN. J. BLOCKCHAIN L. & POL'Y 139, 162–63 (2019).

64. *See* Reyes, *(Un)Corporate Crypto-Governance*, *supra* note 20, at 1886–88.

65. Ivan Fan, *Startup Investing and Venture DAOs*, U. CHI. BUS. L. REV. ONLINE (2023), https://businesslawreview.uchicago.edu/online-archive/startup-investing-and-venture-daos [https://perma.cc/4L59-L235].

66. *Id.*

67. Reyes, *ABR*, *supra* note 42, at 458. In other work, one of the authors of this Article created a taxonomy of autonomous businesses that grouped many different kinds of investment and venture DAOs into a category referred to as distributed business entities, or "DBEs." *Id.* at 475 n.264.

68. *Id.* at 471.

69. KRAUSE HOUSE, https://www.krausehouse.club/ [https://perma.cc/9965-WH3N].

NBA team,[70] and MetaCartel Ventures, "a for-profit DAO created by the MetaCartel community for the purposes of making investments into early-stage Decentralized Applications (DApps)."[71] A specific subtype of venture DAO that often receives its own categorization is Media DAOs—DAOs that operate a media service.[72] Such DAOs might properly fit within the venture category when they are profit-motivated via advertisements or other revenue streams.[73] Decrypt represents an example of a for-profit media (venture) DAO—Decrypt "empowers users to vote on what types of content they want to see."[74]

Communities also use DAOs for a variety of nonventure purposes unrelated to the creation and maintenance of decentralized computer software. For example, collector DAOs, such as Flamingo DAO and ConstitutionDAO, seek to gather like-interested individuals together to jointly purchase a collectable—an expensive NFT in the case of Flamingo DAO and the United States Constitution in the case of ConstitutionDAO.[75] Philanthropy DAOs operate for charitable purposes, while grant DAOs underwrite grants awarded for projects that develop technology and infrastructure to support the technology through research.[76] Some effort to create decentralized social networks also gave rise to social DAOs—"a collection of people organized around a particular interest."[77] One example is Friends with Benefits, which operates a hybrid digital/in-person high-end social club, throws parties, and offers readership subscriptions.[78] Still others employ DAOs as an instructional tool and to experiment with alternative economic mechanisms to incentivize art production[79] or to have a positive social impact.[80] Ultimately, DAOs vary in terms of both technical architecture and purpose. Only some DAOs operate a business, but even when they do, key characteristics pose difficulty for selecting a legal-entity form: fluid and frequent changes in membership, a desire to maintain the level of participant pseudonymity natively afforded by blockchain technology, and a desire to minimize personal liability and regulatory risk.[81]

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70. *See id.*

71. *What Is a Venture DAO?*, METACARTEL VENTURES, https://metacartel.xyz/about [https://perma.cc/ZM6T-NMJY].

72. Hennekes, *supra* note 57 ("Media DAOs reinvent traditional media platforms by creating content driven by the community.").

73. *Id.* ("Think social media, but instead of corporate organizations governing the profits, individuals in the media network are actively earning a piece of the decentralized organization's profit.").

74. *Id.*

75. *Id.*

76. Weston, *supra* note 57.

77. Guillaume, *supra* note 47, at 136.

78. Leigh Cuen, *Will DAOs Revolutionize Media or Just Create Playgrounds for the Rich?*, TECHCRUNCH (Nov. 21, 2021, 7:29 AM), https://techcrunch.com/2021/11/21/will-daos-revolutionize-media-or-just-create-playgrounds-for-the-rich/ [https://perma.cc/Q8SZ-FMGN].

79. Reyes, *ABR*, *supra* note 42, at 468 (describing the Plantoid).

80. WORLD ECON. F., DAOS FOR IMPACT 3 (2023), https://www3.weforum.org/docs/WEF_DAOs_for_Impact_2023.pdf [https://perma.cc/ENY9-Y3GE].

81. *See generally* Wright, *supra* note 52.

B. Choosing Not to Choose: Default Partnership Risk

For a variety of practical, philosophical, and regulatory reasons, many DAOs choose not to form an entity.[82] Unfortunately, choosing not to choose poses its own liability risk by putting a DAO squarely within the realm of general partnership law.[83] Parties who agree to go into business together form a general partnership by default under state law[84] unless they form an entity in a specific jurisdiction, such as a corporation, limited liability company (LLC), or limited partnership.[85] Most states follow some version of the modern uniform act for general partnership law, the Revised Uniform Partnership Act (RUPA), though a few large states such as New York and Michigan still follow the Uniform Partnership Act (UPA).[86] Regardless, both UPA and RUPA define a partnership as "an association of two or more persons to carry on as co-owners a business for profit"[87] that has not been organized under any other

82. Kerr & Jennings, *supra* note 58, at 11 ("DAOs face a variety of issues in trying to form within the existing options for U.S. entity structures because the available entity structures are designed for centralized operations, which is inherently incompatible with a decentralized operational structure.").

83. *See* Reyes, *Rockefeller*, *supra* note 11, at 398–400; Kerr & Jennings, *supra* note 58, at 12.

84. *See, e.g.*, Douglas K. Moll, *Contracting Out of Partnership*, 47 J. CORP. L. 753, 755 (2022) ("If the parties' actions demonstrate that they have, in fact, associated as coowners in a for-profit business, a partnership is formed, even if the parties expressly deny that they are partners."); Hurt, *supra* note 20, at 2490 ("Under general partnership law embodied in state statutes, parties form a general partnership if they agree to co-own a business for profit, and this agreement does not need to be written or formalized in any way.").

85. Zurovec v. Rueben, No. 09-21-00379-CV, 2022 WL 3650128, at *1 (Tex. App. Aug. 25, 2022) (holding that the trial court did not abuse its discretion by determining that the parties were partners in a partnership eventually incorporated as an LLC). If parties intend to organize as a different entity, but begin doing business prior to filing, a court may find that a general partnership existed during that time. Iacono v. Est. of Capano, No. 11841-VCL, 2020 WL 3495328, at *1 (Del. Ch. June 29, 2020) (holding that sophisticated parties with a long relationship together had an oral agreement to form a partnership, even though they were exchanging draft LLC operating agreements before one party died). In rare cases, courts may find a general partnership even where a different entity has been formed. Villanueva v. Villanueva, 260 A.3d 36, 38 (Conn. App. Ct. 2021) (affirming the trial court's finding that a partnership existed between two brothers even though business was held in a single-member LLC formed by only one brother because the other brother did not have a tax identification number). *But see* Dwyer v. Zuccari, No. RDB-19-1272, 2020 WL 1308282, at *4 (D. Md. Mar. 19, 2020) (holding that the parties were not partners because "Maryland law does not recognize the sort of boundless, ill-defined 'partnership' . . . carried out exclusively through the use of business entities").

86. Forty-three U.S. jurisdictions (including the District of Columbia, Puerto Rico, and the US Virgin Islands) have adopted some version of RUPA, with ten remaining states following UPA.

87. UNIF. P'SHIP ACT § 6(1) (UNIF. L. COMM'N 1914); REV. UNIF. P'SHIP ACT § 202(a) (UNIF. L. COMM'N 1997). Some states add their own statutory or judicial tests for determining a default partnership. *See* Ingram v. Deere, 288 S.W.3d 886, 894 (Tex. 2009) (articulating five factors for courts to consider: (1) the receipt or right to receive a share of the profits; (2) the expression of an intent to be partners; (3) the right to participate in control of the business; (4) an agreement to share losses or liabilities; and (5) an agreement to contribute money or property to the business); Ellsworth Paulsen Const. Co. v. 51-SPR LLC, 183 P.3d 248, 252 (Utah 2008) (holding that five elements, including agreement to share losses, were necessary to find the existence of a default partnership) ("As a general rule, there must be [1] a community of interest in the performance of the common purpose, [2] a joint proprietary interest in the subject matter, [3] a mutual right to control, [4] a right to share in the profits, and [5] unless there is an agreement to the contrary, a duty to share in any losses which may be sustained.").

statute, such as a corporation act, limited partnership act, or LLC act.[88] The question then becomes whether or not two or more parties intended to "co-own" a business enterprise, which includes both "co-management"[89] and having a claim on the profits and losses of the enterprise.[90] In a small number of cases, the enterprise may not be a commercial enterprise but a hobby or social activity;[91] in addition, co-owning an asset, such as land[92] or even an airplane,[93] is not a "business enterprise." Even if a business is formed, parties often participate in business ventures as nonowners: brokers,[94] consultants,[95] employees,[96] tenants,[97] and lenders.[98] Both the UPA and RUPA specifically exclude some of these types of relationships,[99] provide tests to determine which sorts of relationships are not partnerships, and list the sharing of profits, but not revenues, as prima facie evidence of a partnership.[100]

88. UNIF. P'SHIP ACT § 6(2) (UNIF. L. COMM'N 1914); REVISED UNIF. P'SHIP ACT § 202(b) (UNIF. L. COMM'N 1997).

89. Penney v. Penney, 355 So. 3d 303, 312 (Ala. 2021) (holding that a son and his wife were in a partnership with the son's parents in their adjacent chicken farms—even though they were deeded separately—because the son and his wife managed all details of the joint operation, shared in losses, and were perceived by third parties to be one venture).

90. *Id.* at 310.

91. Hatton v. Fraternal Ord. of Eagles, Aerie No. 4097, 551 N.E.2d 479, 481 (Ind. Ct. App. 1990) (holding that a nonprofit, unincorporated association was not a partnership).

92. Malone v. Patel, 397 S.W.3d 658, 670 (Tex. App. 2012) (stating that co-ownership of property, "by itself, does not indicate that a person is a partner in business" (quoting TEX. REV. CIV. STAT. art. 6132b–2.03(b) (expired 2023))).

93. *See* Fisher v. Wilkoski, No. 2017AP732, 2018 WL 727065, at *4–6 (Wis. Ct. App. Feb. 6, 2018) (explaining that a firm organized to own and operate an aircraft and a hangar for personal use with no profit generation, with the co-owners splitting expenses, may not have been a partnership under the test because it was not co-owned as a business for profit; however, the partners signed a partnership agreement that adopted the Wisconsin UPA as controlling law, making it a partnership).

94. Buette Derousse Com. Real Est. Props., LLC v. TRP Twin Peaks, LLC, No. 2 CA-CV 2018-0033, 2018 WL 6735182, at *4–5 (Ariz. Ct. App. Dec. 24, 2018) (holding that no partnership existed despite broker wanting to be part of development of parcels where broker was paid a commission, listed as broker, and was not named on deed).

95. MAS Assocs., LLC v. Korotki, 214 A.3d 1076, 1095 (Md. 2019) (holding that parties who engaged in mortgage-origination business were independent contractors, not partners).

96. Liserio v. Colt Oilfield Servs., LLC, SA-19-CV-01159-XR, 2022 WL 16542585, at *4–6 (W.D. Tex. Oct. 28, 2022) (holding that the employee was not in a partnership with employer, even though he was referred to as partner on occasion and shared in profits but did not share in losses and had no management ability).

97. Byrd v. E.B.B. Farms, 796 N.E.2d 747, 755 (Ind. Ct. App. 2003) (holding that the parties intended 50% of profits of tree farm business to be rent, so no partnership was found).

98. Yun v. Um, 627 S.E.2d 49, 53 (Ga. Ct. App. 2006) (holding that no partnership existed because the creditor was repaid with profits).

99. UNIF. P'SHIP ACT § 7 (UNIF. L. COMM'N 1914); REVISED UNIF. P'SHIP ACT § 202(c) (UNIF. L. COMM'N 1997).

100. *Id.*; *see also* Mehta v. Ahmed, No. 01-20-00568-CV, 2022 WL 3720181, at *10–11 (Tex. App. Aug. 30, 2022); nClosures Inc. v. Block & Co., Inc., 770 F.3d 598, 603 (7th Cir. 2014).

The analysis of whether a relationship is a default partnership is very context specific,[101] focusing on the intent of the partners.[102] However, courts analyze whether the parties intended to co-own a business for profit, not whether the parties specifically intended to create an entity known as a partnership.[103] That being said, to date, at least three courts have held that participants in a DAO created a partnership even when participants in the DAO themselves disclaimed any intent to do so, and indeed, disclaimed any profit motive.

First, the Department of Treasury's Office of Foreign Asset Control (OFAC) alleged that the decentralized privacy-enhancing software known as Tornado Cash was actually an "entity known as Tornado Cash," claiming that Tornado Cash was a for-profit organization made up of "its founders and other associated developers" and "the Tornado Cash DAO."[104] In a related civil suit, a district court judge would later agree.[105] Notably, only persons that provided additional services as "relayers" earned any revenue from use of the Tornado Cash software, and acting as a relayer required additional affirmative activity beyond merely being a founder, developer, or holder of the Tornado Cash governance token TORN.[106] Unless and until a person voluntarily used a TORN token to offer relayer services, a TORN token only gave its holder the ability to vote on proposed upgrades to the Tornado Cash software.[107] To the extent a Tornado Cash DAO exists at all, it is a protocol DAO, not a venture DAO.[108] Although the Fifth Circuit Court of Appeals would later overturn the district court's ruling and decide that OFAC had exceeded its authority when it listed the Tornado Cash software on the SDN List, the Fifth Circuit specifically refused to address the issue of whether an entity referred to as Tornado Cash

101. *See* Joseph K. Leahy, *An LLC Is the Key: The False Dichotomy Between Inadvertent Partnerships and the Freedom of Contract*, 52 TEX. TECH L. REV. 243, 250 (2020) (emphasizing the fact-specific inquiry of whether a partnership exists).

102. *See* Hillman v. Cannon, No. 11-0367, 2011 WL 6670657, at *3 (Iowa Ct. App. Dec. 21, 2011) ("Under this caselaw, an intent to associate is the crucial test of partnership.").

103. REVISED UNIF. P'SHIP ACT § 202(a) (UNIF. L. COMM'N 1997) ("whether or not the persons intend to form a partnership"); *see also* TEX. BUS. ORGS. CODE § 152.051(b) (West, Westlaw through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election) ("regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name").

104. Off. of Foreign Assets Control, *Frequently Asked Questions No. 1095*, U.S. DEP'T OF THE TREASURY (Nov. 8, 2022) [hereinafter *FAQ No. 1095*], https://ofac.treasury.gov/faqs/1095 [https://perma.cc/WKS8-NSNP]; *see also* Off. of Foreign Assets Control, *Burma-Related Designations*, U.S. DEP'T OF THE TREASURY (Nov. 8, 2022), https://ofac.treasury.gov/recent-actions/20221108 [https://perma.cc/9M8Y-UN3L].

105. Van Loon v. Dep't of Treasury, 688 F. Supp. 3d 454, 466 (W.D. Tex. 2023), *rev'd*, 122 F.4th 549 (5th Cir. 2024) ("The record shows that Tornado Cash is an association within this ordinary definition. The entity is composed of its founders, its developers, and its DAO.").

106. Wade et al., *supra* note 51.

107. *Id.*

108. *See* Reyes, *Detrimental Reliance*, *supra* note 16, at 1381 n.240.

exists.[109] As a result, the Fifth Circuit's decision and the eventual delisting of the Tornado Cash software from the sanctions list[110] did very little to reduce the risk of triggering regulatory scrutiny because regulators misunderstand a software program as a general partnership.

In a second case, the Commodity Futures Trading Commission (CFTC) sued Ooki DAO, alleging that it operated an unregistered designated-contract market and as an unregistered futures-commission merchant in violation of the Commodity Exchange Act.[111] In doing so, the CFTC alleged that "[t]he Ooki DAO is an unincorporated association comprised of Ooki Token holders who have voted those tokens to govern the Ooki Protocol."[112] Specifically, the CFTC claimed that the Ooki DAO operated a for-profit partnership under state general partnership law principles.[113] Again, in a related civil suit, a district court, deciding a motion to dismiss, agreed that participants in the DAO had formed a partnership.[114] Relying on the California enactment of the Revised Uniform Partnership Act, the district court explained:

> To plausibly allege the existence of a general partnership, the FAC must plead sufficient facts to demonstrate that the bZx DAO is (1) an association of two or more persons (2) carrying on as co-owners of (3) a business for profit. As a starting point, the FAC alleges that the DAO is an "association[] of two or more persons (the tokenholders and investors.)" The FAC also alleges that the bZx DAO generates profits through its margin trading and lending products, Fulcrum and Torque . . . The Court finds that the FAC sufficiently alleges that the DAO is an association of two or more persons and that it operates as a business for profit.[115]

In a third case, a court hinted, without specifically deciding, that a protocol DAO called PoolTogether might be deemed a partnership consisting of the protocol developers, investors in a separate but affiliated entity PoolTogether, Inc., and early users of the protocol.[116] Each of these cases sent shock waves through the blockchain community, as each relates to protocol DAOs, and the idea that protocol DAOs in particular could constitute a general partnership

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109. Van Loon v. Dep't of Treasury, 122 F.4th 549, 571 (5th Cir. 2024). Instead, the Fifth Circuit's analysis focused on the question of whether the smart contracts were property within the meaning of the regulations. *Id.* at 563–71. Because the Fifth Circuit could make that determination without considering OFAC's claim that the "Tornado Cash DAO" constituted an entity capable of regulation, the Fifth Circuit specifically declined to opine as to whether Tornado Cash constituted an entity. *Id.* at 571.

