

Early Signs of What's Next in the SEC's New Approach to Crypto Assets and the Blockchain Industry

Client Alerts

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The SEC's effort to revamp the SEC's approach to crypto assets and the blockchain industry is well underway. After forming a Crypto Task Force in the week of the administration, the SEC has been gathering input on the future of crypto regulation from a wide range of industry stakeholders through publicly available written submissions and dozens of meetings. The SEC's open invitation has prompted input from companies, trade associations, and legal experts representing diverse viewpoints across the digital asset ecosystem. Several common themes have emerged, and the submissions shed light on where the industry is aligned and where significant divergence remains, providing insight into what issues are likely to take priority in the months to come.

Common Themes and Priorities

Participants consistently emphasize the urgent need for **regulatory clarity** in the rapidly evolving crypto market, with a few topics frequently identified at or near the top of the list as high-priority areas for SEC action:

1. Token Classification

One of the most widely shared demands is for the SEC to clarify that most **digital tokens are not securities**. These arguments mirror many of the arguments made over the last few years by defendants in the prior administration's crypto enforcement actions. Many submissions call for the SEC to:

- Retract or modify statements suggesting that most tokens are investment contracts.
- Issue guidance distinguishing between different types of tokens, including distinctions between tokens that are digital commodities and those that are securities.

2. Tailored Disclosure Regime

Many submissions recognize that while most digital tokens are not securities, some tokens will be offered or sold in transactions that may implicate securities laws, particularly in the context of initial fundraising transactions. However, the current securities disclosure requirements are not well suited to the needs of token purchasers or sellers. In short, the information that is available and relevant about a token and any related network is very different than the information that may be available or relevant about a company issuing equity or debt.

Accordingly, there is broad consensus that SEC should work to develop a **customized disclosure regime** for digital assets that do fall within the securities framework—one tailored to the unique features of blockchain-based networks—rather than seeking to retrofit the existing disclosure requirements designed for traditional equity or debt securities.

The SEC has previously taken a similar approach in developing a tailored disclosure regime for asset-backed securities, and many submissions point to that and similar efforts as precedent for developing a tailored disclosure regime.

3. Staking Services

Another recurring topic is the treatment of **staking**—a fundamental mechanism for proof-of-stake (PoS) blockchain networks and other blockchain protocols. Industry participants broadly propose that:

- **Staking rewards should not be construed as interest or lead to classification as a security** because staking rewards serve a network security function rather than a passive investment return.
- Investment products like **ETFs holding staked assets** should be permitted to participate in staking programs to avoid distorting incentives.
- Non-custodial staking by individual users should be explicitly excluded from securities regulations.

While there is relatively broad consensus concerning direct network staking, the considerations are more nuanced for Staking-as-a-Service (SaaS) providers, which typically perform the technical aspects of staking on behalf of their customers/users and distribute the rewards pro rata, less a fee. For these arrangements, the technical and contractual details may matter to the analysis.

4. Non-Custodial Services and Self-Custody

A foundational principle of blockchain technology is the ability for users to **self-custody their own assets** without relying on intermediaries. The prior administration and certain private parties in litigation had sought to bring self-custody within the scope of securities laws by characterizing certain products or services (or their developers) as brokers or dealers or other financial

intermediaries. Accordingly, many submissions urged the SEC to ensure that any regulatory regime explicitly permit self-custody, including by clarifying that:

- Non-custodial services (like crypto wallets or decentralized exchanges) should not be required to register as brokers or dealers.
- Passive front-end interfaces that merely facilitate peer-to-peer transactions should not be regulated as financial intermediaries.

5. Airdrops and Incentive Programs

Many submissions called for clear safe harbors for **airdrops, token rewards, and other non-sale distributions** of digital assets. These mechanisms are common ways for blockchain projects to distribute tokens to early adopters and to incentivize network participation without requiring a clear monetary investment by the user.

The prior administration's enforcement actions had created uncertainty around whether and when such distributions could be deemed securities offerings. Accordingly, many participants seek guidance to make clear that such non-sale distributions are not securities, and to provide rules of the road so that businesses who want to comply with the law have a clear path to do so.

Areas of Divergence

While the public submissions broadly agree on many key issues to be addressed, there is less consensus on the details of how to do so, and what forms of relief are appropriate. Areas of divergence include:

1. Regulatory Sandboxes

Commissioner Hester Peirce has long advocated for a **regulatory sandbox** that would grant temporary exemptions from securities laws for certain crypto projects, allowing them to operate without fear of enforcement at least for an initial period of time. Some submissions voiced their support for sandboxes to signal that the United States is serious about fostering responsible innovation in the digital assets space, while others argued that sandboxes could create unnecessary complexity and discourage long-term compliance by offering only temporary relief.

2. Retroactive Relief and Remediation

There is some disagreement on whether and to what extent the SEC should offer **retroactive relief**. Some submissions proposed a structured remediation process that would allow non-compliant projects to come into compliance without facing enforcement penalties, while others emphasized that any remediation should come with **significant costs** to deter bad actors and to reward actors who made efforts to comply with the securities laws as they were understood under prior administrations.

3. Formal, Informal, and Other Targeted Relief

Many industry voices have called for a broad **pause on enforcement actions** that do not involve fraud or investor harm, and the SEC has already been active in dismissing pending enforcement actions. Others—especially traditional financial institutions—have cautioned that targeted **no-action letters and exemptive relief** would be more appropriate to avoid opening the door to abuse. There does not yet appear to be consensus on which issues are best suited to formal rulemaking, less formal public guidance, exemptive relief, no-action letters, or simple non-enforcement.

What's Next

We have already seen substantial moves to dismiss or pause existing enforcement actions. Based on the patterns emerging from these meetings, other key items likely to be at the top of the SEC's crypto agenda in the coming months include:

- Clarifying **token classifications**. Along these lines, the SEC already clarified that meme coins are generally not securities, and numerous submissions identified stablecoins as another area to be expressly carved out.
- Addressing the **regulatory treatment of staking** in multiple contexts, including direct staking, staking-as-a-service, and staking by ETPs.
- Working to develop a tailored **disclosure regime for securities offerings involving digital assets**.
- Considering proposals for a **sandbox or safe harbor program**.

It is also not too late for industry participants to provide comments. The SEC's door remains open, as it seeks to further its mission of protecting investors while promoting capital formation and maintaining fair markets. The crypto industry now has a unique opportunity, and some might argue a responsibility, to assist in formulating concrete and specific actionable steps to help the SEC develop clear rules of the road for good actors, facilitate relevant disclosures, and enable (not hinder) access to fair markets.

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