

The SEC's New Cryptocurrency Task Force: A Step Toward Regulatory Clarity

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On Jan. 21, 2025, Mark T. Uyeda, the acting chairman of the U.S. Securities and Exchange Commission (SEC), announced the launch of a cryptocurrency task force. This task force, led by SEC Commissioner Hester Peirce, with Richard Gabbert serving as chief of staff and Taylor Asher as senior policy adviser, aims to establish a comprehensive and clear regulatory framework for cryptocurrency. On Feb. 4, 2025, Peirce outlined 10 key priorities for the task force. One of the task force's main priorities is to clarify the application of federal securities laws to digital assets, which is a question that has led to much uncertainty in the cryptocurrency industry. The task force and its determination to develop clear guidelines marks a significant shift from the SEC's recent reliance on enforcement actions to make policy regarding cryptocurrency to a more structured regulatory approach.

The demand for clearer guidelines has been a recurring theme in the cryptocurrency world, including in securities enforcement actions. This was highlighted by the U.S. Court of Appeals for the Third Circuit in a recent decision that ordered the SEC to explain how and when securities laws apply to cryptocurrency. In *Coinbase v. SEC*, Coinbase petitioned the SEC to promulgate rules clarifying how and when securities laws apply to cryptocurrency. Coinbase argued that the existing securities laws do not account for the unique attributes of digital assets, making compliance with the laws economically and even technically infeasible. According to Coinbase, the SEC increased these difficulties by failing to articulate a clear and consistent position on whether digital assets are considered securities and therefore subject to securities laws.

In response, the SEC denied Coinbase's rulemaking petition, stating in a single paragraph that it disagreed with Coinbase's concerns, had higher priority agenda items, and preferred to gather more information before engaging in rulemaking. Coinbase then petitioned the Third Circuit to review the SEC's denial. The Third Circuit found the SEC's explanation for denying Coinbase's rulemaking petition to be insufficiently reasoned. According to the court, the SEC's single paragraph disagreeing with Coinbase's petition failed to explain whether and how it considered Coinbase's workability objections. The SEC did not adequately explain which other regulatory efforts it was prioritizing and why, and while courts typically defer to an agency's allocation of resources and ordering of priorities, that explanation must still be sufficiently reasoned. Finally, the Third Circuit said that the SEC can proceed by incremental rulemaking or adjudication, but if it chooses this route, it must explain why it prefers to proceed this way.

Though the Third Circuit agreed with Coinbase that the SEC's denial was insufficiently reasoned, it did not agree

with Coinbase that the appropriate remedy was to order the SEC to promulgate rules. Only in extreme circumstances can a court overturn an agency's judgment not to institute rulemaking, and the primary economic interests at stake here did not constitute such circumstances. Instead of ordering the SEC to promulgate rules, the Third Circuit remanded the case to the SEC and ordered it to provide a sufficiently reasoned disposition of Coinbase's petition.

As the case now returns to the SEC, all eyes will be on how the SEC justifies its rejection of Coinbase's rulemaking petition. The SEC's explanation could either leave lingering questions or signal a shift towards rulemaking that benefits the cryptocurrency industry through clearer and more supportive regulations. However, given the recent launch of a cryptocurrency task force, and public statements regarding cryptocurrency regulation by current SEC commissioners and Paul Adkins, who has been nominated to become the chair of the SEC, the latter seems increasingly likely.

The Regulation of Digital Assets Is Inconsistent and Unclear

For years, the SEC has relied on enforcement actions rather than clear guidelines to regulate the digital asset industry. Since the first enforcement action in July 2013, the SEC has brought over 200 cryptocurrency-related enforcement actions, peaking in 2023. This approach has led to inconsistencies in the regulation of digital assets. Many of these cases have found that digital assets were securities and were required to be registered pursuant to the federal securities laws.

A notable inconsistency arose in the Southern District of New York, where two courts reached opposite conclusions regarding whether digital assets sold on secondary markets qualify as investment contracts under securities laws. In *SEC v. Ripple Labs*, U.S. District Court Judge Analisa Torres of the Southern District of New York held that Ripple's direct sales of digital tokens to sophisticated individuals and entities constituted securities transactions, but sales to public buyers through secondary trading platforms did not. Ripple argued that the sales did not meet the investment contract criteria set forth in the seminal Supreme Court decision establishing the definition of a security, *SEC v. W.J. Howey*, which are an investment of money, into a common enterprise, and an expectation of profits to be derived solely from the efforts of others. Furthermore, Ripple contended that investment contracts require three additional "essential ingredients," including a contract establishing the investor's rights to an investment, post-sale obligations by the promoter for the investor's benefit, and a contract granting the investor a share in profits.