110. Press Release, U.S. Dep't of Treasury, Tornado Cash Delisting (Mar. 21, 2025), https://home.treasury.gov/news/press-releases/sb0057 [https://perma.cc/DMU7-4NHU].

111. Complaint at 1–2, Commodity Futures Trading Comm'n v. Ooki DAO, No: 3:22-cv-05416 (N.D. Cal. Sept. 22, 2022).

112. *Id.* at 17.

113. *In re* bZeroX, LLC, CFTC No. 22-31, 2022 WL 4597664, at *10 (Sept. 22, 2022) ("The Ooki DAO is a for-profit unincorporated association.").

114. Order on Motion to Dismiss at 13–14, Sarcuni v. bZx DAO, 664 F. Supp. 3d 1100 (S.D. Cal. Mar. 27, 2023) (No. 3:22-cv-00618-LAB-DEB).

115. *Id.* (citations omitted).

116. Kent v. PoolTogether, Inc., 676 F. Supp. 3d 144, 147 (E.D.N.Y. 2023).

shocked many.[117] This reaction from the blockchain community does not necessarily stem from ignorance of general partnership law but rather from a deep sentiment that categorizing protocol DAOs in particular as general partnerships makes little policy sense.[118] Not all governance tokens automatically return profit shares to the tokenholders.[119] Further, where governance tokenholders only contribute to decision-making in an open-source development context, the history of open-source development would give them no reason to suspect they were creating a general partnership.[120] Finally, in light of the personal liability risk stemming from the general partnership form, a key tenet of partnership law rests in the capacity of participants to pick their partners.[121] The fluidity and pseudonymity of membership in a DAO runs contrary to this core principle of partnership law. Irrespective of the fact that treating DAOs as general partnerships runs contrary to certain policies underlying partnership law, real and proven risk exists of a court imposing joint and several personal liability on DAO participants by determining the existence of a general partnership.

C. Legal Wrappers for Decentralized Autonomous Organizations

In the wake of the Ooki and Tornado Cash cases, participants in DAOs began to worry more about the liability risk posed by the default general partnership entity form and considered forming other business entities to mitigate that risk.[122] Because many in the blockchain ecosystem think of DAOs as "alegal" structures that exist via code without the need for law,[123] the blockchain community often analogizes a business entity to a "wrapper" of legal protection around DAO software, harkening back to click-wrap terminology used in relation to software licenses.[124] Choice of entity in this context involves more than the usual considerations of liability, tax consequences, and exit

117. Reyes, *Detrimental Reliance*, *supra* note 16, at 1377–78.

118. Reyes, *Rockefeller*, *supra* note 11, at 400.

119. *See id.* at 391–400.

120. Reyes, *Rockefeller*, *supra* note 11, at 391–95; Reyes, *Detrimental Reliance*, *supra* note 16, at 1377–78.

121. *See* Lidstone & Sparkman, *supra* note 13, at 23; Kleinberger, *supra* note 13, at 589–90.

122. Reyes, *Detrimental Reliance*, *supra* note 16, at 1377–84.

123. *See* Usha R. Rodrigues, *Law and the Blockchain*, 104 IOWA L. REV. 679, 682 (2019); Brummer & Seira, *supra* note 55, at 3–4 ("In their most canonical incarnations, DAOs operate without any formal legal recognition, eschewing dependence on governmental authority for their existence, and resisting the rigidity imposed on them by regulations." (citing Gabriel Shapiro & Sydney Abualy, *Wyoming's Legal DAO-Saster*, METALEX (Apr. 9, 2021), https://lexnode.substack.com/p/wyomings-legal-dao-saster?s=r [https://perma.cc/SGR5-6K8B])).

124. *See* Brummer & Seira, *supra* note 55, at 4 ("In order to easily engage with service providers like bankers, lawyers and consultants, as well as be able to pay taxes, DAOs need a legal wrapper endowing them with a legal identity."). For a look at the lineage of "wrap" agreements in software and website use, see generally Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008); George H. Pike, *Shrink-Wrap, Click-Wrap, Now Browse-Wrap*, INFO. TODAY, Mar. 2004, at 15.

strategies—although those continue to play a role.[125] In addition, those seeking to wrap a DAO in a formal entity structure also consider the extent to which novel and endogenous governance priorities can be respected through the entity form, the extent to which the participants can preserve pseudonymity, and the flexibility of the fiduciary duty framework imbued in each entity.[126] This Section considers each of the commonly used DAO legal wrappers in turn and assesses them in light of both more traditional and more DAO-specific entity-selection criteria, ultimately revealing that each fails to adequately serve the unique entity needs of DAOs.

When a venture DAO elects to operate with a flat governance structure in which the owners also manage the business, they often turn to the LLC as a legal wrapper.[127] The Delaware LLC has become particularly popular in light of (1) the fact that members of a Delaware LLC need not all declare their identity directly in the publicly available documents filed with the state to create the entity and (2) the fairly flexible ability of members to define standards of fiduciary duties by contract.[128] When using the LLC form in other states, however, LLC statutes require identification of members in the formation documents.[129] In an attempt to maintain pseudonymity, venture DAOs that opt to form LLCs under such statutes limit formal legal membership to key persons who agree to identify themselves and then tokenize assignment of their membership interests to other DAO participants.[130] Doing so leaves the assignees in a relatively precarious legal position in comparison to the identified members of the DAO.[131]

Despite these drawbacks, the LLC attracted so much attention as an available legal wrapper for DAOs that several states amended their LLC laws in an attempt to make the perfect LLC wrapper for DAOs and attract blockchain-related businesses to their state.[132] Vermont launched the first such effort with the Vermont Blockchain-Based LLC which aimed to clarify the capacity of LLCs to encode some or all of its operating rules via blockchain

125. *See* Brummer & Seira, *supra* note 55, at 20–29.

126. *See id.* at 6–19.

127. Weinstein et al., *supra* note 29.

128. *See id.* ("Although Delaware has not recognized DAOs as legal entities, many DAOs have been formed as Delaware LLCs."). Notably, Delaware LLC members must be known to someone (often the registered agent) and under certain circumstances pseudonymity may need to be unveiled. DEL. CODE ANN. tit. 6, §§ 18-104(g), 18-305(a)–(b) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)).

129. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 3.010 (West, Westlaw through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election) (requiring contact information of initial managers or, if there are none, contact information of initial members).

130. *See, e.g.*, Sam Padilla, *ATX DAO Testimony on DAO Legislation*, MIRROR (Aug. 20, 2022), https://mirror.xyz/atxdaojournal.eth/K7UMQyttecj22qaWNuuEHbhM-9uMSOGZ0DrAxDWjS14 [https://perma.cc/5FCF-UZ5S].

131. *See, e.g.*, *id.*

132. *See* Weinstein et al., *supra* note 29.

technology and smart contracts and still retain legal effect.[133] The first LLC organized under the new Vermont law was dOrg LLC, "a cooperative of freelance software engineers."[134] Wyoming later adopted a statute that enables the formation of an LLC that declares in its operating agreement that it is a DAO, and the statute recognizes such entities as a DAO LLC.[135] The statute acknowledges the potential for DAO-specific entity features, such as algorithmic management (by smart contract).[136] Tennessee followed suit shortly thereafter, modeling its DAO LLC law after Wyoming's statute but altering it to reflect more practical and technical realities of the venture DAOs currently operating in the marketplace.[137] Ultimately, the LLC form remains less than ideal as a legal wrapper—even for venture DAOs—because owners cannot escape legal requirements to identify themselves without sacrificing legal rights and because of the often very fluid nature of DAO membership and the way such fluidity impacts the enforceability of operating agreements that attempt to limit or define the standards for fiduciary duties. Further, in an attempt to accommodate algorithmically managed DAOs,[138] some of the DAO-specific LLC statutes require public identification of any "managerial" smart contract in the formation documents.[139] Many DAO developers view such requirements as impractical and a reflection of technological misunderstandings, and generally feel that such requirements do not, in fact, help DAOs at all.[140]

Recognizing that LLCs, even under the new DAO-specific laws passed by various states, do not neatly fit the unique needs of many venture DAOs, some prominent DAOs use business trusts and cooperatives as a legal wrapper. In particular, "[t]he Dash DAO organized [as] a New Zealand-based irrevocable trust—the Dash DAO Irrevocable Trust, or the Dash Trust. . . ."[141] Although many states boast a business-trust statute and many other states continue to recognize the Massachusetts common law business trust,[142] use of the U.S.

133. Scott Sugino & Wenting Yu, *DAOs: Looking for Limited Liability & Legal Personality*, O'MELVENY (July 11, 2022), https://www.omm.com/insights/alerts-publications/daos-looking-for-limited-liability-legal-personality/ [https://perma.cc/7M8Q-PNQB].

134. Reyes, *ABR*, *supra* note 42, at 442.

135. WYO. STAT. ANN. § 17-31-104 (LexisNexis through 2024 Budget Session); *see also* Mike Dill, *Crypto, DAOs, and the Wyoming Frontier*, HOLLAND & HART (July 19, 2021), https://www.hollandhart.com/crypto-daos-and-the-wyoming-frontier [https://perma.cc/NY6X-E2X4].

136. Dill, *supra* note 135.

137. Jordan Teague, *Starting a DAO in the USA? Steer Clear of DAO Legislation*, THE DEFIANT (June 7, 2022), https://thedefiant.io/starting-a-dao-in-the-usa-steer-clear-of-dao-legislation#cmfSimpleFootnoteLink1 [https://perma.cc/P88B-KYDA].

138. *See* Wright, *supra* note 52, at 165–66 (for an explanation of algorithmically managed DAOs).

139. Teague, *supra* note 137.

140. *Id.*

141. Reyes, *ABR*, *supra* note 42, at 442.

142. Reyes, *Rockefeller*, *supra* note 11, at 407–08, 410 n.215. This variance in state law poses a potential practical difficulty for use of a business trust as a DAO entity form in the United States. Notably, business trusts formed under a statute that requires an affirmative filing with the state are likely subjected to the

version of this entity may not fit DAO priorities for practical reasons. Alternatively, some have suggested turning to a little-known Colorado law allowing for the creation of a limited cooperative association (LCA).[143] Like the business trust, the LCA allows for a business purpose, offers limited liability, and enables respect for endogenous DAO priorities through cooperative governance.[144]

Recognizing that not all DAOs seek to operate a venture at all, a large measure of discussion evolved around the use of the unincorporated non-profit association (UNA) as a legal wrapper for protocol DAOs.[145] The drawbacks of a UNA lie in both their limitation to non-profit DAOs—thus, venture DAOs may not qualify for use of the UNA structure—and the fact that, like the business trust, not all jurisdictions statutorily recognize the UNA, limiting the availability of liability protection by state.[146] Most states that only recognize a UNA at common law do not recognize the organization as enjoying a separate legal existence from its members, making the members potentially liable for the UNA's debts and liabilities.[147] Lastly, in the absence of a well-fitting U.S. entity structure, many DAOs turn to foreign entity formation.[148]

As DAOs explore using legal wrappers to mitigate the risk of personal liability for DAO participants, two problems ultimately continue to plague their participants. First, it remains difficult to achieve DAO-specific choice-of-entity goals like pseudonymity, flexible fiduciary duties, and novel governance mechanisms through traditional—and even less traditional—entity forms. Second, and as explored more fully below, DAOs wrapped in traditional legal entities often back into an unintended consequence: creating governance tokens for DAO-coordination purposes that trigger the application of securities regulation.

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requirements of the Corporate Transparency Act. Robert D. Hodges & Katheryn J. Thorson, *How Business Entities Held in Trusts Are Treated Under the Corporate Transparency Act*, BROWN WINICK (May 1, 2023), https://www.brownwinick.com/insights/how-business-entities-held-in-trusts-are-treated-under-the-corporate-transparency-act [https://perma.cc/G85U-773N]. Common law business trusts, which are formed entirely by contract, would likely not be subject to the Corporate Transparency Act as a reporting company. *Id.*

143. Weinstein et al., *supra* note 29.

144. Jacqueline Radebaugh & Yev Muchnik, *Exclusive Report: Solving the Riddle of the DAO with Colorado's Cooperative Laws*, THE DEFIANT (Dec. 16, 2021), https://thedefiant.io/solving-the-riddle-of-the-dao-with-colorados-cooperative-laws [https://perma.cc/H8TC-7BXB].

145. *See generally* Kerr & Jennings, *supra* note 58; Miles Jennings & David Kerr, A Legal Framework for Decentralized Autonomous Organizations Part II: Entity Selection Framework (June 2022) [hereinafter Jennings & Kerr, Part II] (unpublished manuscript), https://api.a16zcrypto.com/wp-content/uploads/2022/06/dao-legal-framework-part-2.pdf [https://perma.cc/35AT-GN2U].

146. Sugino et al., *supra* note 133.

147. Jennings & Kerr, Part II, *supra* note 145, at 8.

148. *See* Sugino et al., *supra* note 133 (discussing Cayman Foundations and Singapore Companies).

II. BACKGROUND: ENTITY SELECTION FOR REGULATORY RISK

For some time, blockchain-related open-source software-development communities have focused their legal-wrapper discussions on how to mitigate liability risk and a specific kind of regulatory risk: the one stemming from uncertainty of how securities law applies to tokens broadly, and governance tokens specifically.[149] While discussion of those issues began in 2017 after the SEC first indicated interest in enforcing securities regulation in the context of certain token offerings,[150] the nearly all-consuming focus on securities law left a pathway for other regulatory risks to emerge and catch open-source software communities, and their lawyers, by surprise.[151] In recognition of the very real regulatory risk to blockchain-related open-source software-development communities posed by securities law, this Part first considers the complex and somewhat tumultuous application of securities regulation to tokens. This Part then goes beyond where most other analyses stop and considers the implications of the Corporate Transparency Act (CTA) and the role that entity formation can play in bringing an open-source software-development community within the regulatory jurisdiction of other agencies such as the CFTC and OFAC. This Part does not address the federal taxation consequences of entity selection, which is largely up to the organizers of any noncorporate entity, regardless of the specific entity.[152]

A. Securities Law: Digital Assets as Securities

Both federal and state law regulate the offer and sale of financial instruments that are classified as "securities."[153] This designation is a substantial toggle: if an instrument (or package of agreements and obligations) is a security, then the scheme and its promoters are subject to a costly and burdensome system of registration and disclosure, unless exempt.[154] If the instrument is not a security, then it escapes securities regulation entirely, though state law claims sounding in contract and fraud may be relevant.[155] If digital assets are

149. Dill, *supra* note 135.

150. SEC 2017 Report, *supra* note 33, at 2 (opining that the interests in "DAO" were securities).

151. *See* Samuel D. Brunson, *Standing on the Shoulders of LLCs: Tax Entity Status and Decentralized Autonomous Organizations*, 57 GA. L. REV. 603 (2023).

152. *See id.* at 630 n.181 (examining the intersection of the "check-the-box regulations" enabling unincorporated associations to accept partnership taxation or elect corporate taxation and the emergence of the DAO form).

153. *See Framework for "Investment Contract" Analysis of Digital Assets*, U.S. SECS. & EXCH. COMM'N (July 5, 2024) [hereinafter SEC 2019 Framework], www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_edn1 [https://perma.cc/2BEJ-SJX9] (detailing the extensive list of factors to consider for each element of the *Howey* test).

154. *See id.*

155. *See id.*

considered securities,[156] then the offer and sale of those assets may violate Section 5 of the Securities Act of 1933,[157] and any false statements made in promoting the sale of those assets will violate Section 10(b) of the Securities Exchange Act of 1934.[158] This question is an almost existential question for many digital asset issuers and has become a hot-button political issue in 2025. As explained below, the SEC under Chair Gary Gensler generally proceeded as if digital assets were securities; following the 2024 presidential election, however, the SEC has shown a willingness to re-examine that presumption.[159]

1. Investment Contracts

For federal law purposes, the term "security" is defined in Section 2(a)(1) of the Securities Act of 1933,[160] which lists many recognizable financial instruments, including stocks, notes, bonds, and derivative instruments.[161] This definition does not list some very common types of equity interests: partnership interests, limited partnership interests, and limited liability company interests, though many state laws define some of these interests as securities per se.[162]

156. Considerable debate exists about whether a digital asset itself can be considered a security, or whether the terms under which they are offered constitute a security (as an investment contract) while the digital asset remains separate but related property. *See, e.g.*, Memorandum from Crypto Task Force Staff to Crypto Task Force Meeting Log 2–3 (Feb. 24, 2025), https://www.sec.gov/files/memo-gottlieb-hinkes-verret-022425.pdf [https://perma.cc/C2BL-NRKY] (describing the SEC's prior approach to treating digital assets as "cryptoasset securities" and arguing that "[t]he SEC should decline to continue this practice and clarify that while various factors, acts and communications between legal actors may give rise to a transaction in a security, a digital asset itself is not a security unless some positive law recognizes that the digital asset is a security . . . ."). Indeed, under Hester Peirce's leadership, the SEC is actively exploring this very issue. SEC Comm'r Hester M. Peirce, Statement, *There Must be Some Way Out of Here*, SEC (Feb. 21, 2025), https://www.sec.gov/newsroom/speeches-statements/peirce-statement-rfi-022125 [https://perma.cc/YC3S-2QMT] (providing a list of questions for stakeholder input using a potential taxonomy that explores whether there are digital assets that may "have the intrinsic characteristics of securities").

