

5 Ways SEC's Crypto Approach Could Change Under Trump

By **Tiffany Smith, Kyle Swan and Josh Nathanson** (November 27, 2024)

The election of Donald Trump as president could have a significant impact on the crypto industry given his campaign promise of a procrypto administration.[1] Trump will be able to appoint a new chair of the U.S. Securities and Exchange Commission who could decide to take a different approach to crypto than has been taken under the leadership of the current chair, Gary Gensler.



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Under Gensler's leadership, the SEC has brought numerous enforcement actions against crypto industry members alleging violations of the federal securities laws, including actions solely for failing to register as a broker-dealer, clearing agency or national securities exchange under the Exchange Act.[2] At the same time, the SEC has not proposed rules tailored to crypto-assets, instead suggesting that current statutory and regulatory requirements can be applied to them.[3]



Kyle Swan

Crypto industry members have disagreed and reported that their attempts to engage with the SEC on crypto-related issues have been unsuccessful.[4] However, with the upcoming appointment of a new SEC chair, this approach could change, so members of the crypto industry should start preparing to engage with the SEC once new leadership is confirmed.

Under new leadership, the SEC could take a number of different approaches, including the following.

1. Pause Registration-Only Enforcement Actions

The SEC has brought several enforcement actions against crypto companies solely for violations of the registration provisions of the Securities Act or Exchange Act without allegations of fraud or other misconduct.[5] New SEC leadership could pause bringing additional registration-only enforcement actions until there is a clear framework for the regulation of crypto-assets and intermediaries transacting in crypto-assets under SEC rules.[6]



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2. Issue Updated Guidance on Determining When Crypto-Assets Are Offered and Sold as Securities

It's been over five years since the SEC staff published the "Framework for 'Investment Contract' Analysis of Digital Assets,"[7] which described the circumstances under which digital assets are offered and sold as "investment contracts" — and therefore securities.

Since that time, the crypto industry has changed significantly. For example, many crypto projects have matured and become more decentralized, and proof-of-stake consensus has grown prevalent. Yet, the SEC has not issued additional guidance.

The SEC could update the framework to take into account the changes in the industry within the last five years and explain why certain crypto-assets — like bitcoin and ether — are not

offered and sold as securities. New guidance also could address asset-backed stablecoins, which are now one of the most prominent uses of crypto-assets.[8]

3. Propose Rules for Crypto

The SEC could propose tailored rules that take into account the differences between crypto-assets and traditional securities.[9]

To date, the SEC has largely declined to recognize differences between crypto and traditional securities in its rulemakings, despite the views — and legal challenges — of industry members.[10] Instead, the SEC has pursued rules for securities broadly, and within the proposing and adopting releases noted that the rules also would apply to "crypto-asset securities." [11]

In some instances, these rules were finalized over concerns of industry members about the rules' applications to crypto-assets and the SEC's compliance with the Administrative Procedure Act.[12]

4. Use Its Exemptive Authority

The SEC could use its general exemptive authority granted by Congress under Section 28 of the Securities Act[13] and Section 36 of the Exchange Act[14] to provide tailored relief from requirements under those acts that may present challenges for crypto market participants due to differences between crypto-assets and traditional securities.[15]

The SEC could also issue additional no-action positions, declining to pursue enforcement actions against firms for engaging in certain crypto-asset activities, as a temporary stopgap measure until crypto-specific rules can be proposed or adopted.

5. Update the Special-Purpose Broker-Dealer Statement

The SEC could update the 2020 temporary no-action position that permitted so-called special-purpose broker-dealers to perform trading and custody functions with respect to digital asset securities to make the position more workable for today's crypto industry and extend the sunset date of February 2026.

Today, there are only two registered special-purpose broker-dealers, and the scope of activities they are permitted to conduct, and the assets they are permitted to conduct those activities with, remain unclear given the absence of SEC guidance on critical issues, such as when a crypto-asset is offered and sold as a security. An update could make this guidance more effective.

Conclusion

With Republican control of both the Senate and the House in the incoming 119th Congress, there also may be an opportunity for Congress to pass crypto legislation. However, even if this is the case, the SEC will still likely have a role in the regulation of crypto. The Financial Innovation and Technology for the 21st Century Act, which passed the House with bipartisan support in July,[16] and the Lummis-Gillibrand Responsible Financial Innovation Act,[17] which was reintroduced in 2023, both carve out roles in the regulation of digital assets for the SEC and the U.S. Commodity Futures Trading Commission.

If new SEC leadership decides to take a different approach to crypto than current

leadership, crypto industry members could play a key role in shaping the future of crypto policy. In a Nov. 12 post on X, formerly Twitter, SEC Commissioner Hester Peirce noted that "people inside [and] outside the agency need to be thinking now about what good crypto regulation looks like. We need good ideas to fuel a public discussion."^[18]

Given the focus on crypto as part of Trump's campaign, the SEC could take a number of different approaches to crypto, including one or more of the approaches outlined above. As a result, crypto industry members should start preparing to engage with the SEC so that their perspectives are considered as crypto regulation under new SEC leadership takes shape.

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[1] Trump vowed to make the United States "the crypto capital of the planet." Wyatt Grantham-Phillips, What to know about crypto's Trump rally as Bitcoin soars past \$87,000 to an all-time high, *Fortune* (Nov. 12, 2024), <https://fortune.com/crypto/2024/11/12/crypto-trump-rally-bitcoin-soars-past-87000-all-time-high/>.