The court rejected Ripple's essential ingredients test, explaining that it imposed more requirements than the Supreme Court required for investment contracts. It explained that Ripple's sales of digital tokens to sophisticated individuals and entities constituted investment contracts because buyers invested money in exchange for the digital tokens, Ripple pooled the proceeds from the sales and used them to fund its operations, and buyers had a reasonable expectation of profits derived from Ripple's efforts. The court said the sales on secondary trading platforms, however, did not constitute investment contracts since they were blind bid/ask transactions that eliminated any reasonable expectation of profits. Therefore, the court found that whether digital assets qualify as investment contracts under securities laws depends on the circumstances of the sale.

In contrast, Judge Jed Rakoff in *SEC v. Terraform Labs* declined to follow Torres's reasoning in *Ripple*. Rakoff was faced with the same question of whether digital tokens qualified as investment contracts and were therefore

subject to securities laws. Like in *Ripple*, the *Terraform* court found there to be an investment of money and a common enterprise. However, when addressing the reasonable expectation of profits, the *Terraform* court refused to differentiate between digital assets based on their manner of sale since the Supreme Court never made such a distinction. Additionally, whether a purchaser bought the digital assets directly from the defendants or in a secondary transaction had no impact on whether a reasonable person would view the defendants' actions and statements as demonstrating a promise of profits based on their efforts. Therefore, the court held that Terraform's digital assets qualified as investment contracts and were subject to securities laws.

The Need for Clarity Is Urgent

Shortly after the *Ripple* decision in 2023, Chairman of the House Financial Services Committee Patrick McHenry and Chairman of the House Agriculture Committee Glenn Thompson issued a statement urging Congress to provide clear guidelines for the digital asset industry. The statement also emphasized that the SEC cannot continue to regulate digital assets through enforcement, as this approach harms investors and results in too much uncertainty.

This sentiment is echoed in ongoing enforcement actions, where defendants argue that the SEC needs to provide clarity on how and when securities laws apply to digital assets. In 2023, the SEC initiated a separate enforcement action against Coinbase, alleging that its platform operates as an unregistered securities exchange. Coinbase moved for judgment on the pleadings, arguing that digital assets do not qualify as investment contracts under securities laws and that the application of securities laws to digital asset transactions represents a significant question that Congress has not authorized the SEC to address with broad regulatory authority. The Southern District of New York denied Coinbase's motion, and Coinbase urged the Second Circuit to hear its interlocutory appeal, arguing that users of digital asset trading platforms, cryptocurrency companies, the SEC, and lower courts "badly need clarity on what the federal securities laws require."

The Second Circuit agreed with Coinbase and certified the interlocutory appeal, explaining that the conflicting decisions regarding whether digital assets qualify as investment contracts necessitated appellate guidance. The court noted that the conflict between *Ripple* and *Terraform* demonstrates a "fundamental difficulty" of applying *Howey* to digital assets, which is a "difficult legal issue of first impression for the Second Circuit." The certification of Coinbase's interlocutory appeal is significant because it will be the first time a federal appellate court assesses whether cryptocurrency transactions qualify as investment contracts and are therefore subject to securities laws.

The Future of Digital Assets and Securities Laws Is Rapidly Changing

The SEC's newly established cryptocurrency task force, along with a 30% decline in enforcement actions in 2024, signals a significant shift toward establishing comprehensive regulatory guidelines for cryptocurrency. This change is further underscored by President Donald Trump's pledge to securing America's position as the world's leader in the digital asset economy. In support of this pledge, Trump recently signed an executive order, "Strengthening American Leadership in Digital Financial Technology." The executive order emphasizes the objective of achieving regulatory clarity and certainty in the digital asset industry and establishes a working group tasked with developing a regulatory framework for digital assets. The SEC will be represented in the working group, which includes the chairman of the SEC among its members.

Overall, the federal government, including the SEC, appears to be moving toward a more structured regulation of cryptocurrency, much to the relief of the cryptocurrency industry. However, this shift is unfolding rapidly, so readers are encouraged to stay tuned for further developments as the SEC's approach continues to evolve.

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