157. Though private investors could sue for rescission if they purchased an unregistered security under Section 12(a)(1), the statute of limitation is one year (without tolling), and they can get rescission only from the person that sold them the security, not the seller's seller. *See* Fabian v. LeMahieu, No. 19-CV-00054-YGR, 2019 WL 4918431, at *8–9 (N.D. Cal. Oct. 4, 2019) (holding that purchasers of the token had no cause of action because they were past the statute of limitations, and tolling language for Section 12(a)(2) did not apply (citing Nolfi v. Ohio Ky. Oil Corp., 675 F.3d 538, 553 (6th Cir. 2012))); *see also* Underwood v. Coinbase Glob., Inc., 654 F. Supp. 3d 224, 238 (S.D.N.Y. 2023) (holding that the issuer was not a statutory seller under Section 12(a)(1) because the purchaser bought from third party).

158. Securities Exchange Act of 1934 § 10(b), 15 U.S.C § 78j.

159. Dave Michaels, *Trump's Return Heralds Litigation Peace for Crypto*, WALL ST. J. (Dec. 1, 2024), https://www.wsj.com/finance/regulation/trump-crypto-us-war-0b91cc21 [https://perma.cc/2CKT-66CG] ("The president-elect, shedding previous skepticism of crypto, has pledged support for the digital-asset industry, whose leaders embraced his campaign.").

160. Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1). The counterpart to this definition in the Securities Exchange Act of 1934 is found in § 3(a)(10). *See* 15 U.S.C. § 78c(a)(10).

161. 15 U.S.C. § 77b(a)(1).

162. CAL. CORP. CODE § 25019 (Westlaw with Ch. 1 of 2023-24 2nd Ex. Sess. and all laws through Ch. 1017 of 2024 Reg. Sess.) (defining security to include a "membership in an incorporated or unincorporated association"); CONN. GEN. STAT. § 36b-3(19) (2019) (defining security to include "interests of limited

These interests may be securities only if they are considered "investment contracts," a catch-all term listed in Section 2(a)(1).[163] The term "investment contract" has been described by the courts as necessary to encompass new and exotic types of financial instruments as well as creative, fraudulent schemes, and it allows the SEC to protect prospective investors from opportunistic promoters strategically attempting to circumvent securities regulation.[164]

Since 1946, federal courts have determined whether a financial relationship seems like an investment contract by applying a test set out by the Supreme Court in *S.E.C. v. Howey*.[165] An agreement or set of agreements will constitute a security if a person (1) invests money[166] (2) in a common enterprise[167] (3) with an expectation of profits[168] (4) solely from the efforts of another (or others).[169]

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partners in a limited partnership"); GA. CODE ANN. § 10-5-2(31) (LexisNexis through 2024 Regular and Extraordinary Session of the General Assembly) (defining "investment contract" to include "an interest in a limited partnership or a limited liability company"); IOWA CODE § 502.102(28)(e) (2025) (defining security to include interests in a "limited liability company or in a limited liability partnership"); ME. STAT. tit. 32, § 16102(28) (2025) (defining "investment contract" to include "an interest in a limited partnership"); MISS. CODE ANN. § 75-71-105(n) (LexisNexis with legislation from the 2024 1st and 2nd Extraordinary Sessions and Regular Session, and SB 2145 from the 2025 Regular Session; also includes changes and corrections made by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation) (defining "investment contract" to include "an investment in a limited partnership, [and] a limited liability company"); MO. REV. STAT. § 409.1-102(28)(E) (2024) (defining "security" to include "investment contract" which "may" include "an interest in a limited partnership"); NEV. REV. STAT. § 90.295 (2023) (including in the definition of "security" "a limited partnership interest, [and] an interest in a limited-liability company"); N.M. STAT. ANN. § 58-13C-102(DD)(6) (2024) (including in the definition of "security" "any interest in a limited partnership or a limited liability company"); 70 PA. CONS. STAT. § 1-102(t) (2022) (including limited partnership interests as securities, and memberships in certain limited liability companies where all members "participate actively and directly in the management of the company"); TEX. GOV'T CODE ANN. § 4001.068(a)(1)(A) (West, Westlaw through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election) ("a limited partner interest in a limited partnership" is a security); WIS. STAT. § 551.102(28)(e) (2023) (including limited liability partnership interests and limited liability company interests as securities unless the number of interest holders does not exceed fifteen holders or all holders are "actively engaged in the management").

163. 15 U.S.C. § 77b(a)(1).

164. SEC v. Edwards, 540 U.S. 389, 393 (2004) ("This definition 'embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'" (quoting SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946))).

165. *Howey*, 328 U.S. at 293.

166. *See* Int'l Bhd. v. Daniel, 439 U.S. 551, 560 (1979) (holding that an employee, whose employer paid money each month into a mandatory contribution pension plan, did not invest money in that plan for purposes of the *Howey* test).

167. *See* SEC v. SG Ltd., 265 F.3d 42, 50 (1st Cir. 2001) (explaining that some circuits require horizontal commonality, not just vertical commonality, and that "horizontal commonality requires more than pooling alone; it also requires that investors share in the profits and risks of the enterprise").

168. *See id.* at 54 (holding that the marketing materials for stock market "game" emphasized the earning of profits from investing in fictional companies, creating the expectation of profits and not just gaming for consumptive value).

169. *See* SEC v. Aqua-Sonic Prods. Corp., 687 F.2d 577, 582 (2d Cir. 1982) (holding that "solely" is not a "literal limitation" and that courts "consider whether, under all the circumstances, the scheme was being promoted primarily as an investment or as a means whereby participants could pool their own activities, their money and the promoter's contribution in a meaningful way").

States have also adopted this test,[170] as well as a related test articulated by the Fifth Circuit in *Williamson v. Tucker*,[171] to determine whether partnership interests and LLC interests meet the last prong of the *Howey* test.[172] In general terms, the *Howey* test excludes nonstock investments that are purchases of assets for consumption,[173] purchases of assets with expectations of appreciation due to increasing demand[174] (including commodities), purchases without some sort of pooling of funds and outcomes,[175] and investments in which the purchaser's own efforts will contribute to future profits or losses.[176]

2. Entity Interests as "Investment Contracts"

Because interests in unincorporated entities are not listed in Section 2(a)(1),[177] interests in individual entities must be analyzed under the *Howey* test.[178] All types of partnership and LLC interests easily meet the first three prongs: new partners or members give consideration to a common enterprise with an expectation of sharing in future profits. The fourth prong, however, will not be present in entities in which the purchaser will have some management control. If investors have management rights, then their investment will not profit, if at all, based solely on the efforts of others. Envision the two stereotypical opposing entities in the U.S.: general partnerships, in which all partners have the default right to co-manage, and corporations, in which shareholders have delegated management power to the board of directors. Stock in corporations is a security by definition, but partnership and LLC interests must be analyzed to see whether the rights to co-

170. *See, e.g.*, Chan v. HEI Res., Inc., 512 P.3d 120, 123 (Colo. 2022) ("An investment contract is undefined in the statute, but Colorado has long followed federal law in applying the test set forth in *Securities & Exchange Commission v. W.J. Howey Co.* . . . ."); Life Partners, Inc. v. Arnold, 464 S.W.3d 660, 670 (Tex. 2015) (applying the *Howey* test, which Texas adopted in *Searsy v. Comm. Trading Corp.*, 560 S.W.2d 637 (Tex. 1977)).

171. Williamson v. Tucker, 645 F.2d 404, 417 (5th Cir. 1981).

172. SEC v. Arcturus Corp., 928 F.3d 400, 409 (5th Cir. 2019) (explaining that Texas has adopted the *Williamson* test); *Chan*, 512 P.3d at 123 (holding that in Colorado, the *Williamson* test does not create presumption that partnership interests are not securities).

173. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 857 (1975) (holding that money deposited to secure future housing in a subsidized development was not an investment contract because the depositors had no expectation of profiting from their leases).

174. *See* Woodward v. Terracor, 574 F.2d 1023, 1026 (10th Cir. 1978) ("[N]o 'investment contract' is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values . . . ." (quoting Cont. Buyers League v. F & F Inv., 300 F. Supp. 210 (N.D. Ill. 1969))).

175. *See* Garcia v. Santa Maria Resort, Inc., 528 F. Supp. 2d 1283, 1292 (S.D. Fla. 2007) (holding that the purchase of a condominium did not involve a common enterprise).

176. *See* Ave. Cap. Mgmt. II, L.P. v. Schaden, 843 F.3d 876, 882 (10th Cir. 2016) (holding that a private equity funds that collectively purchased 80% of the LLC interests in a manager-managed LLC did not purchase securities under the *Williamson* test because the funds controlled the board of managers).

177. Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1).

178. Christopher W. Cole, *Financing an Entrepreneurial Venture: Navigating the Mase of Corporate, Securities, and Tax Law*, UMKC L. REV. 473, 496 (2009).

manage are reserved to all participants or whether the parties have contracted for more centralized management and passive investment. Were courts to merely look to a partnership agreement or LLC operating agreement, organizers could easily draft an agreement that created at least a semblance of collective management, even if management was centralized in reality.

Under the *Williamson* test, general partnership interests and member-managed LLC interests are much more likely not to be considered securities,[179] but courts must look through the default form to both the written agreements and the practical realities.[180] In *Williamson v. Tucker*,[181] the Fifth Circuit analyzed interests in a joint venture to determine whether jurisdiction under federal securities law was improperly dismissed by determining whether a partner has "irrevocably delegated his powers, or is incapable of exercising them, or is so dependent on the particular expertise of the promoter or manager that he has no reasonable alternative to reliance on that person."[182] If a partner is dependent on the management of others by contract or by circumstance, then the partnership interest, however described, is an investment contract.[183] Other salient facts a court would consider are whether the interests were sold to large numbers of the general public so as to dilute management power; whether the partner has necessary business experience and expertise; and whether the partners are unable to replace the management, either due to lack of removal power or because the enterprise relies on that particular manager or team.[184]

Entrepreneurs wishing to raise large amounts of capital are probably not willing to be a general partnership merely to escape federal securities regulation, however. Unrelated, inexperienced strangers in a large venture would not have the ability to successfully monitor the activities of the partnership in order to feel comfortable with unlimited personal liability, not to mention the limitations fiduciary duties would have on investing in potentially competing enterprises.[185]

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179. *Compare* SEC v. Merch. Cap., LLC, 483 F.3d 747, 755 (11th Cir. 2007) (describing *Williamson* as creating a "presumption" that general partnership interests are not an investment contract unless one of the factors is present), *with* Chan v. HEI Res., Inc., 512 P.3d 120, 123 (Colo. 2022) ("We reject the notion that general partnerships are entitled to any presumption that might imply that a plaintiff bears a burden of proof [that the general partnership interest is a security] greater than the preponderance of the evidence burden generally applicable in civil litigation.").

180. Williamson v. Tucker, 645 F.2d 404, 422 (5th Cir. 1980) ("[T]he mere fact that an investment takes the form of a general partnership or joint venture does not inevitably insulate it from the reach of the federal securities laws.").

181. *Id.* at 404.

182. *Id.* at 422–23.

183. *Id.* at 422–24.

184. *Id.*

185. One exception to this rule seems to be joint ventures in the oil and gas industry in which promoters do market and sell joint venture interests in drilling operations to geographically dispersed strangers, which makes the passive investments susceptible to enforcement actions for selling unregistered securities. S*ee, e.g.*, SEC v. Arcturus Corp., 928 F.3d 400 (5th Cir. 2019) (involving over 300 investors who invested in a series of joint ventures that owned drilling rights in oil wells). The Fifth Circuit remanded this case to the trial court,

Arranging a structure to look like a joint venture or general partnership to avoid securities regulation may have equally negative consequences under state general partnership law.[186]

Williamson[187] involved a small number of individuals investing in joint ventures in the 1960s, prior to the advent of both the limited liability partnership (LLP) and the LLC. Each of these "new" forms expands the possibilities for a combination of limited liability and an investor-management structure that might pass the *Williamson* test. The LLP is an entity formed as a general partnership, but the owners have elected via a public filing for it to have limited liability for its partners; all partners may co-manage the partnership, but they will not be vicariously liable for the obligations of the entity or each other.[188] The LLC is a further innovation in hybrid entities: members can choose to co-manage or delegate management power to a manager or group of managers.[189] Either way, everyone enjoys limited liability and only those with management power (either all the members or the designated member-managers) owe the entity fiduciary duties. Generally, LLP interests and member-managed LLC interests can withstand *Williamson* analysis and not be considered securities.[190] Promoters have understandably attempted to arrange new ventures as either an LLP or LLC without centralized management in order to obtain limited liability without being regulated for selling securities.

One wrinkle is that many founders of new ventures really want to both raise capital and retain management power without selling management rights

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holding that material issues of fact were disputed regarding the *Williamson* factors and not suitable for disposition at summary judgment. *Id.* at 424; *see also* SEC v. Sethi Petroleum, LLC, 2016 WL 4196667, at *1 (E.D. Tex. Aug. 9, 2016); SEC v. Shields, 744 F.3d 633 (10th Cir. 2014) (involving sixty investors in several joint ventures organized for oil and gas exploration and drilling). The Tenth Circuit in the *Shields* case held that the joint venture interests, marketed to many investors through cold-calling activities, were investment contracts. *Shields*, 744 F.3d at 641–48.

186. *See supra* Section I.B.

187. *Williamson*, 645 F.2d at 404.

188. *See* CHRISTINE HURT & D. GORDON SMITH, BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) § 1.01 (2d ed. 2018) [hereinafter HURT & SMITH, LLPs] (chronicling the emergence of LLP statutory provisions as amendments to general partnership statutes beginning in 1991 in Texas); Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences – The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 724–26 (1997) (tracing the history of the first LLP statutory provisions enacted); Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 COLO. L. REV. 1065, 1069 (1995) (stating that the emergence of the LLP "liability shield" was a "direct outgrowth of the collapse of real estate and energy prices in the late 1980s, and the concomitant disaster that befell Texas's banks and savings and loan associations," resulting in lawsuits against the financial institutions' lawyers and accountants, formed as general partnerships).

189. *See* Susan Pace Hamill, *Some Musings as LLCs Approach the Fifty-Year Milestone*, 51 CUMB. L. REV. 1 (2020).

190. *See* Foxfield Villa Assocs., LLC v. Robben, 967 F.3d 1082 (10th Cir. 2020); *see also* Ave. Cap. Mgmt. II, L.P. v. Schaden, 843 F.3d 876, 882–84 (10th Cir. 2016) (holding that the private equity funds that collectively purchased 80% of the LLC interests in a manager-managed LLC did not purchase securities under the *Williamson* test because the funds controlled the board of managers).

with equity interests.[191] Accordingly, securities law cases often involve passive investments strategically structured to look like genuine co-management interests.[192] Applying the *Williamson* test, the courts look through the promotional materials and organizational documents to see whether the investors have the opportunity, ability, and interest in actively participating in the venture.[193] Some state statutes, in fact, bake the fact-specific *Williamson* test into their definitions of "security" and "investment contract."[194] Many cases involving digital assets have met the same securities law fate when promoters superficially created the appearance of co-management without the reality of it.[195]

Looking and operating like a general partnership, however, has very specific drawbacks, as discussed above. One alternative would be a member-managed LLC, with bona fide member-manager interests that are not considered securities. In addition, an LLC organized in Delaware could waive fiduciary duties of the member-managers and retain limited liability.[196] An LLP, if

191. *See generally* NOAM WASSERMAN, THE FOUNDER'S DILEMMAS: ANTICIPATING AND AVOIDING THE PITFALLS THAT CAN SINK A STARTUP (2012).

192. *See, e.g.*, SEC v. Merch. Cap., LLC, 483 F.3d 747 (11th Cir. 2007) (reversing a trial court verdict for defendants and holding that registered LLP interests were "investment contracts" under the *Williamson* test).

193. For example, in *Merchant Capital*, the partnership agreement "informed partners that they were expected to take an active role in the business" and gave partners the theoretical power to name the general partner, remove the general partner for cause, participate on committees, amend the agreement, and approve expenditures. *Id.* at 757. In practice, however, none of these rights were able to be exercised because the partners were not given opportunities to exercise them. *See id.* at 759–61.

194. *See, e.g.*, IOWA CODE § 502.102(28)(e) (West, Westlaw with legislation effective November 5, 2024 from the 2024 Regular Session and the November 5, 2024, general election) ("'[S]ecurity' does not include an interest in a limited liability company or a limited liability partnership if the person claiming that such an interest is not a security proves that all of the members of the limited liability company or limited liability partnership are actively engaged in the management of the limited liability company or limited liability partnership; provided that the evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company or limited liability partnership, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company or limited liability partnership.").

