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SEC Chair outlines regulatory priorities for cryptocurrency

By Mark D. Lytle and Colin T. Missett

In a speech delivered on Tuesday, August 3, 2021, the chair of the U.S. Securities and Exchange Commission, Gary Gensler, outlined the agency's priorities for regulating cryptocurrencies. After first telling the story of the origins of Bitcoin and noting his own personal interest in "how technology can expand access to finance and contribute to economic growth," Chair Gensler used the majority of his speech to highlight ways the SEC is looking to protect investors in the crypto space, which he characterized as "more like the Wild West" at the moment.¹

Chair Gensler's specific areas of focus are four-fold:

Unregistered crypto securities

Chair Gensler emphasized that the SEC would continue the agency's work under former Chairman Jay Clayton to regulate any crypto assets that are securities pursuant to the Supreme Court's test in *SEC v. Howey Co.*, 328 U.S. 293 (1946). The SEC has brought dozens of enforcement actions over the years to compel entities that raise assets through unregistered digital asset securities offerings (or initial coin offerings (ICOs)) to register with the SEC, and that work evidently will continue unabated under Chair Gensler. However, in addition to enforcement actions against the entities that create and offer unregistered tokens, Chair Gensler expressed his belief that the SEC also has jurisdiction over any trading, lending, or decentralized finance (DeFi) platforms that host unregistered tokens, noting that "to the extent that there are securities on these trading [or lending] platforms, under our laws they have to register with the Commission unless they meet an exemption."

Stablecoins

Chair Gensler highlighted the increasing popularity of stablecoins, which now have an existing market share of \$113 billion. Chair Gensler did not express a view as to whether stablecoins were securities, but to the extent they are, he promised "full investor protection of the Investment

¹ [Remarks Before the Aspen Security Forum](#), Chair Gary Gensler, U.S. SECURITIES AND EXCHANGE COMMISSION (Aug. 3, 2021).

Company Act and the other federal securities laws to these products,” and noted he would be working with the President’s Working Group on Financial Markets² on this issue.

Crypto exposure on traditional exchanges

Chair Gensler also promised to continue to regulate traditional investment vehicles that provide exposure to crypto assets. Chair Gensler also appeared to express some openness to crypto-based exchange-traded funds (ETFs) (which have been long-anticipated by the crypto community), noting that current laws provide “significant investor protections” and that he looked forward to the staff’s review of such filings.

Custody of crypto assets

Finally, Chair Gensler noted that the SEC is seeking comment on crypto custody arrangements by broker-dealers and relating to investment advisers.

Implications of SEC crypto priorities

Chair Gensler’s remarks this week suggest that implementing enhanced investor protections to reign in “the Wild West” of crypto including the “fraud, scams, and abuse” will be a priority for the SEC under his leadership. His comments also provide some further insight into how he intends to regulate this ever-growing industry, as set forth above. At the same time, however, Chair Gensler continues to signal that there is only so much the SEC can do to regulate crypto assets that are not securities unless or until Congress intervenes to close gaps that allow certain transactions, products, and platforms to fall “between regulatory cracks.” Back in May, for example, Chair Gensler noted that the SEC currently would not have authority to regulate an exchange that trades solely in Bitcoin—i.e., an asset that is not a security—and he called on Congress to think through what rules may be needed to protect the investing public with respect to such exchanges.³ Reiterating those comments this week, Chair Gensler emphasized that the SEC and other financial regulators “would benefit from additional plenary authority to write rules for and attach guardrails to crypto trading and lending,” noting legislative priorities “should center on crypto trading, lending, and DeFi platforms.”

For companies operating in this space, Chair Gensler’s remarks confirm that the SEC will continue to use its authority to regulate financial products and exchanges that clearly fall within the agency’s jurisdiction. However, for those anticipating that Chair Gensler may employ the SEC’s rulemaking powers or other tools to expand the SEC’s reach to currently unregulated areas of the crypto industry, that appears to be unlikely absent congressional action to clearly provide the SEC with new authority.

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² [Readout of the Meeting of the President’s Working Group on Financial Markets to Discuss Stablecoins](#), U.S. DEPARTMENT OF THE TREASURY (July 19, 2021).

³ [2021 FINRA Annual Conference: A Conversation With The Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission \(SEC\)](#), FINRA (May 20, 2021), (see approx. 18:00 mark).