

Statement

Statement on the Denial of a Rulemaking Petition Submitted on behalf of Coinbase Global, Inc.



Chair Gary Gensler

Dec. 15, 2023

Today, the Commission denied a Petition for Rulemaking^[1] filed on behalf of Coinbase Global, Inc. I was pleased to support the Commission’s decision for three reasons. First, existing laws and regulations apply to the crypto securities markets. Second, the SEC addresses the crypto securities markets through rulemaking as well. Third, it is important to maintain Commission discretion in setting its own rulemaking priorities.

Existing laws and regulations already apply to the crypto securities markets.

There is nothing about the crypto securities markets that suggests that investors and issuers are less deserving of the protections of our securities laws. Congress could have said in 1933 or in 1934 that the securities laws applied only to stocks and bonds. Instead, Congress included a long list of 30-plus items in the definition of a security, including the term “investment contract.”

As articulated in the famous Supreme Court decision, *SEC v. W.J. Howey Co.*,^[2] an investment contract exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. The Howey Court said that the definition of an investment contract “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.” This test has been reaffirmed by the Supreme Court numerous times—the Court cited *Howey* as recently as 2019.

In a later decision, the Supreme Court said in *Reves v. Ernst & Young*, “Congress’s purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called.”^[3]

The analyses in *Howey* and *Reves*, which have functioned well for decades and been applied to various forms of investment, focus on the economic reality of transactions, instead of labels or form. For years, federal courts have applied those Supreme Court precedents to the particular facts and circumstances presented by crypto assets, with no court concluding that these standards are unworkable as applied to a crypto asset.^[4] Of course, under this case-by-case analysis, not every crypto asset is necessarily offered and sold as a security. Nevertheless, the Supreme Court’s analysis has proven a workable method of determining whether a financial instrument is offered and sold as a security.

Thus, to the extent that crypto assets are offered and sold in the form of an investment contract, and to the extent that entities intermediate transactions in crypto asset securities, the federal securities laws apply.

The Commission has long explained that, as with any type of instrument, if a particular crypto asset is offered and sold as a security, its offer or sale requires disclosure through the registration process developed by Congress to protect investors.^[5] These disclosures and protections remain important in the context of crypto assets that are securities, as evidenced by numerous and notorious fraudulent schemes in this space. I disagree with the petition's assertion that it is not feasible to identify an "issuer" of crypto asset securities. An issuer need not be a formal company issuing stock; it also includes a person or entity that organizes or sponsors the organization that is investing funds in an enterprise for profit. Federal courts have identified the issuers of crypto assets that were offered and sold as securities. Moreover, these issuers have material information concerning the issuer and those securities that, absent disclosure, is not readily available to prospective and existing investors. The current registration and disclosure regime accommodates a variety of issuers and securities. As the petition acknowledges, offerings of crypto asset securities have been registered or qualified under those existing securities laws.^[6]

The securities laws also require any person who acts as a securities intermediary—such as a broker-dealer, exchange, clearing agency, or transfer agent—to register with the Commission and thereby comply with specific statutory and regulatory requirements. Although the petition suggests that intermediaries are not required to conduct transactions in crypto asset securities, in fact, the Petitioner itself is an intermediary in the crypto asset markets—an intermediary that facilitates transactions on its own internal ledgers rather than using blockchain technology.^[7] These regulatory requirements protect investors from manipulation, fraud, and other abuses—all of which have been experienced in the intermediation of crypto asset securities.

For example, the Commission has brought enforcement actions against persons acting as broker-dealers in crypto asset securities without registration that have perpetrated costly fraud against their customers and counterparties.^[8] Similarly, trading platforms for crypto asset securities that fulfill exchange functions must register or operate pursuant to an exemption,^[9] and the evasion of such oversight contributed to the collapse of many trading platforms, resulting in substantial investor losses.^[10] To the extent that entities are acting as clearing or transfer agents with respect to transactions in crypto asset securities, they too are subject to registration and important investor protection provisions.^[11]

The SEC addresses the crypto securities markets through rulemaking as well.

I disagree with the petition's assertion that now is the right time for the regulatory action it suggests. The Commission and its staff are currently pursuing numerous undertakings applicable to crypto asset securities and intermediaries, and the Commission's assessment of whether and, if so, how to alter the existing regulatory regime may be informed by the results of these initiatives.