195. Audet v. Fraser, 605 F. Supp. 3d 372, 396 (D. Conn. 2022) (holding that a jury finding that Paycoin was not a security was against weight of the evidence and that the ability of "anybody" to "participate in the 'consensus process for determining whether transactions would become part of the [Paycoin blockchain]'" was outweighed by fact that promoters marketed Paycoin by emphasizing the efforts of GAW to increase the market value of Paycoin (alteration in original)); SEC 2017 Report, *supra* note 33, at 13–14 (explaining how DAO Token holders had the contractual right to propose projects to "the Curators" and vote on projects approved by the Curators, but taking the position that the DAO Tokens were securities because that limited voting right was not meaningful control). The SEC emphasized that the voting rights were "perfunctory" and that the DAO Token holders were "widely dispersed and limited in their ability to communicate with one another." *See id.* at 14.

196. DEL. CODE ANN. tit. 6, § 18-1101(e) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)) ("A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.").

organized in Delaware, could also waive fiduciary duties of all partners and retain limited liability.[197]

3. "Cryptoassets" as "Investment Contracts"

The history of cryptocurrencies[198] and cryptographic tokens as investment contracts under the *Howey* test, though short, is fairly complex and has spawned a robust body of scholarship.[199] In the 2010s, the SEC and other regulators initially treated cryptocurrencies bitcoin and ether as something between a stateless currency and a stored-value payment system,[200] and most scholars agreed.[201] By 2015, however, the U.S. Commodity Futures Trading Commission was treating bitcoin and other virtual currencies as a commodity under the Commodities Exchange Act.[202] In addition, to the extent that a cryptocurrency functioned as a utility token to purchase a particular good or service, then it would not be a security.[203] When a venture capital firm, operated entirely via blockchain technology, imploded, however, the SEC took the opportunity to put the world on notice that *Howey* could apply to make certain types of digital

197. *Id.* § 15-103(f) ("A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.").

198. For a discussion of the nuances of cryptocurrency-related terminology, see *infra* notes 322–33 and accompanying text. *See also* Reyes, *Language Wars: Cryptocurrency*, *supra* note 46.

199. The first published article retrieved in Westlaw from its "Law Reviews and Journals" database containing either the word "cryptocurrency" or the term "bitcoin" in the main text was published in 2012 and was written by a law student at Temple Law School. *See* Nikolei M. Kaplanov, *Nerdy Money: Bitcoin, the Private Digital Currency, and the Case Against Its Regulation*, 25 LOY. CONSUMER L. REV. 111 (2012). Since then, approximately 2,800 additional articles have been published in the same database using either term.

200. SEC, *Investor Alert: Bitcoin and Other Virtual Currency-Related Investments*, INVESTOR.GOV (May 7, 2014), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/investor-39 [https://perma.cc/FUK7-NLCU] (describing bitcoin as a "decentralized, peer-to-peer virtual currency"); *see also* Misha Tsukerman, *The Block Is Hot: A Survey of the State of Bitcoin Regulation and Suggestions for the Future*, 30 BERKELEY TECH. L.J. 1127, 1155 (2015) (summarizing the few enforcement actions by the SEC as reflective of the opinion of the SEC not that "the purchase of a Bitcoin on an exchange counted as a security or investment contract" but that Ponzi schemes that involved using Bitcoin as the initial investment contribution or that promised returns based on Bitcoin appreciation did involve securities).

201. *See, e.g.*, Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159, 199 (2012) ("In sum, because there is likely no common enterprise, Bitcoin is unlikely to be an investment contract."); Jeffrey E. Alberts & Bertrand Fry, *Is Bitcoin a Security?*, 21 B.U. J. SCI. & TECH. L. 1, 2 (2015) (describing Bitcoin as a "decentralized peer-to-peer [digital] payment network" that is not a security (alteration in original) (quoting *Frequently Asked Questions*, BITCOIN.ORG, https://bitcoin.org/en/faq#what-is-bitcoin [https://perma.cc/AV97-YZJY]).

202. *See In re* Coinflip, Inc., CFTC No. 15–29, 2015 WL 5535736 (Sept. 17, 2015) ("Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities.").

203. Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets*, 70 HASTINGS L.J. 463 (2019).

tokens, which seemed neither like utility tokens nor like stable virtual currencies, "investment contracts."[204]

Over time, the SEC has focused on whether the value or exchange rate of the digital asset would increase or decrease solely from the efforts of another and whether the token purchaser was led to expect profits from these efforts.[205] Participants in blockchain protocols that issue tokens have at least three arguments that the tokens are not investment contracts: (1) the tokens are not marketed as an investment at all but rather as something holders use that has value only because it is useful;[206] (2) the tokens are marketed as likely to appreciate, not through the efforts of the promoters but by increased demand unrelated to the promoter's efforts;[207] and (3) the tokens are marketed as likely to appreciate, in some part, by the efforts of the investor.[208] As critics, including one SEC commissioner, have pointed out, the same token may meet the test for security at one point in time, but the sale or resale of that token later on may not.[209] Initial coin offerings (often undertaken by selling tokens at the second layer in the blockchain technology stack), for instance, would be more likely to involve securities than offerings of the same tokens a few years later.[210]

204. SEC 2017 Report, *supra* note 33. Whether the SEC intended to treat the tokens themselves as investment contracts or as the object of investment contracts remains a hotly contested issue that the Gensler SEC began to shift away from, and the Crypto Task Force under Commissioner Peirce appears poised to continue clarifying the line between the digital asset and the investment contract. See, e.g., Lewis Cohen, et al., The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities (Dec. 13, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4282385; Peirce, *supra* note 156.

205. *See* SEC 2019 Framework, *supra* note 153 (detailing the extensive list of factors to consider for each element of the *Howey* test).

206. *See id.* ("The digital asset is marketed in a manner that emphasizes the functionality of the digital asset . . . for its intended functionality.").

207. This argument would then pose the question of whether the instrument is a commodity, but if demand increases because the underlying protocol becomes more popular because of efforts of the promoters, then it's likely to be considered a security. *See* SEC v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 369–71 (S.D.N.Y. 2020) (holding that "Grams" were a security because the fortunes of the tokenholders are tied to the fortunes of TON blockchain, run by promoters). The timing of the efforts could be prior to the sale or after. *See* SEC v. Mut. Benefits Corp., 408 F.3d 737 (11th Cir. 2003). *But see* SEC 2019 Framework, *supra* note 153 (stating that the *Howey* test is less likely to be met if "[t]he distributed ledger network and digital asset are fully developed and operational").

208. This argument has proven difficult to make successfully. *See* Audet v. Fraser, 605 F. Supp. 3d 372, 389–90 (D. Conn. 2022) (instructing the jury that, according to case law, "solely" does not mean that the participants did not contribute at all but that the promoter contributes in a meaningful way).

209. *See* SEC Comm'r Hester M. Peirce, *Token Safe Harbor Proposal 2.0*, SEC (Apr. 13, 2021), https://www.sec.gov/newsroom/speeches-statements/peirce-statement-token-safe-harbor-proposal-20 [https://perma.cc/YAD4-7UHA] (proposing a "three-year grace period within which, under certain conditions, [network developers] can facilitate participation in and the development of a functional or decentralized network, exempted from the registration provisions of the federal securities laws"). This proposal, like its earlier 2020 predecessor, has not been acted upon by the full Commission.

210. *Id.*

Pointedly, the SEC Chairperson under President Joe Biden, Gary Gensler, maintained that most cryptocurrencies are securities,[211] and indeed the SEC under Gensler brought numerous enforcement actions, many successful, against firms that offer and sell different types of digital tokens, including exchanges that facilitate the trading of various types of tokens.[212] In addition, the SEC had attempted to restrict the listing of electronically-traded products (ETPs) based on the "spot" prices of bitcoin and ether, which are not considered securities. After losing a court challenge from Grayscale Investments,[213] the SEC in January 2024 approved the listing of numerous bitcoin-related ETPs.[214]

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211. *See, e.g.*, Chair Gary Gensler, *We've Seen This Story Before - Remarks Before the Piper Sandler Global Exchange & Fintech Conference*, SEC (June 8, 2023), https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-piper-sandler-060823 [https://perma.cc/2VKF-M4SW] ("As I've said numerous times, the vast majority of crypto tokens meet the investment contract test."). More recently, in announcing approval of the listing of various electronically traded products surrounding the spot price of bitcoin, Chair Gensler emphasized that the approval did not

> signal anything about the Commission's views as to the status of other crypto assets under the federal securities laws or about the current state of non-compliance of certain crypto asset market participants with the federal securities laws. As I've said in the past, and without prejudging any one crypto asset, the vast majority of crypto assets are investment contracts and thus subject to the federal securities laws.

Chair Gary Gensler, *Statement on the Approval of Spot Bitcoin Exchange-Traded Products*, SEC (Jan. 10, 2024) [hereinafter *Gensler ETP Statement*], https://www.sec.gov/newsroom/speeches-statements/gensler-statement-spot-bitcoin-011023 [https://perma.cc/8LWW-U56K].

212. *See* SEC v. Coinbase, 726 F. Supp. 3d 260, 260 (S.D.N.Y. 2024) (denying defendants' motion to dismiss, holding that the SEC adequately alleged that the cryptoassets constituted "investment contracts" under the *Howey* test). In so holding, Judge Katherine Polk Failla stated, "[T]he 'crypto' nomenclature may be of recent vintage, but the challenged transactions fall comfortably within the framework that courts have used to identify securities for nearly eighty years." *Id.* at 268. The SEC has also refused to settle charges against Binance, the largest cryptocurrency exchange in the world, which settled charges brought by the Department of Justice for $4 billion. Plea Agreement, United States v. Binance Holdings Ltd., No. 2:23-cr-00178-RAJ (W.D. Wash. Nov. 21, 2023). To date, many of the SEC claims against various Binance products have survived dismissal. *See* SEC v. Binance Holdings Ltd., 738 F. Supp. 3d 20, 20–21 (D.D.C. 2024) (denying defendants' motion to dismiss concerning some, but not all, products sold by Binance because the SEC plausibly alleged that those products were investment contracts); *see also* SEC v. Terraform Labs Pte Ltd., 684 F. Supp. 3d 170, 171 (S.D.N.Y. 2023) (denying defendants' motion to dismiss because the SEC adequately alleged that cryptoassets were investment contracts and therefore securities). *But see* SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308, 308 (S.D.N.Y. 2023) (granting in part the SEC's motion for summary judgment as to whether certain sales of XRP constituted securities, but granting defendants' motion for summary judgment as to other sales); Risley v. Universal Navigation Inc., 690 F. Supp. 3d 195, 196 (S.D.N.Y. 2023) (granting defendants' motion to dismiss).

213. Grayscale Invs., LLC v. SEC, 82 F.4th 1239, 1242 (D.C. Cir. 2023) (vacating the SEC's rejection of Grayscale's proposed listing of an ETP based on the spot price of bitcoin as arbitrary and capricious). The court was not convinced that an ETP based on spot prices of a commodity was any more dangerous than the two ETPs based on futures of the same commodity that the SEC had approved. *See id.* at 1242 ("It is a fundamental principle of administrative law that agencies must treat like cases alike.").

214. *Gensler ETP Statement*, *supra* note 211. The approval came the day after a hacker gained control of the SEC's account on the social media platform X and posted that the SEC had approved these ETPs, causing the price of bitcoin to temporarily spike. *See* David Yaffe-Bellany, *A Hack of the S.E.C.'s Social Media Account Caused a Bitcoin Frenzy, Briefly*, N.Y. TIMES (Jan. 9, 2024), https://www.nytimes.com/2024/01/09/business/sec-x-hack-bitcoin.html [https://perma.cc/LSP5-DM5R].

Regulation of digital tokens is in dire need of additional guidance, whether legislative, administrative, or judicial. Cases, even in the same jurisdiction, are being decided in inconsistent ways, and frustrated promoter-defendants are increasingly attacking the authority of the SEC to apply the *Howey* test to digital tokens.[215] In February 2024, promoters of the digital-asset trading platform Legit.Exchange filed in federal court for a declaratory judgment that the exchange is not a "securities exchange."[216] Because even strategic planning and bona fide intentions on the part of a decentralized autonomous organization may not escape the net of securities regulation, a new *Williamson* test for DAOs is necessary to facilitate economic development in this area. In fact, Coinbase had petitioned the SEC in 2022 to propose new rules addressing how federal securities laws applied to digital assets; the SEC denied this request in late 2023.[217] In January 2025, however, the Third Circuit held under the Administrative Procedure Act that the SEC's one-paragraph order denying the petition was arbitrary and capricious, ordering the SEC to provide a "sufficiently reasoned disposition" to Coinbase's petition.[218]

In 2025, under new Chair Peter Atkins, the SEC dropped several cryptocurrency-related enforcement actions, including against Coinbase Global Inc.[219] Moreover, the SEC has tasked a new Crypto Task Force under Commissioner Hester M. Peirce to "provide clarity on the application of the federal securities laws to the crypto asset market and to recommend practical

215. Litigants are increasingly citing to a rarely and only recently used doctrine of statutory construction, the "Major Questions Doctrine," to challenge the SEC's ability to continue to use the eighty-year-old *Howey* test to define financial instruments as securities. *See* Memorandum of Law in Support of Coinbase's Motion for Judgment on the Pleadings at 21, SEC v. Coinbase, Inc., 726 F. Supp. 3d 260 (S.D.N.Y. 2024) (No. 1:23-cv-04738-KPF) (asserting that "[w]hen the government 'claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy,' courts cannot accept an agency's 'novel' statutory construction" (citing West Virginia v. EPA, 577 U.S. 1126 (2016))). So far, lower courts do not seem particularly interested in this argument. *See* SEC v. Terraform Labs Pte Ltd, 684 F. Supp. 3d 170, 189 (S.D.N.Y. 2023) ("Put simply, it would ignore reality to place the crypto-currency industry and the American energy and tobacco industries – the subjects of *West Virginia* and *Brown & Williamson*, respectively – on the same plane of importance."); SEC v. Binance Holdings Ltd., 738 F. Supp. 3d 20, 81 (D.D.C. 2024) (framing the SEC enforcement action as "an unremarkable exercise of the agency's enforcement authority"); *see also* SEC v. Coinbase, Inc., 726 F. Supp. 3d 260, 283 (S.D.N.Y. 2024) (holding that the SEC was merely "exercising its Congressionally bestowed enforcement authority to regulate 'virtually any instrument that might be sold as an investment,' 'in whatever form they are made and by whatever name they are called'" (quoting SEC v. Edwards, 540 U.S. 389, 393 (2004))).

216. Complaint at 35, Lejilex v. SEC, No. 4:24-cv-00168-O (Feb. 21, 2024) (citing the major questions doctrine to de-legitimize "the SEC's Regulatory Landgrab").

217. *See* Coinbase, Inc. v. SEC, 126 F.4th 175, 187–95 (3d Cir. 2025) (holding that the APA does not require rulemaking in the digital-asset sphere because agencies have broad discretion over whether to institute rulemaking proceedings).

218. *See id.* at 198.

219. Press Release, Secs. & Exch. Comm'n, SEC Announces Dismissal of Civil Enforcement Action Against Coinbase (Feb. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-47 [https://perma.cc/8CFP-R4QG] ("On January 21, 2025, the Commission announced the formation of the Crypto Task Force, which is dedicated to helping develop a comprehensive and clear regulatory framework for crypto assets. Given the pending work of the Crypto Task Force, the Commission is dismissing this matter.").

policy measures that aim to foster innovation and protect investors."[220] As the work of the Task Force continues, uncertainty remains as to whether or which digital assets will be categorized as securities, but fear of enforcement prior to more clarity has abated.[221]

B. Corporate Transparency Act

Under the federal Corporate Transparency Act[222] passed in 2020, incorporated entities in the United States were required to disclose the names, dates of birth, and addresses of "beneficial owners" to the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN), with a deadline of December 31, 2024.[223] FinCEN was then tasked with maintaining a national registry of beneficial owners of "reporting companies," though this registry will not be accessible to the public.[224] However, following the 2024 presidential election and legal challenges to the statute, FinCEN postponed the compliance deadline to March 21, 2025.[225] Under the Act, any entity that is formed by making a filing must comply with the disclosure requirements, which explicitly includes corporations and limited liability companies, and most likely limited

220. Press Release, Secs. & Exch. Comm'n, SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force (Jan. 21, 2025), https://www.sec.gov/newsroom/press-releases/2025-30 [https://perma.cc/6SQ2-4VFV] ("The Task Force's focus will be to help the Commission draw clear regulatory lines, provide realistic paths to registration, craft sensible disclosure frameworks, and deploy enforcement resources judiciously.").

221. *See* Richard Fair, *Uniswap's Reprieve Reveals the Uncertainty of DeFi Regulation*, CLS BLUE SKY BLOG (Apr. 28, 2025), https://clsbluesky.law.columbia.edu/2025/04/28/uniswaps-reprieve-reveals-the-uncertainty-of-defi-regulation/ [https://perma.cc/KE8Y-FQCG] (noting that uncertainty still remains, even from state securities regulators).