[2] See, e.g., *Compl., Securities and Exchange Comm'n v. Coinbase, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. Jun. 6, 2023); *Compl., Securities and Exchange Comm'n v. Cumberland DRW LLC*, No. 24-cv-9842 (N.D. Ill. Oct. 10, 2024); *Compl., Securities and Exchange Comm'n v. Bittrex Inc., et al.*, No. 2:23-cv-00580 (W.D. Wash. Apr. 17, 2023); In the Matter of eToro USA LLC, Exchange Act Release No. 101001 (Sept. 12, 2024). In each of these actions, the SEC alleged that the crypto firm failed to register under the Exchange Act or the Securities Act of 1933 (Securities Act) but did not allege that the firm committed fraud or that customers were otherwise harmed.

[3] See, e.g., Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange," 88 Fed. Reg. 29448, 29449 (May 5, 2023) (stating "the Commission's view that the Proposed Rules should apply to trading in any type of security, regardless of the specific technology used to issue and/or transfer the security").

[4] See Jesse Hamilton, Robinhood Joins Coinbase in Saying It Tried to 'Come In and Register' Like SEC Wanted, *CoinDesk* (Jun. 7, 2023), <https://www.coindesk.com/policy/2023/06/07/robinhood-joins-coinbase-in-saying-it-tried-to-come-in-and-register-like-sec-wanted/>.

[5] See *supra* note 2.

[6] See Eleanor Terret, SEC commissioner backs Trump's plan to end crypto crackdown, Fox Business (Nov. 7, 2024), <https://www.foxbusiness.com/markets/secs-uyeda-backs-trumps-plan-end-crypto-crackdown>.

[7] Strategic Hub for Innovation and Financial Technology, SEC, Framework for 'Investment Contract' Analysis of Digital Assets (last updated Jul. 5, 2024), available at <https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets>.

[8] See Stablecoin market capitalisation reached a two-year high; Crypto.com Exchange was the top crypto exchange with USD support by spot trading volume in July, Crypto.com (Aug. 5, 2024), <https://crypto.com/market-updates/crypto-market-pulse-weekly-05-08-2024>.

[9] For example, the SEC could use its authority under Section 28 of the Securities Act and Section 36 of the Exchange Act to promulgate rules that grant targeted exemptions from existing laws.

[10] See, e.g., *Br. for Petitioner, Coinbase, Inc. v. Securities and Exchange Comm'n*, No. 23-3202 (3d Cir. Dec. 15, 2023).

[11] The SEC has mentioned crypto assets in several rule proposing and adopting releases. See, e.g., Regulation Best Execution, 88 Fed. Reg. 5440, 5448 (Jan. 27, 2023); Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange," 88 Fed. Reg. 29448, 29449 (May 5, 2023); Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer in Connection With Certain Liquidity Providers, 89 Fed. Reg. 14938, 14960-61 (Feb. 29, 2024). With the Supreme Court's decision in *Loper Bright*, the SEC will no longer receive Chevron deference when it interprets an ambiguous federal statute. *Loper Bright Enterprises v. Raimondo*, 603 US _ (2024). This ruling may make it more difficult for the SEC to engage in rulemaking where the agency relies on a less than explicit interpretation of its authority under a federal statute. See, e.g., Bridget Hickey, *Chevron Ruling May 'Hamstring' SEC Rulemaking Agenda: Lawyers*, Financial Advisor IQ (Jul. 1, 2024), https://financialadvisoriq.com/c/4553184/599594/chevron_ruling_hamstring_rulemaking_agenda_lawyers; Christopher Coopman, *Crypto won big in the Supreme Court's Loper Bright decision*, Cointelegraph (Jul. 10, 2024), <https://cointelegraph.com/news/crypto-won-big-supreme-courts-loper-bright>.

[12] See, e.g., Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer in Connection With Certain Liquidity Providers, 89 Fed. Reg. at 15000; A.H. Capital Management, L.L.C., Comment Letter on Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer (May 27, 2022), <https://www.sec.gov/comments/s7-12-22/s71222-20129926-296181.pdf>.

[13] 15 U.S.C. § 77z-3 (granting the SEC the authority to provide exemptive relief from the Securities Act by rule or regulation).

[14] 15 U.S.C. § 78mm (granting the SEC the authority to provide exemptive relief from the Exchange Act by rule, regulation or order).

[15] For example, unlike traditional securities, many crypto assets do not represent claims on the assets of a company. Disclosures mandated by the federal securities laws do not

include information that may be material to crypto asset purchasers, such as information about token governance rights. In addition, unlike traditional securities, crypto assets are traded globally on a 24/7 basis.

[16] Financial Innovation and Technology for the 21st Century Act, H.R.4763, 118th Cong. (2024), <https://www.congress.gov/bill/118th-congress/house-bill/4763>.

[17] Lummis-Gillibrand Responsible Financial Innovation Act, S.2281, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/2281>.

[18] See Veronica Irwin, Trump Promised Clear Crypto Regulations, but the SEC Might Not Be Prepared to Give Them, Unchained (Nov. 12, 2024), <https://unchainedcrypto.com/trump-promised-clear-crypto-regulations-but-the-sec-might-not-be-prepared-to-give-them/> (describing a podcast interview where Commissioner Peirce said she is concerned that the agency is not prepared for a presidential administration that is more hospitable to crypto and noting that if the administration was open minded to developing good rules, it is unclear what those rules should be, thus good ideas from inside and outside of the SEC are needed to fuel public discussion).