For example, the Special Purpose Broker-Dealers Release provides a five-year period during which broker-dealers operating in defined circumstances will not be subject to Commission enforcement action for violating certain broker-dealer requirements with regard to activities in crypto asset securities.^[12] I disagree that the Special Purpose Broker-Dealers Release has not proved to be workable; the timeframe for this initiative has yet to expire, and a broker-dealer has now registered with the Financial Industry Regulatory Authority to operate pursuant to the Special Purpose Broker-Dealers Release.^[13]

The Commission also has proposed and solicited comment on a number of rules applicable to crypto asset securities, including those relating to Regulation Best Execution, Safeguarding Advisory Client Assets, Regulation Systems Compliance and Integrity, and Amendments Regarding the Definition of "Exchange."^[14] The Commission also is currently pursuing a number of enforcement actions alleging that crypto asset market participants have violated existing securities laws and regulations, the results of which could provide the Commission with additional information and experience.^[15] Moreover, as the marketplace for crypto asset securities develops, Commission staff continue to engage with crypto asset market participants, including by providing staff guidance regarding crypto asset securities and non-security crypto assets,^[16] and by contributing to reports on crypto assets such as

those requested by Executive Order^[17] and produced through multinational efforts.^[18] The information gained from any or all of these efforts could inform the Commission’s consideration of its regulatory approach in this area.

It is important to maintain Commission discretion regarding rulemaking priorities.

An important part of the Commission’s responsibility is determining how best to deploy the resources that Congress entrusts to us. We thoughtfully consider the timing and priorities of our regulatory agenda and how to best utilize our talented and hardworking staff. Discretion to determine the priorities of our regulatory agenda, especially with respect to discretionary rulemaking like that requested by the Petitioner, is a critical element of our ability to faithfully execute Congress’s mandate. While the crypto market experiences outside fraud, abuse, and noncompliance relative to its size, it nevertheless is a small portion of the bigger-than-\$110 trillion capital markets. It is important that the Commission maintain discretion to direct focus to whichever parts of the capital markets need updated regulation.

Conclusion

As I said prior to the collapse of one of the largest noncompliant crypto intermediaries that cost investors billions of dollars, meaningful engagement with the SEC is always welcome, and I look forward to working with crypto projects and intermediaries that wish to comply with the law. Of course, just as in other parts of the securities markets, registration and compliance take work. This is appropriate, though, because it’s the work that ensures that investors get the full, fair, and truthful disclosure they deserve. As Gurbir Grewal, the Director of the SEC’s Division of Enforcement, has said, “You simply can’t ignore the rules because you don’t like them or because you’d prefer different ones: the consequences for the investing public are far too great.”

The investing public benefits when they receive disclosures and related protections about a project’s prospects and business. The investing public benefits when intermediaries are registered and overseen. The investing public benefits when all industry participants compete on a level playing field.

The existing securities regime appropriately governs crypto asset securities. I agree with the Commission’s decision to deny the petition.

[1] See Petition for Rulemaking – Digital Asset Securities Regulation, <https://www.sec.gov/files/rules/petitions/2022/petn4-789.pdf>.

[2] *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

[3] *Reves v. Ernst & Young*, 494 U.S. 56, 60-61 (1990).

[4] See, e.g., *SEC v. Blockvest, LLC*, No. 18-cv-2287, 2019 WL 625163, at *4-*9 (S.D. Cal. Feb. 14, 2019); *SEC v. Nat. Diamonds Inv. Co.*, 19-cv-80633, 2019 WL 13277296, at *8-*10 (S.D. Fla. May 28, 2019); *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352, 368-79 (S.D.N.Y. 2020), *appeal dismissed*, No. 20-1076, 2020 WL 3467671 (2d Cir. May 22, 2020); *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169, 177-80 (S.D.N.Y. 2020); *SEC v. NAC Found., LLC*, 512 F. Supp. 3d 988, 995-97 (N.D. Cal. 2021); *SEC v. LBRY, Inc.*, 639 F. Supp. 3d 211, 216-21 (D.N.H. 2022), *appeal dismissed*, No. 23-1743 (1st Cir. Oct. 23, 2023); *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346, 2023 WL 4858299, at *10-*15 (S.D.N.Y. July 31, 2023).

[5] See *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Release No. 81207, 2017 WL 7184670 (July 25, 2017).

[6] Further, the Petition and its supporting documents refer to “digital asset securities” more than 120 times and purport to seek a discussion about “what the SEC can do *within its own authority*” (emphasis added) regarding the “regulatory treatment of digital asset securities,” thus acknowledging that crypto assets can be offered and sold as

securities and subject to oversight by the SEC. The Petition also asserts that the SEC has a “*responsibility* to oversee the digital asset securities markets” (emphasis added), including with regard to rules for “the offer, sale, registration, and trading of digital asset securities.”

[7] See *SEC v. Coinbase, Inc.*, No. 23-cv-4738 (S.D.N.Y. June 6, 2023).