222. The Corporate Transparency Act is part of the Anti-Money Laundering Act of 2020, 31 U.S.C. § 5311, and appears in Section Title LXIV of the National Defense Authorization Act enacted by Congress on January 1, 2021. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6401, 134 Stat. 3388 (2021) [hereinafter Corporate Transparency Act].

223. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (Sept. 30, 2022) (to be codified at 31 C.F.R. pt. 1010). Though, FinCEN recently paused these filing obligations and plans to issue new rules. *See FinCEN Pauses All CTA Filing Obligations and Will Issue New Rules*, CLEARY GOTTLIEB (Feb. 28, 2025), https://www.clearygottlieb.com/news-and-insights/publication-listing/fincen-pauses-all-cta-filing-obligations-and-will-issue-new-rules [https://perma.cc/T8YJ-VSK4].

224. Lawrence A. Goldman & David Joseph Marella, *The Corporate Transparency Act: Augmented Federal Anti-Money Laundering Legislation Brings New Reporting Requirements of Company Ownership*, BUS. L. TODAY (Jan. 29, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-february/the-corporate-transparency-act/ [https://perma.cc/3A6B-2CU4] ("The CTA broadly defines a *reporting company* as any corporation, limited liability company, or other similar entity created by filing a document with the secretary of state or similar office in any state or territory or with a federally recognized Indian Tribe, or formed under the laws of a foreign country and registered to do business in the United States.").

225. FinCEN Notice, *FinCEN Extends Beneficial Ownership Information Reporting Deadline by 30 Days; Announces Intention to Revise Reporting Rule*, FIN. CRIMES ENF'T NETWORK (Feb. 18, 2025), https://www.fincen.gov/sites/default/files/shared/FinCEN-BOI-Notice-Deadline-Extension-508FINAL.pdf [https://perma.cc/9DC8-2XW9].

partnerships.[226] General partnerships with no state filings would appear to be exempt,[227] and one could argue that general partnerships that make an election to be limited liability partnerships might be exempt because the filing does not "create" the entity.[228] Because this new legal requirement is designed to target relatively invisible shell companies used for illegal activities,[229] larger companies, including many that are subject to federal reporting requirements under other regulatory regimes, are exempt, but small, "mom-and-pop" companies are not.[230] In addition, states are proposing their own transparency acts, which would require similar disclosures that contribute to a public database of beneficial owners of business entities.[231]

The term "beneficial owner" in the Corporate Transparency Act attempts to capture different types of owners that might exert control of the entity,

226. *See* Corporate Transparency Act § 6403(a)(11)(A)(i), 31 U.S.C. § 5336 ("The term '[domestic] reporting company' means a corporation, limited liability company, or other similar entity that is created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe . . . ."); Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59498 (noting that several commenters requested clarification on what types of entities came under the wording of "corporation, limited liability company, or other similar entity" but ultimately determining that the vague language was preferable because of the great variation in state entity choices).

227. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. at 59537 ("In general, FinCEN believes that sole proprietorships, certain types of trusts, and general partnerships in many, if not most, circumstances are not created through the filing of a document with a secretary of state or similar office. In such cases, the sole proprietorship, trust, or general partnership would not be a reporting company under the final rule.").

228. *Id.* ("Moreover, where [a general partnership or trust] registers for a business license or similar permit, FinCEN believes that such registration would not generally 'create' the entity, and thus the entity would not be created by a filing with a secretary of state or similar office.").

229. Corporate Transparency Act § 6402(3) ("It is the sense of Congress that . . . malign actors seek to conceal their ownership of corporations, limited liability companies, or other similar entities in the United States to facilitate illicit activity, including money laundering, the financing of terrorism, proliferation financing, serious tax fraud, human and drug trafficking, counterfeiting, piracy, securities fraud, financial fraud, and acts of foreign corruption . . . ."). The Act continues: "[M]oney launderers and others involved in commercial activity intentionally conduct transactions through corporate structures in order to evade detection, and may layer such structures, much like Russian nesting 'Matryoshka' dolls, across various secretive jurisdictions such that each time an investigator obtains ownership records for a domestic or foreign entity, the newly identified entity is yet another corporate entity, necessitating a repeat of the same process . . . ." *Id.* § 6402(4).

230. *Id.* § 6403(a)(11)(B)(xxi)(II) (excluding from the definition of "reporting company" under the Securities and Exchange Act of 1934, the Investment Company Act of 1940, and other types of regulatory acts that mandate disclosure, certain affiliated entities of those companies, companies that have more than twenty employees that have a physical presence in the U.S. and filed U.S. tax returns "demonstrating more than $5,000,000 in gross receipts or sales in the aggregate"). Another exclusion is for dormant entities that are not owned by a foreign person, hold no assets, and have not paid or received funds greater than $1000. *See id.* § 6403(a)(11)(B)(xxiii).

231. Alessio D. Evangelista et al., *The Corporate Transparency Act Is Here and the New York LLC Transparency Act Is Coming*, SKADDEN (Jan. 31, 2024), https://www.skadden.com/insights/publications/2024/01/the-corporate-transparency-act [https://perma.cc/4VF2-2WUC] (noting that the NYTA will go into effect on December 21, 2024, but will apply "only to limited liability companies formed or authorized to do business in New York"). A similar bill in California failed. S.B. 738, 2023–24 Leg., Reg. Sess. (Cal. 2023).

including 25% owners and some nonowner officers.[232] To the extent that a DAO was formed as an LLC or similar entity, even as a member-managed LLC, then the DAO would have to disclose any owners that held 25% of the ownership interests, as well as "senior officers."[233] Under the regulations, each member in a member-managed LLC could theoretically be required to disclose their identities even if no one owned over 25% if they each had the right to co-manage and many decisions were subject to supermajority votes. Presumably, a very large member-managed LLC could have both dispersed ownership and dispersed control sufficient to not give any specific member "substantial control," thus avoiding disclosure, if that type of management is practicable. Otherwise, a member-managed LLC could, therefore, have reduced securities law risk, liability risk, and fiduciary duty risk, but might require beneficial-owner disclosure if it didn't meet the exemption for an operating company with $5 million in revenues and twenty employees.

With the postponed deadline looming large, FinCEN promulgated an Interim Final Rule on March 21, 2025.[234] This new rule revises the definition of "reporting company" to include only "foreign reporting companies," meaning that companies formed in the U.S. do not need to comply with the disclosure obligations.[235] However, companies formed outside the U.S. but operating in the U.S. as registered foreign entities will have to report beneficial owners, but not beneficial owners who are "U.S. persons."[236] Strangely, from the language of the interim final rule, the new definition of "reporting company" might encompass general partnerships and LLPs because it includes the term "other entity" in the definition without the qualifying language about being created by a filing.[237]

Though some organizers of a DAO may not bristle at this type of disclosure, other organizers choose business forms in jurisdictions that either

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232. Corporate Transparency Act § 6403(a)(3)(A) ("The term 'beneficial owner' means, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity . . . .").

233. 31 C.F.R. § 1010.380(d)(1) (2023) (defining "substantial control" to include a "senior officer" and others who "[d]irects, determines, or has substantial influence over important decisions made by the reporting company").

234. *Interim Final Rule: Questions and Answers*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/boi/ifr-qa [https://perma.cc/4M6J-5DHQ] ("Consistent with the exemptive authority provided in the Corporate Transparency Act and the direction of the President, the Secretary of the Treasury . . . has reassessed the balance between the usefulness of collecting BOI and the regulatory burdens imposed by FinCEN's BOI reporting requirements.").

235. Beneficial Ownership Information Reporting Requirement Revision and Deadline Extension, 31 C.F.R. § 1010.380(c)(1)(ii) (2025) (defining "reporting company" as "[a]ny entity that is: (A) [a] corporation, limited liability company, or other entity; (B) [f]ormed under the law of a foreign country; and (C) [r]egistered to do business in any State or tribal jurisdiction").

236. *See id.* § 1010.380(d)(4)(i) ("Reporting companies are exempt from the requirement in 31 U.S.C. 5336 and this section to report the beneficial ownership information of any United States persons who are beneficial owners.").

237. *See id.* § 1010.380(c)(1)(ii)(A).

have very little disclosure of members, directors, partners, etc. or are amenable to having any listed participant be another entity without further disclosure. The Corporate Transparency Act regulations specifically circumvent this type of strategy, looking through entities to ultimate owners and even to ultimate contract parties who receive the benefits of ownership.[238] Whether the CTA will apply to all entities, foreign and domestic, depends on FinCEN's final rulemaking, due late 2025.

C. The Role of Becoming an Entity in Triggering Other Regulatory Frameworks

As has become apparent from our discussion at this point, choosing not to choose an entity in order to avoid securities regulation leaves DAO participants open to personal liability risk.[239] Similarly, some DAO participants may believe that choosing not to choose an entity structure can shield DAOs from exposure to regulatory risks beyond securities regulation.[240] Recent regulatory enforcement activity and private lawsuits[241] provide evidence that this sentiment also rests on a myth. Specifically, recent enforcement actions undertaken by both the CFTC[242] and OFAC targeted DAOs that chose not to choose a formal entity form.

For example, in September 2023, the CFTC entered an enforcement order in connection with a smart-contract protocol built on the Algorand blockchain called the Deridex Protocol.[243] Anyone could access and use the smart contract either by using Deridex's website or by directly interacting with the smart contracts in a decentralized manner via the Algorand blockchain protocol.[244] The smart contracts allowed users to trade on a leveraged basis, and because Deridex could update the smart-contract code, the CFTC determined that the Commodity Exchange Act applied to prohibit leveraged trading via the smart contracts without registration.[245] In other words, although Deridex—a

238. *Id.* § 1010.380(d)(2).

239. *See supra* Section I.

240. Press Release, CFTC, Statement of CFTC Div. of Enf't Dir. Ian McGinley on the Ooki DAO Litigation Victory (June 9, 2023) (on file with author) ("The founders created the Ooki DAO with an evasive purpose, and with the explicit goal of operating an illegal trading platform without legal accountability . . . This decision should serve as a wake-up call to anyone who believes they can circumvent the law by adopting a DAO structure, intending to insulate themselves from law enforcement and ultimately putting the public at risk.").

241. *See, e.g.* Samuels v. Lido DAO, 757 F. Supp. 3d 951 (N.D. Cal. 2024) (assuming both that the unincorporated DAO is a general partnership and that the tokens issued are securities).

242. The CFTC action against Ooki DAO offers an example here, but because this case has already been discussed above, *supra* notes 111–10 and accompanying text, we do not repeat discussion further. For a more in-depth discussion of the Ooki DAO operations, the rights of OOKI tokenholders, and how designation as a partnership did not fit Ooki DAO well, see Reyes, *Detrimental Reliance*, *supra* note 16, at 1377–78.

243. *In re* Deridex, Inc., CFTC No. 23-42, 2023 WL 5937236, at *2 (Sept. 7, 2023).

244. *Id.*

245. *Id.* at *3–4.

corporation—intentionally distanced itself from the protocol and the community using and conducting transactions through the protocol, Deridex's failure to formalize its relationship with the protocol beyond developing the smart-contract code ultimately made it the prime target for CFTC enforcement action when the CFTC sought an entity to hold accountable for activity undertaken by others via software.

Similarly, when OFAC sought to list the Tornado Cash software on the Specially Designated National List, it needed to identify an entity that owned the software because only persons or property belonging to persons may be sanctioned under OFAC's authority.[246] Thus, OFAC declared that Tornado Cash was an entity consisting of the Tornado Cash "founders and other associated developers" and "the Tornado Cash DAO."[247] Doing so allowed OFAC to argue that Tornado Cash was a person or entity subject to its regulatory authority[248] and that transactions using the Tornado Cash smart-contract software could properly be blocked as involving "property and interests in property" belonging to the sanctioned Tornado Cash entity.[249] As a matter of technical reality, some people owned Tornado Cash governance tokens called TORN tokens.[250] And although TORN tokenholders had in fact voted on decisions related to the maintenance of the Tornado Cash software over time,[251] they did not hold rights to revenue by virtue of owning a TORN token,[252] nor did tokenholders purchase TORN tokens for the purpose of operating a for-profit privacy-enhancing software as a service.[253] Whether intentionally or unintentionally, the choice of TORN tokenholders not to

246. 50 U.S.C. § 1702(a)(1)(B) (giving OFAC the authority to sanction a foreign country or national and its property under the International Emergency Powers Act (IEEPA); 22 U.S.C. § 9214(c)(1) (2021) (giving OFAC the authority to sanction a person and its property under the North Korea Sanctions & Policy Enhancement Act).

247. *FAQ No. 1095*, *supra* note 104.

248. 31 C.F.R. § 510.305 (2019).

249. 50 U.S.C. § 1702(a)(1)(B) (2019); 22 U.S.C. § 9214(c)(1) (2021).

250. Wade et al., *supra* note 51 ("TORN is an ERC20-token built on Ethereum that is expressly used by the community to vote on governance proposals. Any user of Ethereum may purchase TORN tokens and participate in this process.").

251. *Id.* ("However, the permission to update these contracts is held not by a human, but by another smart contract. This smart contract, also known as *Tornado Cash: Governance*, defines the rules and operations that determine how the Router and Relayer Registry may be updated. In short, *Tornado Cash: Governance* provides that updates to these smart contracts are processed at the behest of the community, which holds public votes to determine what updates should occur, and when. Any holder of TORN tokens may participate in these votes.").

252. *Id.* (explaining that merely holding TORN tokens did not earn revenue, but any TORN tokenholder could optionally act as a relayer: "'[R]elayers' are independent operators that provide an *optional* service for Tornado Cash users. . . . Relayers allow users to process withdrawals without needing to pre-fund their withdrawal accounts, which helps users maintain privacy when withdrawing. . . . The user sends this transaction to their selected relayer, who processes the withdrawal on their behalf, earning a fee in the process.").

253. *Id.* ("[P]articipating in the *Tornado Cash: Governance* process is *entirely optional*: users can use Tornado Cash pools without any involvement, oversight, or interaction with the *Tornado Cash: Governance* process.").

formalize their relationship to one another and to the software did not protect them or their software project from regulatory enforcement.

The lesson from recent regulatory activity outside of securities regulation dovetails with the lessons of DAO participants who have faced personal liability as a result of their membership in a DAO: choosing not to choose a formal entity structure does not insulate a DAO from liability or regulatory risk. The better course of action would be to adopt a formal entity structure optimized to mitigate both personal liability risk and regulatory risk.

III. CRAFTING A BETTER ORGANIZATIONAL CHOICE: PRIVATE-ORDERING SOLUTIONS

To date, and particularly in light of potential disclosure obligations under the Corporate Transparency Act, none of the entity options explored as available solutions for DAOs achieve such risk mitigation without sacrificing common DAO organizational goals of pseudonymity, flexible fiduciary duty regimes, and failure to trigger securities regulations when issuing governance tokens.[254] In search of the entity that can carefully thread this needle, this Article next turns to one often overlooked and one relatively new private-ordering solution: the limited liability partnership and the contractarian joint venture.

A. The Limited Liability Partnership

As described above, the LLP is a general partnership that has made an election under the state general partnership statute to choose limited liability for its partners.[255]

1. Liability

In an LLP, no partner is personally liable for the contractual and tort obligations of the LLP, whether by contribution or otherwise.[256] Partners remain liable for their own wrongdoing and the wrongdoing of those they

254. Notably, when one of the authors proposed a business trust as a potential entity vehicle for DAOs in 2019, the Corporate Transparency Act had not yet been enacted, and much of the securities regulation enforcement activity had not yet been undertaken. *See generally* Reyes, *Rockefeller*, *supra* note 11, at 406. These more recent developments give rise to the need to revisit potential private-ordering solutions beyond the business trust that may be available to DAOs.

255. UNIF. P'SHIP ACT § 901(b) (UNIF. L. COMM'N 2013).

256. *Id.* § 306(c) ("A debt, obligation, or other liability of a partnership incurred while the partnership is a limited liability partnership is solely the debt, obligation, or other liability of the limited liability partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability partnership solely by reason of being or acting as a partner.").

supervise.[257] This structure would allow organizers of a blockchain protocol to choose an entity with decentralized management but gain limited liability, reducing the risk that all participants would be liable for losses, such as losses due to hacking.[258] State statutes do differ in what types of firms may organize as LLPs, however. Though most states allow any firms to form LLPs,[259] several states, including California,[260] Oregon,[261] and New York,[262] restrict the use of the form to certain licensed professionals. This set of professionals may be limited to lawyers, accountants, engineers, architects, and physicians, or it may be expanded to any number of occupations that require a professional license. Most states, however, do not have those restrictions, including Delaware.[263] Organizers of a DAO would necessarily need to choose the law of a state with broad eligibility rules for an LLP, and for other reasons explained below, Delaware will probably be the best choice.[264]

2. Fiduciary Duties

As in general partnerships, partners in an LLP have the same rights as partners in a general partnership, including the right to co-management.[265]

257. *See id.* § 306 cmt. c ("Because the partner liability at issue is solely vicarious, the LLP shield is irrelevant to claims seeking to hold a partner directly liable on account of the partner's own conduct.").

258. *See* Sarcuni v. bZx DAO, 664 F. Supp. 3d 1100, 1115–16 (S.D. Cal. 2023). *But see* Brunson, *supra* note 151, at 615 ("As a normative matter, placing DAOs into the *general partnership* category may not be ideal. While some aspects of DAOs are good fits for partnerships, others are not. For instance, because DAOs lack any type of formal entity creation, and because founders and investors find each other online, it is not immediately obvious what jurisdiction's laws should govern a DAO-as-general-partnership.").

259. *See* UNIF. LTD. P'SHIP ACT § 110 cmt. b (UNIF. L. COMM'N 2013).

260. *See* CAL. CORP. CODE § 16101(8)(A) (West, Westlaw with Ch. 1 of 2023-24 2nd Ex. Sess., and all laws through Ch. 1017 of 2024 Reg. Sess. 2024) (limiting the form of "[r]egistered limited liability partnership" to "the practice of architecture, the practice of public accountancy, the practice of engineering, the practice of land surveying, or the practice of law").

261. OR. REV. STAT. § 67.600 (2023) ("Notwithstanding any other provision of this chapter, a partnership, not including a limited partnership, may register as a limited liability partnership or apply for authority as a foreign limited liability partnership only if it: (a) Renders professional service; or (b) Is affiliated with a limited liability partnership or a foreign limited liability partnership that renders professional service.").

262. *See* N.Y. P'SHIP LAW § 121-1500(a)(1) (McKinney, Westlaw through L.2025 chapters 1 to 49, 61 to 107) (requiring each partner in a registered limited liability partnership to be "a professional authorized by law to render a professional service within this state and who is or has been engaged in the practice of such profession").

263. *See* DEL. CODE ANN. tit. 6, § 15-1001 (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)).

264. Additionally, some jurisdictions require LLPs to maintain minimum amounts of insurance or reserves, particularly professional service LLPs, in attempt to lessen the risk that claimants will go undercompensated. *See* OKLA. STAT. tit. 54, § 1-309(b)(1) (2024) (requiring a minimum of $500,000 worth of insurance to be maintained by an LLP not rendering professional services). Delaware requires insurance to be maintained only if the LLP is providing legal services. *See* DEL. SUP. CT. R. 67(h)(iv).

265. UNIF. P'SHIP ACT § 401(h) (UNIF. L. COMM'N 2013) ("Each partner has equal rights in the management and conduct of the partnership's business.").

Partners, however, also owe the entity and each other default fiduciary duties.[266] Most state statutes provide that a partnership agreement may limit or alter fiduciary duties but not completely eliminate them.[267] A well-drafted general partnership agreement in those jurisdictions could limit partners' duties of care, particularly with regards to hackers and other known risks. More importantly, Delaware partnership law allows for the elimination of all fiduciary duties of partners to the partnership and to one another.[268] Because of this, a Delaware LLP would provide organizers with a decentralized entity with limited liability and the ability to eliminate fiduciary duties in a partnership agreement if the organizers believed that to be the best structure.

3. Securities Law

To the extent that DAO promoters wish to avoid securities law regulation, general partnership interests are presumed not to be investment contracts under federal law because partners have the default right to co-manage the business. However, this right must not be curtailed in the partnership agreement, the partners must exercise this right in practice, and the partners must have the ability and experience to exercise that power.[269] Cases discussing this, however, involve a managing general partner (or partners) having most of the power, so the investing partners' power is necessarily compared to the managing partner's power.[270] In a DAO, even if a particular partner held only minimal power, if no other partner held substantial power, then the partnership interests would seem not to be a security under the *Williamson* test.[271]

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266. *Id.* § 409(a) ("A partner owes to the partnership and the other partners the duties of loyalty and care . . . .").

267. *Id.* § 105(d)(3) ("If not manifestly unreasonable, the partnership agreement may: (A) alter or eliminate the aspects of the duty of loyalty stated in Section 409(b); (B) identify specific types or categories of activities that do not violate the duty of loyalty; (C) alter the duty of care, but may not authorize conduct involving bad faith, willful or intentional misconduct, or knowing violation of law; and (D) alter or eliminate any other fiduciary duty.").

268. DEL. CODE ANN. tit. 6, § 15-103(f) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)) ("A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement; provided, that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing."); *see also* United States v. Sanofi-Aventis U.S. LLC, 226 A.3d 1117, 1127 (Del. 2020) ("DRUPA modifies certain of RUPA's default rules, and also contains other provisions which have no counterpart in RUPA. Among the latter is Section 15-103(d), which provides that it is the policy of DRUPA to give maximum effect to the principal of freedom of contract and the enforceability of partnership agreements.").

269. Williamson v. Tucker, 645 F.2d 404, 421–23 (5th Cir. 1981).

270. *See, e.g.*, SEC v. Shields, 744 F.3d 633, 645 (10th Cir. 2014); SEC v. Mieka Energy, 259 F. Supp. 3d 556, 562 (E.D. Tex. 2017); SEC v. Sethi, 910 F.3d 198, 204 (5th Cir. 2018); SEC v. Arcturus, 928 F.3d 400, 410 (5th Cir. 2019); Ave. Cap. Mgmt. II, L.P. v. Schaden, 843 F.3d 876, 884 (10th Cir. 2016).

271. *See* SEC v. Merch. Cap., LLC, 483 F.3d 747, 755–57 (11th Cir. 2007).

Unfortunately for DAO organizers, state securities regulators may define a security differently than the SEC. Many state statutes specifically reference certain types of partnerships and limited liability companies in the definition of "security."[272] Though most of those states that go beyond Section 2(a)(1) to address unincorporated entities specifically mention LLCs[273] or limited partnerships,[274] California's statute broadly includes "membership in an incorporated or unincorporated association,"[275] though cases involving partnerships generally follow the federal analysis of "investment contract."[276] More problematically, the Connecticut statute specifically includes interests in an LLC or an LLP in its definition of "security."[277] Iowa and Wisconsin statutes specifically mention LLPs but state that an LLP interest will not be a security if all interest holders are "actively engaged in the management" of the LLP.[278] Both statutes, however, state that having the right to vote, the right to seek information, or the right to participate, without more, does not constitute active engagement.[279] In a DAO, tokenholders would generally have minimal

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272. *See, e.g.*, CAL. CORP. CODE § 25019 (West, Westlaw with Ch. 1 of 2023-24 2nd Ex. Sess., and all laws through Ch. 1017 of 2024 Reg. Sess.); TEX. GOVT. CODE ANN. § 4001.068(a)(1) (2022).

273. § 25019 (including "interest in a limited liability company . . . except a membership interest in a limited liability company in which the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company; provided that evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company").

274. § 4001.068(a)(1) ("a limited partner interest in a limited partnership").

275. § 25019.

276. *See* Consol. Mgmt. Grp., LLC v. Dep't of Corps., 75 Cal. Rptr. 3d 795, 804–06 (Cal. Ct. App. 2008) (holding that joint venture interests were securities under California law, using the *Howey* and *Williamson* tests to analyze that even though the joint venture agreements distributed power among the participants like a general partnership, there was not actual exercise of meaningful joint venture powers). California courts recognize both the *Howey* test and the "risk capital" test in determining whether an instrument is an "investment contract." *See* McCool v. Wilson, 2020 WL 7223252, at *5–8 (C.D. Cal. Oct. 28, 2020) (holding that California recognizes both tests and that an LLC in which the investor was one of two managers did not constitute a security for that investor under the *Howey* test); *see* Reiswig v. Dep't of Corps., 50 Cal. Rptr. 3d 386, 391–92 (Cal. Ct. App. 2006) (using the risk capital test to hold that CDs offered by financial institutions for attending pitch on annuities was not a security).

277. CONN. GEN. STAT. § 36b-3(19) (2021) ("as an 'investment contract', an interest in a limited liability company or limited liability partnership").

278. IOWA CODE § 502.102(28)(e) (2024) (including interest in LLCs and LLPs as securities, "provided 'security' does not include an interest in a limited liability company or a limited liability partnership if the person claiming that such an interest is not a security proves that all of the members of the limited liability company or limited liability partnership are actively engaged in the management of the limited liability company or limited liability partnership"); WIS. STAT. § 551.102(28)(e) (2023) (including limited liability partnership interests and limited liability company interests as securities unless the number of interest holders does not exceed fifteen holders or all holders are "actively engaged in the management").

279. § 502.102(28)(e) ("provided that the evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company or limited liability partnership, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company or limited liability partnership"); § 551.102(28)(e)(1) ("However, evidence that partners or members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability partnership or limited liability

managerial participation, even though that participation would be equal and not concentrated.[280] So, states such as Wisconsin and Iowa might consider those interests securities, though no cases have tested this definition in either jurisdiction.

4. Pseudonymity

General partnerships do not require a state filing; therefore, the names and existence of the general partners are not publicly available. Partnerships seeking limited liability, however, must make a filing at the office of the secretary of state. For example, if a DAO wanted to create a Delaware LLP and waive fiduciary duties, the DAO would be required to file an election ("statement of qualification") with the Delaware Secretary of State.[281] The form, however, is very simple and requires only that the name of the LLP is given as well as the number of partners that the LLP has at the time of the filing.[282] The names of the partners do not need to be disclosed.[283] Other states have similarly unintrusive filings.[284]

One unknown issue is whether the Corporate Transparency Act[285] will apply to LLPs. As discussed above, beginning on January 1, 2025, certain small businesses were going to be required to disclose their beneficial owners to FinCEN, though that deadline was postponed indefinitely for domestic entities. However, the term "reporting company" in the CTA specifies only corporations, limited liability companies, and other entities created by "the filing of a document with a secretary of state or a similar office under the law of a State or Indian tribe."[286] Many commenters on the proposed rule asked for clarification of whether and which general partnerships, limited partnerships, LLPs, and sole proprietorships were "reporting companies," but the final rule declined to create an exhaustive list, presumably because of the variation between states of numerous alternative entities.[287] LLPs arguably may not be

company, or the right to participate in management, shall not establish, without more, that all partners or members are actively engaged in the management of the limited liability partnership or limited liability company.").

280. *See supra* Section I.A.

281. DEL. CODE ANN. tit. 6, § 15-1001(b) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)).

282. *Id.*

283. *Id.*

284. *See, e.g.*, CAL. CORP. CODE § 16953 (West, Westlaw with Ch. 1 of 2023-24 2nd Ex. Sess., and all laws through Ch. 1017 of 2024 Reg. Sess.).

285. 31 U.S.C. § 5336.

286. *See id.* § 5336(a)(11) ("The term '[domestic] reporting company'—(A) means a corporation, limited liability company, or other similar entity that is—(i) created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe. . . .").

287. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498, 59535 (Sept. 30, 2022) (codified at 31 C.F.R. pt. 1010) (noting that several commenters requested clarification on what types

reporting companies because the election to adopt an LLP "shield" to an existing general partnership does not "create" the partnership.[288] In the background to the final rule, FinCEN states:

> In general, FinCEN believes that sole proprietorships, certain types of trusts, and general partnerships in many, if not most, circumstances are not created through the filing of a document with a secretary of state or similar office. In such cases, the sole proprietorship, trust, or general partnership would not be a reporting company under the final rule.[289]

When asked whether any voluntary filing would then require these listed businesses to be considered reporting companies, FinCEN distinguishes between filings which "create" the entity and filings that do not.[290] Though the CTA is unclear, arguably, a limited liability partnership election does not create the partnership.[291] For example, failure to file a limited partnership certificate with a secretary of state generally results in a limited partnership not being created and instead, the business being treated as a general partnership under state law.[292] The failure to file an LLP-shield election does not change the organizational entity at all or the governing statute.[293] Finally, some states allow

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of entities came under the wording of "corporation, limited liability company, or other similar entity" but ultimately determining that the vague language was preferable because of the great variation in state entity choices).

288. *Id.* at 59537 ("Moreover, where [a general partnership or trust] registers for a business license or similar permit, FinCEN believes that such registration would not generally 'create' the entity, and thus the entity would not be created by a filing with a secretary of state or similar office.").

289. *Id.*

290. *Id.*

291. *See* HURT & SMITH, LLPs, *supra* note 188, at § 2.03(A)(6) ("LLP statutes generally permit a 'partnership' to become an LLP, implying that a partnership already exists."). In addition, UNIF. P'SHIP ACT § 901(a) (UNIF. L. COMM'N 2013) states that "[a] partnership may become a limited liability partnership pursuant to this section." Other state statutes make the argument even more forcefully. *See* TEX. BUS. ORGS. CODE ANN. § 152.802(a) (West, Westlaw through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election) ("[A] partnership, to become a limited liability partnership, must file an application for registration with the secretary of state"). Moreover, the Texas LLP registration provision requires the general partnership to already have a tax identification number and have the registration signed by the majority of the partners. *See id.* § 152.802(a)–(b). Other evidence can be found in other state statutes. *See* DEL. CODE ANN. tit. 6, § 15-201(b) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)) ("A limited liability partnership continues to be the same partnership that existed before the filing of a statement of qualification under § 15-1001 of this title.").

292. *In re* Loverin Ranch, 492 B.R. 545, 547–48 (Bankr. D. Or. 2013) (noting that a limited partnership agreement identifying some partners as limited partners and limiting the liability of those partners is insufficient to form a limited partnership without a filing with Oregon's Secretary of State); Fujimoto v. Au, 19 P.3d 699, 737 (Haw. 2001) (holding that the nonfiling of a limited partnership created, at a minimum, a general partnership); *see also* Aquino v. Alexander Cap., L.P., 632 B.R. 7, 20 (S.D.N.Y. 2021) (holding that under Delaware law, though a limited partnership was validly formed, it later was dissolved for not naming a new general partner after the one on the certificate was dissolved; during the operation of the business after the certificate was invalid, the business was a general partnership).

293. Apcar Inv. Partners VI, Ltd. v. Gaus, 161 S.W.3d 137, 142 (Tex. App. 2005) (holding that after the partnership failed to be a registered LLP, the partners were individually liable for new obligations under the general partnership statute).

limited partnerships to file LLP elections, so that registration definitely does not create the underlying limited partnership.[294]

Of course, FinCEN is currently taking comments on final rules implementing the CTA that may not contain a reporting requirement for domestic entities currently or in the future; to the extent that a DAO could be classified as a foreign entity selling digital assets in the U.S., then that entity currently could have reporting obligations.[295]

B. The Contractarian Joint Venture

A relatively recent case in Delaware highlights a potential new entity choice: a purely contractual joint venture that is not governed by any entity statute.[296] In 2021, the Delaware Chancery Court recognized a fairly uncommon relationship: a joint venture relationship that the venturers contractually agreed was not a partnership and would not be governed by partnership law.[297] In holding that the joint venture had successfully eliminated fiduciary duties and all other default rights of partners in a general partnership, the court noted that "[t]he parties in this case formed a joint venture but specified that they were not forming a partnership, preferring a purely contractual relationship."[298] Though the court did not indicate that this case was exceptional in any way, joint ventures are generally treated as partnerships under state law.[299]

In almost all other instances, joint ventures would be governed by partnership law, [300] and in most other states, this would mean default fiduciary

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294. *See, e.g.*, TEX. BUS. ORGS. CODE § 152.805 (West, Westlaw through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election) ("A limited partnership may become a limited liability partnership by complying with applicable provisions of Chapter 153.").

295. 31 C.F.R. § 1010.380(a)(1)(i) (2025) (requiring existing foreign reporting companies to file a report within 30 calendar days of the March interim final rule and new foreign reporting companies to file a report within 30 days of registering to do business in the U.S.).

296. Symbiont.io, Inc. v. Ipreo Holdings, LLC, 2021 WL 3575709 (Del. Ch. Aug. 13, 2021).

297. *Id.*

298. *Id.* at *53.

299. *See, e.g.*, Robert Flannigan, *The Joint Venture Fable*, 50 AM. J. LEGAL HIST. 200 (2010) (situating joint ventures within partnership law and describing the history of the separate category); *see also* Sarath Sanga, *A Theory of Corporate Joint Ventures*, 106 CALIF. L. REV. 1437, 1448 (2018) (retelling the history of a distinct joint venture doctrine that is now "defunct," stating that "[i]n practice, the difference [between joint ventures and general partnerships] is essentially zero. Partnership law *generally* applies to joint ventures.").