[8] See, e.g., *SEC v. ICOBox*, No. 19-cv-8066 (C.D. Cal. Sept. 18, 2019), Dkt. 1; *SEC v. Abramoff*, No. 20-cv-4190 (N.D. Cal. June 25, 2020), Dkt. 5; *SEC v. Brown*, No. 21-cv-4791 (S.D.N.Y. May 28, 2021), Dkt. 1; *SEC v. Chicago Crypto Cap., LLC*, No. 22-cv-4975 (N.D. Ill. Sept. 14, 2022), Dkt. 1; *SEC v. The Hydrogen Tech. Corp.*, No. 22-cv-8284 (S.D.N.Y. Sept. 29, 2022), Dkt. 3.

[9] See *DAO Report*, 2017 WL 7184670, at *1, *13-*14.

[10] See, e.g., 83 Fed. Reg. 37579, 37603, 37585 n.97, 37602 n.317 (Aug. 1, 2018) (Mt. Gox and Bitfinex); *SEC v. Bankman-Fried*, No. 22-cv-10501 (S.D.N.Y. Dec. 13, 2022), Dkt. 1 (FTX Trading Ltd.).

[11] See *SEC v. Beaxy Digit., Ltd.*, No. 23-cv-1962 (N.D. Ill. Mar. 29, 2023), Dkt. 1 (alleging that defendant acted as unregistered clearing agency with regard to crypto asset securities).

[12] *Custody of Digital Asset Securities by Special Purpose Broker-Dealers*, 86 Fed. Reg. 11627, 11628 (Feb. 26, 2021) (“Special Purpose Broker-Dealers Release”).

[13] See FINRA, BrokerCheck Report, Prometheus Ember Capital, Central Registration Depository No. 312784, SEC No. 8-70739, https://files.brokercheck.finra.org/firm/firm_312784.pdf.

[14] See *Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer*, 87 Fed. Reg. 23054, 23057 n.36 (Apr. 18, 2022) (proposed rules regarding the statutory definitions of “dealer” and “government securities dealer” with respect to all securities, including crypto asset securities); *Regulation Best Execution*, 88 Fed. Reg. 5440, 5448-49, 5540-42 (proposed Jan. 27, 2023) (proposed rules requiring broker-dealers to seek best execution of customer orders, including for crypto asset securities); *Safeguarding Advisory Client Assets*, 88 Fed. Reg. 14672, 14676, 14688-94, 14700, 14706, 14710, 14715, 14726 (proposed Mar. 9, 2023) (proposed rules addressing investment advisers’ obligations regarding the custody and safeguarding of clients’ assets, including security and non-security crypto assets); *Regulation Systems Compliance and Integrity*, 88 Fed. Reg. 23146, 23166-68 (proposed Apr. 14, 2023) (discussing proposed amendments to the application of technology infrastructure rules for markets and intermediaries, including relevant systems pertaining to crypto asset securities); *Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of “Exchange,”* 88 Fed. Reg. 29448 (proposed May 5, 2023) (soliciting comments on the application of the proposed amended definition to trading systems for crypto asset securities, among other issues).

[15] See, e.g., *SEC v. Binance Holdings Ltd.*, No. 23-cv-1599 (D.D.C. June 5, 2023), Dkt. 1 (alleging that defendants offered with regard to crypto asset securities exchange, broker-dealer, and clearing agency functions without registering to provide them); *SEC v. Coinbase, Inc.*, No. 23-cv-4738 (S.D.N.Y. June 6, 2023), Dkt. 1 (similar); *SEC v. Payward, Inc.*, No. 23-cv-6003 (N.D. Cal. Nov. 20, 2023), Dkt. 1 (similar).

[16] See Strategic Hub for Innovation and Financial Technology, *Framework for “Investment Contract” Analysis of Digital Assets*, <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>; Division of Trading and Markets & FINRA, *Joint Staff Statement on Broker-Dealer Custody of Digital Asset Securities* (July 8, 2019), <https://www.sec.gov/news/public-statement/joint-staff-statement-broker-dealer-custody-digital-asset-securities>; Letter to Ms. Kris Dailey, FINRA, *ATS Role in the Settlement of Digital Asset Security Trades* (Sept. 25, 2020) (discussing a three-step process broker-dealers use when operating an alternative trading system for the purpose of trading crypto asset securities), <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf>.

[17] See, e.g., *President’s Working Group, Report on Stablecoins* (Nov. 2021), https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf; *Ensuring Responsible Development of Digital Assets*, Exec. Order No. 14067, 87 Fed. Reg. 14143 (Mar. 9, 2022).

[18] See, e.g., *High-level Recommendations for the Regulation, Supervision and Oversight of Crypto-asset Activities and Markets: Final report*, FSB (July 17, 2023), <https://www.fsb.org/2023/07/high-level-recommendations-for-the-regulation-supervision-and-oversight-of-crypto-asset-activities-and-markets-final-report/>; OICV-IOSCO, *Policy Recommendations for Decentralized Finance (DeFi) Consultation Report* (Sept. 2023), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD744.pdf>.