300. *See, e.g.*, TEX. BUS. ORGS. CODE § 152.051(b) (West, Westlaw through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election) (stating that an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether the association is called a "joint venture" or any other name); *see also* Giant Res., LP v. Lonestar Res., Inc., 2022 WL 2840265, at *5 (Tex. App. July 21, 2022) ("Generally, a joint venture is governed by the same rules as a partnership."); Morris Int'l, Inc. v. Packer, 2021 WL 5115529, at *7 (N.C. Bus. Ct. Nov. 2, 2021) ("A joint [venture] is in the nature of a kind of partnership, and although a partnership and a joint [venture] are distinct relationships, they are governed by substantially the same rules." (quoting Jones v. Shoji, 444 S.E.2d 203 (N.C. 1994))); Hook v. Giuricich, 823 P.2d 294, 296 (Nev. 1992) ("A joint

duties and accounting rights that could not be eliminated.[301] In Delaware, however, even partners in a general partnership can eliminate fiduciary duties (but not all accounting rights),[302] so presumably the court would not look for a reason not to recognize a "nonfiduciary joint venture." Interestingly, though, the court did not begin its analysis, as do other joint venture cases, by stating that it was applying general partnership law and then recognizing a fiduciary duty waiver. Instead, the court pointed out that though a joint venture is "classically a partnership relationship," the parties contractually agreed not to be a partnership.[303] This case stands out as one in which a disclaimer of partnership works to negate what otherwise would be valid evidence of a partnership under RUPA and under the Delaware statute,[304] even though both statutes are wary of such disclaimers.[305] Recent case law, at least adjudicating disputes between the purported partners, has shown more willingness to allow parties to disclaim partnership as long as other indicia of partnership are not present.[306]

Though Justice Benjamin N. Cardozo might be surprised that co-adventurers would not owe one another fiduciary duties,[307] this choice seems

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venture is a less formal relationship than a partnership and is typically an association entered into to perform a more limited business objective for a more brief period of time.").

301. UNIF. P'SHIP ACT § 105(d)(3) (UNIF. L. COMM'N 2013) (describing the aspects of the duty of loyalty and the duty of care that may be altered but not eliminated).

302. DEL. CODE ANN. tit. 6, § 15-103(f) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)).

303. *Symbiont.io*, 2021 WL 3575709, at *53 ("The parties in this case formed a joint venture but specified that they were not forming a partnership, preferring a purely contractual relationship.").

304. UNIF. P'SHIP ACT § 202(a) (UNIF. L. COMM'N 2013); DEL. CODE tit. 6, § 15-202(a) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)) (defining as a partnership "the association of 2 or more persons (i) to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership").

305. UNIF. P'SHIP ACT § 202 cmt. (UNIF. L. COMM'N 2013) ("Subjective intent to create the legal relationship of 'partnership' is irrelevant. What matters is the intent *vel non* to establish the business relationship that the law labels a 'partnership.' Thus, a disclaimer of partnership status is ineffective to the extent the parties' intended arrangements meet the criteria stated in this subsection."); *see also* Moll, *supra* note 84, at 755 ("If the parties' actions demonstrate that they have, in fact, associated as co-owners in a for-profit business, a partnership is formed, even if the parties expressly deny that they are partners.").

306. Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P., 593 S.W.3d 732 (Tex. 2020) (reversing a trial court finding of the existence of a partnership between two large oil and gas companies in the face of a written memorandum of understanding disavowing a partnership). In this case, the Texas Supreme Court focused on freedom of contract and the ability of parties to design their own relationship; however, facts existed suggesting that the parties had moved beyond the MOU to develop a pipeline, resulting in expensive litigation spanning almost a decade. *Id.*; *see also* Lombardo v. R.L. Young, Inc., 2020 WL 3104910, at *11–12 (D. Conn. June 11, 2020) (explaining that creating titles with the word "partner" does not convert an independent contractor, who signed contract disclaiming partnership, into a partner, absent other evidence of partnership).

307. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("The two were coadventurers, subject to fiduciary duties akin to those of partners." (citation omitted)); *see also* Christine Hurt, *Commentary on* Meinhard v. Salmon, *in* FEMINIST JUDGMENTS: CORPORATE LAW REWRITTEN 191, 196 (Anne M. Choike et al. eds., 2023) (examining the quintessential partnership duty of loyalty case, in which Judge Cardozo goes to pains to explain that Meinhard and Salmon were not partners, but, nevertheless, that "[j]oint adventurers, like

available in Delaware in joint ventures, general partnerships, and indeed all other business entity contexts except the corporate context.[308] This choice, though perhaps costly and time-consuming in drafting and negotiating, would be preferable to a default partnership in many respects.

1. Liability

One drawback to being a nonfiduciary joint venture is that no amount of contracting among the venturers can create limited liability with respect to third parties. One primary objective of creating a separate legal entity to carry on a business as a principal is to direct rights, obligations, assets, and liabilities to that separate entity. In that respect, the joint venture would be similar to a default partnership in that each venturer would be personally liable for the obligations of the venture. In the event of a negligence claim based on hacking losses to third parties, for example, any judgment would be borne by the venturers. There may be at least two solutions, however, to the harshness of this result.

First, the joint venturers could waive any claims they would have to any other venturer in the contract itself, whether for breach of a fiduciary duty or for any other duty. Waivers among signatories would be valid, though any waivers or indemnifications among the parties would not be enforceable against third parties that were not parties to the joint venture agreements.[309] If, for example, a hacking incident affected only other joint venturers, then a well-drafted joint venture agreement could create effective limited liability. In a DAO, if the only participants with the DAO are joint venturers, then there would be effectively no third-party claimants.

The second solution imposes a contracting cost directly on each venturer. In many joint ventures, the venturers are each a limited liability entity, such as a corporation,[310] and the losses would be equally borne by the assets of each constituent corporation, or a corporation formed specifically by the constituent

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copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty." (quoting *Meinhard*, 164 N.E. at 546)).

308. Though the duties of care and loyalty may not be waived in a Delaware corporation, the duty not to usurp corporate opportunities may be waived, and personal liability of officers and directors may be eliminated for the duty of care in the articles of incorporation. *See* DEL. CODE ANN. tit. 8, §§ 102(b)(7), 122(17) (West, Westlaw through ch. 3 of the 153rd General Assembly (2025-2026)); *see also* Leo E. Strine, Jr. & Travis J. Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS, AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11 (Robert W. Hillman & Mark J. Loewenstein eds., 2015) (comparing with other Delaware entities the costs and benefits of the Delaware corporation with limited fiduciary duties and personal liability).

309. *See In re* Keck, Mahin, & Cate, 274 B.R. 740, 748 (Bankr. N.D. Ill. 2002) (acknowledging that a provision in a general partnership agreement reducing departing partners' personal liability for firm obligations each year after departure to zero over five years was enforceable between the partnership and the partners, but not against third party creditors, who could hold the departing partners liable).

310. *See* Sanga, *supra* note 299, at 1468 (arguing for an "internal affairs doctrine" for corporate joint ventures, which is "commonplace").

corporation to be a venturer, not by the ultimate shareholders. In a DAO, the venturers are likely to be individuals, unless each tokenholder is encouraged to organize as a limited liability entity to hold the tokens. Though this would add some costs to participating in the DAO, the benefits to the beneficial tokenholder could be worth it.

2. Fiduciary Duties

Unlike a default partnership, a Delaware joint venture could contract to eliminate and waive all fiduciary duties, much like other partnerships and LLCs in Delaware.[311] To ensure that the joint venture agreement would be interpreted and construed similarly to the agreement in *Symbiont.io*, the agreement should contain a choice-of-law provision not only selecting Delaware law but also providing the Delaware courts as the forum for disputes.[312] To ensure that the forum-selection clause is honored, other formalities may need to be observed.[313]

3. Securities Law

A joint venture should not trigger federal securities law as long as the venturers are true co-adventurers and management power is not concentrated in one venturer or group. If the organizers of the DAO attempt an organization that resembles a joint venture, the "investment contract" analysis would be identical to the analysis discussed above for LLPs.[314] If the joint venture were merely a joint venture in form but not in practice, then the tokens would be securities under the *Williamson* test.[315] Additionally, unlike LLP interests, joint venture interests would generally not be included in a statutory definition of "security." Recent cases involving joint venture interests offered broadly to numerous offerees have involved joint venture interests in oil and gas exploration.[316] These interests can be considered securities if offered to

311. Symbiont.io, Inc. v. Ipreo Holdings, LLC, 2021 WL 3575709, at *53 (Del. Ch. 2021).

312. *See, e.g.*, *id.*

313. Clapper v. Press Ganey Assocs., LLC, 894 S.E.2d 778, 783 (N.C. App. 2023) (explaining that N.C. Stat. 22B-3, which forbids a contract entered into in North Carolina to have a forum-selection clause outside of North Carolina as against public policy, did not apply to invalidate the forum-selection clause contained in a limited partnership agreement which was "entered into" at "the place at which the last act was done by either of the parties essential to a meeting of minds" (quoting Bundy v. Com. Credit Co., 157 S.E. 860, 862 (N.C. 1931))).

314. Hooker v. JN Prop. Sols., LLC, 2021 WL 4306899, at *7–9 (Md. Ct. Spec. App. Sept. 22, 2021) (holding that a "silent partner" in a relationship that was either a general partnership or a joint venture had depended on the other venturer, who was his financial advisor, and so purchased a "security").

315. *See* Chan v. HEI Res., Inc., 512 P.3d 120 (Colo. 2022); Stengell v. Cal. Dep't of Bus. Oversight, 2021 WL 3046557 (Cal. App. July 20, 2021).

316. *See, e.g.*, SEC v. Arcturus Corp., 928 F.3d 400 (5th Cir. 2019) (involving over 300 investors who invested in a series of joint ventures that owned drilling rights in oil wells); SEC v. Sethi Petroleum, LLC,

prospective purchasers with little or no experience in oil and gas investing and operations.[317] How these tests would map onto a DAO would depend on the activities of each individual DAO. However, among the business entity choices, interests in joint ventures and general partnerships are the least likely to be considered securities.

4. Pseudonymity

Because joint ventures are not created by filing a document with a governmental agency, the identity of the venturers would not be publicly disclosed in any state filing. In addition, as discussed in Section IV.A.4, the Corporate Transparency Act probably would not require any filings listing beneficial owners of joint ventures.

5. Other Considerations

Because all the rights and obligations are contained in the joint venture agreement, however, each venturer would need to be a party to the joint venture agreement. While this is generally uncontroversial in a typical joint venture between a smaller number of participants, DAOs usually intend participants to be many and to change over time frequently and fluidly.[318] If a DAO issues governance at token issuance, conceivably, purchasers could sign a detailed joint venture agreement at that time.[319] It is not at all clear, however, whether, or how, agreement to such a joint venture contract could run with the token such that when it is transacted to a downstream purchaser, the secondary token owner can be said to have properly entered into the joint venture agreement.[320] The extent to which a contract transfers with a token when that token is transacted remains a subject for further investigation and legal engineering.

IV. CRAFTING A BETTER ORGANIZATIONAL CHOICE: REGULATORY PROPOSALS

Though the authors outlined two possibilities for DAOs to attempt to use private-ordering solutions to intentionally create an association that would meet

2016 WL 4196667 (E.D. Tex. Aug. 9, 2016); SEC v. Shields, 744 F.3d 633 (10th Cir. 2004) (involving sixty investors in several joint ventures organized for oil and gas exploration and drilling).

317. *Arcturus Corp.*, 928 F.3d at 417–18.

318. Wright, *supra* note 52, at 156.

319. This might be achieved through a click-wrap agreement or other electronically signed agreement entered into at time of token purchase. Such agreements, whether highly formalized or not, accompanying initial token purchases are not all that uncommon. Shaanan Cohney & David A. Hoffman, *Transactional Scripts in Contract Stacks*, 105 MINN. L. REV. 319 (describing the white papers and other promises that combine with smart-contract code to create contracts).

320. *See* Van Houweling, *supra* note 124, at 931–32.

the needs of the DAOs without straying either into the unlimited-liability regime of general partnership law or into federal securities law issues, these solutions should not be necessary for many, many DAOs. Because contracting is costly and time-consuming, new law could greatly enhance outcomes for many participants in this industry, particularly unsophisticated ones.

Even armed with two additional tools in the private-ordering tool belt, DAOs generally, and protocol DAOs created by open-source software-development communities in particular, would still benefit from legal changes that better align policy priorities with technical realities. In that vein, this Part proposes a small and minimally invasive change to RUPA to clarify the application (or not) of general partnership law and its policy aims for DAOs. Second, this Part joins the chorus of scholars, industry participants, and even regulators[321] calling for adaptation of the *Howey* test to better meet the needs of DAOs that issue governance or other tokens.[322] In particular, this Part proposes a novel approach that adapts the *Reves* and *Williamson* tests to reflect the new realities of the token market.[323]

A. RUPA: Presumption that a DAO Is Not a Partnership

The general partnership form is the default entity when two or more persons agree to co-own a business for profit.[324] The authors do not fault the basic premise that the law needs a default entity for parties, particularly unsophisticated ones, who operate what amounts to a multi-owner "sole proprietorship." The default-partnership doctrine is well-intentioned and protects partners and third parties from opportunism. This doctrine is enshrined in both the Uniform Act[325] and state statutes.[326]

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321. In early 2025, the SEC issued two staff statements clarifying that two digital asset scenarios do not involve the purchase or sale of "securities." *See* SEC Div. of Corp. Fin., *Staff Statement on Meme Coins*, SEC (Feb. 27, 2025), https://www.sec.gov/newsroom/speeches-statements/staff-statement-meme-coins [https://perma.cc/55H4-V6F9]; SEC Div. of Corp. Fin, *Staff Statement on Certain Proof-of-Work Mining Activities*, SEC (Mar. 20, 2025), https://www.sec.gov/newsroom/speeches-statements/statement-certain-proof-work-mining-activities-032025 [https://perma.cc/KYV7-NHWJ].

322. *See* Melissa C. Bender et al., *SEC Crypto Roundtables Illuminate Regulatory Path for Digital Assets and Trading Platforms*, ROPES & GRAY (Apr. 17, 2025), https://www.ropesgray.com/en/insights/alerts/2025/04/sec-crypto-roundtables-illuminate-regulatory-path-for-digital-assets-and-trading-platforms [https://perma.cc/XFL3-TUGK] (reporting on the first two roundtables of the Crypto Task Force, led by Commissioner Peirce, and the discussions of both the "common enterprise" and "solely from the efforts of others" prongs of the *Howey* test).

323. For a description of some of those realities, see Shaanan Cohney et al., *Coin-Operated Capitalism*, 119 COLUM. L. REV. 591 (2019).

324. *See* UNIF. P'SHIP ACT § 202(a) (UNIF. L. COMM'N 2013).

325. *Id.* ("Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.").

326. *See, e.g.*, N.Y. P'SHIP LAW § 10(1) (McKinney, Westlaw through L.2025 chapters 1 to 49, 61 to 107) ("A partnership is an association of two or more persons to carry on as co-owners a business for profit and

That being said, RUPA provides a list of relationships that will not be considered partnerships: co-ownership of property, even if the co-owners share profits earned from the property; sharing of gross returns; and sharing of profits as repayment of an obligation, such as debt, rent, services, wages, retirement benefits, interest, or installment sale.[327]

Depending on the anticipated activities of the DAO, the association of tokenholders may arguably not be a business for profit.[328] The problem, however, is that DAOs can be extremely different, just like any association, and some look very much like businesses intent on making profits and some do not.[329] Because of the novelties of DAOs and the high-profile nature of the campaign by the SEC to declare all digital tokens securities, the argument surrounding them seems to be focused on the assumption that they are business associations. If the federal government is arguing that interests are securities, then the underlying organization must be an unincorporated business entity. Conceivably, some DAO protocol users may just be interested in using the blockchain for their own enterprise, which makes it seem more like sharing space or tools or office equipment.

To shift the framing away from a presumption of a profit-seeking co-enterprise, the Uniform Law Commission, or state legislatures, could amend Section 202(c) or its state counterparts.[330] Including another item in the list of

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includes for all purposes of the laws of this state, a registered limited liability partnership."); TEX. BUS. ORGS. CODE ANN. § 152.051(b) (West, Westlaw through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election) ("[A]n association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the parties intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name."). The Texas statute also contains five factors that indicate a partnership, including the right to receive profit sharing; expression of intent to be partners; control rights; and an agreement to share losses. *See id.* § 152.052(a).

327. UNIF. P'SHIP ACT § 202(c) (UNIF. L. COMM'N 2013).

328. Case law gives many examples of agreements that are not equal to co-owning a business, such as co-owning property and sharing space and expenses by businesspeople. *See* Malone v. Patel, 397 S.W.3d 658, 670 (Tex. App. 2012) (stating that co-ownership of property, by itself, "does not indicate that a person is a partner in business"); M.I.F. Sec. Co. v. R.C. Stamm & Co., 463 N.Y.S.2d 771, 773–74 (App. Div. 1983), *aff'd per curiam*, 459 N.E.2d 193 (N.Y. 1983) (holding that there was no partnership despite a relationship in which one party paid the other 40% of net proceeds in return for clearing services, office space, and employee fringe benefits).

329. *See* Shawn Bayern, *Implied Organizations and Technological Governance*, 64 WM. & MARY L. REV. 969, 985 (2023) (explaining that the technology used to create an association should not determine whether the association is a general partnership or not; whether the persons intend "to form a for-profit business without making any formal organizational filing" determines it).

330. In his excellent article, Professor Bayern argues that the common law should adapt to address decentralized organizations as implied technological organizations because "[b]usiness relationships are too varied and complex to be easily predicted in advance or easily reduced to formulas; this is why, for example, the courts of equity have had such a significant role to play in organizational law." *Id.* at 993. Though the authors agree that the categorization of DAOs will hinge on context and multiple, ever-changing factors, the existing RUPA provisions have created a fairly uniform and predictable body of law to determine whether myriad business arrangements pre-DAO are partnerships, and so a RUPA tweak may be up to this task. *See* Hurt, *supra* note 20, at 2505 (noting that "[r]egardless of which state's statute controls, the tests are fairly

relationships that are not evidence of co-owning a business to include certain types of DAOs would be extremely helpful in allowing these productive uses to not be a general partnership (and not a business firm) and thus not a security.

One solution would be to add a section (4) to Section 202(c):

> In determining whether a partnership is formed, the following rules apply . . . (4) dispersed membership in a community that coordinates activity through the use of controllable electronic records and their related technical systems, and in which revenues may be achieved only by individuals selling, investing, or redeploying their own controllable electronic records.

The exact wording of the new Section 202(c)(4)[331] should capture associations that are not formed to achieve a business end but leave for business-entity laws the organization formed for the distinct purpose of attracting investment from tokenholders to use to increase the value of the tokens. Once the foundational question transforms from "are these individuals co-managing the digital asset business together" to "is this digital asset community a business at all," then courts may be able to recognize each DAO differently and more accurately.

B. A New Howey *Test for Cryptographic Tokens*

The inclusion of the term "investment contract" in federal and state securities law definitions is meant to be a catch-all and to broadly encompass a wide array of situations in which a promoter sells an opportunity to a passive investor to reap profits in a business enterprise, however packaged. The *Howey* test is extremely flexible by design;[332] however, other tests have proved useful for particular types of identifiable financial instruments: (1) notes, which are listed in Section 2(a)(1) and (2) partnership and LLC interests, which are not. This Article argues that a similarly tailored test for digital assets would be appropriate to help courts and the SEC sort out which types of digital assets are securities and which are not.

Such a test is required because although used colloquially in the blockchain context, the term "digital asset" is a catch-all term that refers to a wide variety

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similar" as to whether a general partnership has been formed, but "because the facts are different in each case, the resulting court holdings are quite varied").

331. We borrow the term "controllable electronic records" from the 2022 Amendments to the UCC which uses the term to define the universe of "digital assets" down to those that can be "subject[] to control." UNIF. COM. CODE app. DD (AM. L. INST. 2023). We borrow this term and the reference to "related technical systems" out of deference to the uniform law preference for technology neutral language. We recognize that any uniform law committee composed to consider this proposal would, of course, take whatever approach it felt preferable and necessary. This proposal reflects our attempt to start a conversation about how we might protect open-source communities from a specific kind of legal risk when they use technology to coordinate activity in ways that courts are currently (and inappropriately, in our view), interpreting to constitute a partnership.

332. *See* SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308, 332 (S.D.N.Y. 2023).

of assets with important technical and functional differences.[333] Indeed, the Uniform Fiduciary Access to Digital Assets Act uses the term "digital asset" to refer broadly to information held in a password-protected online account, such as an account on X or any other social media account.[334] More specifically, people often use the term "crypto-asset" as an umbrella term to cover any cryptographic asset that might transact via a blockchain protocol.[335] Within this umbrella term, many different assets exist. For example, native cryptocurrency (sometimes referred to as intrinsic or protocol tokens) serves both as a medium of exchange via a specific blockchain protocol and as an important technical security feature that makes the protocol work as intended.[336] Bitcoin is the native cryptocurrency of the Bitcoin network and ether is the native cryptocurrency of the Ethereum protocol.[337] Meanwhile, the term "token" most often refers to nonintrinsic tokens issued at Layer 2 of the blockchain technology stack.[338] The DAO tokens evaluated by the SEC in 2017 represent an example of such nonintrinsic tokens. Other forms of tokens include nonnative protocol tokens—which function like native cryptocurrency but exist at a higher layer of the blockchain technology stack—and governance tokens—a nonintrinsic token that gives its holder certain governance rights for specific smart-contract software.[339]

The technical differences between these very different types of "crypto-assets" reflect important differences in the uses to which they are put. Users generally turn to native cryptocurrencies for use as a payment system.[340] Tokens are often employed to raise capital or as utility tokens that give the holder rights to a service or to act in some way (e.g., vote on a governance proposal).[341] Nonnative protocol tokens fuel Layer 2 protocols and seek to enable scalability and interoperability across protocols.[342] The different technical features and the

333. *See* Reyes, *Language Wars: Cryptocurrency*, *supra* note 46, at 1224.

334. *See* Suzanne Brown Walsh et al., *Digital Assets and Fiduciaries*, *in* RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW 91, 92–93 (John A. Rothchild ed., 2016).

335. *See* Reyes, *Language Wars: Cryptocurrency*, *supra* note 46, at 1226, 1247–48.

336. *See id.* at 1212–13.

337. Note, practice is to use the lower-case bitcoin or ether to refer to the individual unit of cryptocurrency and to use the upper-case Bitcoin and Ethereum when referring to the protocol. *See* Angela Walch, *The Bitcoin Blockchain as Financial Market Infrastructure: A Consideration of Operational Risk*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 837, 846 n.41 (2015).

338. *See* Reyes, *Language Wars: Cryptocurrency*, *supra* note 46, at 1213–15.

339. *See id.* at 1216–17.

340. *See generally* Dan Quatrella, *SAFE and Sound? Examining How the SAFE + Token Warrant Model Navigates Howey*, 7 BUS. & FIN. L. REV. 99, 104 (2024).

341. *See* Kyle Bersani, *Separating Governance Tokens from Securities: How the Utility Token May Fall Short of the Investment Contract*, 43 CARDOZO L. REV. 1305, 1316–17 (2022).

342. *See* Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets*, 70 HASTINGS L.J. 463, 472–73 (2019).

purposes to which each is put should inform their treatment under securities regulation.[343]

A new test could help distinguish between crypto-assets that are mainly (1) payment systems; (2) native cryptocurrencies serving a security or other core function in the operation of the protocol through which the asset transacts; (3) commodities; (4) utility tools; (5) NFTs; and (6) representations of future profits of a common enterprise.

In *SEC v. Ripple Labs, Inc.*, the court seemed to divide digital assets into two, unprecedented categories: (1) digital assets for which the purchase price becomes working capital of the venture and (2) digital assets for which the purchase price is merely paid to another asset holder.[344] This distinction is not used elsewhere in securities law; a security is a security whether it is sold from the issuer to the first purchaser or from the first purchaser to the second, tenth, or thousandth purchaser. Using the *Howey* test, tokens may admittedly fail or pass various prongs depending on whether the DAO that issued the tokens is beginning or mature and what sort of managerial efforts are being made at what time and by whom. This is a flaw in the test as applied to digital assets, but the test itself does not address whether the purchase price goes to the issuer or a seller.[345] This issue was discussed at the second roundtable hosted by the Crypto Task Force in April 2025.[346]

The Second Circuit may not weigh in on this issue from *Ripple* as much of the *Ripple* case has settled following the departure of SEC Chair Gensler and the nomination of new Chairperson Peter Atkins. Though Ripple had appealed parts of the district court's verdict imposing a $125 million fine for selling unregistered securities,[347] and the SEC had appealed the portions of the verdict holding that some sales were not securities,[348] the SEC agreed to abandon its

343. In prior work, one of the authors asked, "What would the market look like if securities regulation focused on technical and functional aspects beyond the flashy issue of 'decentralization?'" *See* Reyes, *Language Wars: Cryptocurrency*, *supra* note 46, at 1215–16. Together, the authors of this Article hope to outline a potential answer.

344. SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308, 328 (S.D.N.Y. 2023) ("Whereas the Institutional Buyers reasonably expected that Ripple would use the capital it received from its sales to improve the XRP ecosystem and thereby increase the price of XRP, Programmatic Buyers could not reasonably expect the same. Indeed, Ripple's Programmatic Sales were blind bid/ask transactions, and Programmatic Buyers could not have known if their payments of money went to Ripple, or any other seller of XRP." (citation omitted)).

345. *See* Ave. Cap. Mgmt. II, L.P. v. Schaden, 843 F.3d 876, 882–84 (10th Cir. 2016) (holding that LLC interests purchased from the founder by private equity funds were not securities under the *Howey* and *Williamson* tests because the funds controlled the board of managers, not because the purchase price went to the departing founder).

346. *See* Bender, *supra* note 322.

347. SEC v. Ripple Labs, Inc., 2024 WL 3730403 at *9 (S.D.N.Y. Aug. 7, 2024).

348. Each party filed a notice of appeal in this action in Fall 2024. *See* Notice of Appeal of Plaintiff, SEC v. Ripple Labs Inc., No. 24-2648 (2d Cir. Oct. 3, 2024); Notice of Cross-Appeal of Defendant, SEC v. Ripple Labs Inc., No. 24-2648 (2d Cir. Oct. 10, 2024).

appeal.[349] Ripple's appeal of the finding of a securities law violation is ongoing, however.

1. Reves *Test*

Section 2(a)(1) specifically lists "notes" in the definition of "security."[350] Unlike the term "stock," which the Supreme Court has said refers to corporate stock with the characteristics of corporate stock,[351] the term "notes" may refer to promissory notes with the characteristics of notes but used in a variety of circumstances. All notes used in financing have a term, stated principal, and stated fixed or variable rates of interest; the "issuer" of the note, however, might be an individual or an entity.[352] In addition, the purpose of the financing might be to purchase a consumer product, a residential home, or college tuition on the one hand, or to finance the general operations of a business firm, on the other. In *Reves v. Ernst & Young*,[353] the Supreme Court held that notes were not per se securities but must be analyzed on a case-by-case basis;[354] the Court articulated a number of factors, the "family resemblance test,"[355] to attempt to distinguish between the types of financings that seem like investments by the lender to the maker of the note and the types of financings that do not.[356] Most

349. *See* Jonathan Stempel & Niket Nishant, *Ripple Labs Says US SEC Ends Appeal over Crypto Oversight*, REUTERS (Mar. 19, 2025), https://www.reuters.com/legal/ripple-ceo-says-us-sec-will-drop-appeal-against-crypto-firm-2025-03-19/ [https://perma.cc/9DJH-P7E8] (noting that since January 2025, the SEC "has retreated on crypto oversight," ending enforcement actions against Coinbase and Kraken).

350. Securities Act § 2(a)(1), 15 U.S.C. § 77b(a)(1) ("The term 'security' means any note, stock, treasury stock, security feature, security-based swap . . . .").

351. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 851 (1975) (holding that a housing cooperative that issued "stock" to rental applicants in return for deposit payments was not issuing securities because the "stock" in question had none of the characteristics of corporate stock, such as free transferability, right to appreciation in value, right to dividends as and when declared, and right to vote); *see also* Landreth Timber Co. v. Landreth, 471 U.S. 681, 687 (1985) (holding that the purchase of all the outstanding stock of a corporation is still the purchase of "securities" under Section 2(a)(1) even though the transaction would not meet the *Howey* test given that the purchaser's own efforts would drive any profit potential post-purchase).

352. *See, e.g.*, Reves v. Ernst & Young, 494 U.S. 56, 58–59 (1990) (reciting facts involving promissory notes issued by an entity); Archer v. Warner, 538 U.S. 314, 317 (2003) (reciting facts involving a promissory note issued by one individual to another as part of a settlement agreement, including a description of the principal amount).

353. *Reves*, 494 U.S. at 67–70 (holding that demand notes issued by a grain cooperative to members were securities).

354. *Id.* at 62 (noting that in *Landreth*, the Court had specifically said that "[u]nlike 'stock,' . . . 'note' may now be viewed as a relatively broad term that encompasses instruments with widely varying characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context" (citing *Landreth*, 471 U.S. at 694)).

355. The test analyzes (1) the motivations of a reasonable buyer and seller entering into this financial transaction; (2) the plan of distribution of the instrument; and (3) the reasonable investments of the investing public. *See id.* at 65–66.

356. Among the types of notes that are not securities: "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a 'character' loan to a bank customer, short-term notes secured by an

recently, the Second Circuit has used the *Reves* test to hold that notes issued to banks in a lending syndicate were not securities where the notes had assignment restrictions.[357]

Notably, the *Reves* Court warned that the *Howey* test should not be used for notes because whether a note is an "investment contract" is irrelevant to whether it is a security, similar to the Court's rejection of *Howey* for stock.[358] Recognizing that the *Howey* test may have limited usefulness for other types of specific securities, one can argue that digital assets could benefit from a specific multi-factor test similar to the *Reves* test. DAOs, DAO protocols, and digital assets are as varied and different in their uses and purposes as notes; recognizing that there are digital securities and nondigital securities and attempting to create a resemblance test could be invaluable to participants, courts, and regulators. The Crypto Task Force could consider proposing to the SEC Chair that rulemaking in this area would balance capital formation with investor protection.

2. Williamson *Test*

Alternatively, if regulators or the courts determine that the "investment contract" category is still relevant for digital assets, the *Howey* test could be tweaked in the same way that the *Williamson* court[359] tweaked the *Howey* test to apply to partnerships. The new test would help flesh out the analysis of whether the tokenholder had an "expectation of profits produced by the efforts of others"[360]: separately, did token purchasers have any expectation of "profit" and then, how that "profit" would be derived. The *Williamson* test attempts to separate out owner-investors in alternative entities between passive investors and active owners based on characteristics, rights, and activities that are common and familiar in alternative business entities.[361] Where the *Howey* test is general, the *Williamson* test asks about the operating agreement of the entity and how it interacts with statutory default rules, the relationship between statutory actors in these entities (general partners, LLC managers, and members), and how the parties specifically act in common alternative entity scenarios.[362]

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assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business." *See id.* at 65 (citing Exch. Nat'l Bank of Chi. v. Touche Ross & Co., 544 F.2d 1126, 1137 (2d Cir. 1976)).

357. Kirschner v. JP Morgan Chase Bank, N.A., 79 F.4th 290, 304 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 818 (2024) (emphasizing that the *Reves* Court explained that the federal securities regime is not to "provide a broad federal remedy for all fraud" but merely to "regulate the investment market").

358. *See Reves*, 494 U.S. at 64; *see also Landreth*, 471 U.S. at 690–92 (rejecting the application of the *Howey* test to stock).

359. *See* Williamson v. Tucker, 645 F.2d 404, 421–22 (5th Cir. 1981); *see also* discussion *supra* Section III.A.2.

360. Warfield v. Alaniz, 569 F.3d 1015, 1020 (9th Cir. 2009).

361. *See Williams*, 645 F.2d at 423–24.

362. *See id.* at 422–25.

Likewise, a test specific to digital assets should take into account (1) the expectations of the parties in the DAO; (2) the rights given to the parties in the DAO; (3) the activities of the parties using the DAO protocol and any digital asset created by the protocol; and (4) the relationship between and among the parties in the DAO, but *as compared to other DAOs*, not as compared to partnerships, LLCs, or corporations.

CONCLUSION

The size of the role that DAOs, DAO protocols, and digital assets will continue to play in the U.S. economy is unclear, but the demand for these associations and products seems to be growing, even as legal uncertainty in this sector persists.[363] The significant disconnect between DAOs and the existing legal regime is two-pronged: (1) traditional general partnership law recognizes many DAOs as general partnerships, an entity that imposes personal liability on each participant, and (2) traditional securities law does not have a test tailored to distinguish between digital assets that are securities and those that are not.

Market participants can attempt to navigate these disconnects by intentionally choosing a business entity at the beginning of the creation of a DAO that attempts to structure an association to meet the needs of the participants: no personal liability, no fiduciary duties owed by the participants, and interests not considered securities under federal and state law. As described above, this Article offers two choices: a Delaware limited liability partnership and a Delaware joint venture with a very detailed joint venture agreement that contractually allocates rights and obligations in an optimal manner.

In addition, this Article argues that the law should adapt to this new industry. First, the Uniform Partnership Act and state partnership acts could add a new provision that would exclude certain types of DAOs from being considered a general partnership by default. Second, the Crypto Task Force could propose, and the SEC adopt, a new test in the tradition of the *Howey* test and the *Reves* test that would distinguish types of digital assets that should be considered securities and those that should not. Much as the *Reves* test recognizes that promissory notes are used in a wide variety of situations, many of which do not seem like investments, courts, legislators, and regulators should recognize that digital assets are just as varied. A specialized test would use the specific characteristics of different types of digital assets to sort investment assets from utility assets, membership assets, payment systems, currencies, and commodities.

363. *See* Alexander Osipovich & Vicky Ge Huang, *Trump 2.0 Era Brings Flurry of Crypto Deals*, WALL ST. J. (Apr. 26, 2025), https://www.wsj.com/finance/currencies/trump-crypto-deals-regulation-e134056d [https://perma.cc/23FY-P3US] (chronicling the story of Twenty One Capital, a "bitcoin company" scheduled to go public through a de-SPAC merger in 2025 as part of a trend of crypto-related acquisitions).

By offering the joint solutions of new private-ordering paths for DAOs in the near term and the proposal for legal reform in the longer term, this Article recognizes in both its analysis and proposals the deep diversity in technical architecture and purpose across DAO implementations. In doing so, this Article hopes to encourage continued nuanced and practical dialogue about the existing tools in a DAO's legal toolbox and the need for evolution in business-formation law to ensure that it is applied consistently with its underlying policy priorities.