

From Ballots to Blockchain: Potential Changes to SEC Digital Asset Regulation

Jonathan Sherman, Dr. Alison R. Manzer, Maxwell Solomons, Courtney Wong, Tushar Sharma, Ali Zankar
December 18, 2024

With the 2024 US election in the rear-view mirror, the landscape of American digital asset regulation is poised for significant changes. This begins with the upcoming departure of the current Chair of the US Securities and Exchange Commission (SEC), Gary Gensler. On November 21, 2024, Gensler announced his resignation as SEC Chair, effective January 20, 2025.¹ Gensler's tenure has been marked by the SEC's oft-criticized "regulation by enforcement" approach to digital asset regulation.² As discussed below, critics argue that this has created uncertainty and stifled innovation in the digital asset industry.

Following Gensler's resignation, Paul Atkins is currently slated to become the next SEC Chair.³ Atkins, a former SEC Commissioner, has extensive experience in financial services, including working with banks, financial technology groups, and crypto-related clients. Since 2017, he has also co-chaired the crypto advocacy group, the "Digital Chamber's Token Alliance."⁴ His nomination has been well-received by many in the crypto industry.

Regardless of who assumes the role, the appointment of a new Chair could lead to immediate shifts in the SEC's regulatory agenda as the Chair holds significant influence over the SEC's activities.⁵ Stakeholders in the digital assets community have speculated about potential actions the new Chair will undertake on digital asset regulation and the broader implications of these actions on financial markets and innovation within the digital asset sector. As such, the upcoming changes in the SEC's leadership and regulatory approach warrants close attention, particularly for any Canadian-based digital assets companies looking to enter the US market, and to monitor how Canadian regulators react to changes in the US.

The SEC's Previous Challenges in Regulating Digital Assets

The digital asset industry has become increasingly frustrated with the lack of clear regulatory guidance from the SEC. On September 18, 2024, the US House Committee on Financial Services convened a hearing titled "Dazed and Confused: Breaking Down the SEC's Politicized Approach to Digital Assets." During this hearing, Jennifer J. Schulp, Director of Financial Regulation Studies at the Cato Institute, testified that while the SEC's enforcement-forward strategy might be effective where rules are clear, "where the application of existing rules to digital assets is uncertain or inappropriate, [the strategy] effectively amounts to a ban on crypto activity within the US."⁶

Cassels

Enforcement actions by the SEC are based on the assertion that most digital assets are to be governed under traditional securities legislation, including the *Securities Act of 1933*,⁷ the *Securities Exchange Act of 1934*,⁸ and the 1946 *Howey* test.⁹ However, the approach of applying these traditional laws to digital assets through individual court actions has resulted in varied and inconsistent judicial outcomes. For example, in the notable cases *SEC v Ripple Labs*¹⁰ and *SEC v Terraform Labs*,¹¹ both 2023 cases heard in the Southern District of New York, judges had conflicting decisions on whether digital assets should be considered securities. As Schulp noted in her testimony, “[c]rypto projects aspire to upend [the conventional corporate] model, [and] that creates significant challenges to the traditional concept of an investment contract.”¹²

This tension came to light earlier this year, when the SEC’s enforcement campaign took a hit after the US District Court for the District of Columbia partially granted Binance Holding Limited’s motion to dismiss in *SEC v Binance Holdings Limited, et al.*¹³ Before ruling that the SEC had not established that digital assets were outright to be considered securities subject to SEC oversight, the Court made a point of observing that “the [SEC]’s decision to oversee this billion dollar industry through litigation – case by case, coin by coin, court after court – is probably not an efficient way to proceed, and it risks inconsistent results that may leave the relevant parties and their potential customers without clear guidance.”¹⁴ In response, the [SEC filed a motion to amend its original complaint](#), causing further confusion by clarifying that its prior blanket use of the phrase “crypto asset securities,” when referring to digital assets, did not necessarily mean that it was referring to the crypto asset itself as the security. Instead, the SEC argued that the digital assets were sold in a scheme that involved unregistered investment contracts caught by the test provided in the seminal *Howey* decision (therefore falling under the SEC’s jurisdiction), and not that the digital assets themselves were necessarily securities.¹⁵ Binance responded by filing a motion to dismiss the amended complaint on November 6, 2024, arguing that the SEC did not establish a clear legal foundation to distinguish between assets involved in investment contracts, and the investment contracts themselves.¹⁶ For more information on this pertinent case, [please see our Cassels Comment](#).

State-Level Regulatory Progress

While digital asset regulatory reform at the federal level has been the focus of most of the digital asset sector’s attention, most financial services activity in the US is also regulated at the state level. State laws and regulators have played an important role in many digital asset products and markets in the US, including the use of digital assets, tokenization, and traditional financial assets (such as stablecoins and other “real-world” digital assets), as well as the broader use of distributed ledger and blockchain technology to support financial transactions. Many digital asset ventures and businesses developing digital asset products and services must, therefore, navigate state rules that apply to all financial services businesses (such as money transmitters) and digital asset-specific rules like New York’s ‘BitLicense’ and California’s Digital Financial Assets Law (DFAL). The BitLicense requires any businesses involved in virtual currency activities to be licensed by the New York State Department of Financial Services,¹⁷ while California’s DFAL mandates licensing by the California Department of Financial Protection and Innovation for companies

engaging in digital asset activities.¹⁸

Moreover, many companies that require a BitLicense in New York also have either a money-services license or a trust license. These licenses set baseline requirements for businesses dealing in digital asset products and services in the state of New York. However, “virtual currency activities” are broadly defined and are intended to be applied to an extensive array of activities. As such, BitLicense adds heightened general and digital asset-specific requirements, and existing supervision or registration with a federal authority generally will not exempt a company from the requirement to obtain a BitLicense if it is conducting virtual currency activities.

This complex regulatory landscape at the state level is further complicated by the SEC’s asserted control over digital assets regulation. On November 14, 2024, eighteen US states collectively filed suit against the SEC, accusing the agency of overstepping its bounds by classifying most digital asset transactions as securities without explicit Congressional authorization. The complaint claims that the SEC’s asserted authority could “swallow” the jurisdiction of other agencies like the Commodity Futures Trading Commission (CFTC). The states argue that “[t]he SEC’s exaggerated understanding of its own authority [...] leaves current and potential industry participants struggling to discern what legal obligations they may be undertaking. And even if not all SEC enforcement actions may succeed, the threat alone chills the entire industry.” The state lawsuit increases the pressure on the SEC from both state governments and industry participants, which makes the new Chair’s upcoming agenda all the more important in restoring stakeholder confidence.

Potential Digital Asset Changes Under New SEC Leadership

There are several actions the new SEC Chair could take to shift the agency’s approach to digital asset regulation to foster a more welcoming environment for digital asset initial public offerings (IPOs). The low-hanging fruit is to revisit the agenda of the SEC’s Division of Enforcement, the primary investigative and prosecutorial arm through which the “regulation by enforcement” approach has been implemented. Commissioner Hester Peirce and Commissioner Mark Uyeda have been publicly critical of this enforcement approach and have argued that a new regulatory framework is needed for the digital asset space. As such, it is anticipated that new leadership will pursue an agenda more similar to that adopted by former Chair Jay Clayton,¹⁹ which would entail fewer enforcement actions and a more pointed focus on plainly fraudulent conduct.

Similarly, the Chair could direct the SEC’s Division of Corporation Finance, which is responsible for the review of registration statements filed by companies planning to go public, to take a streamlined approach in connection with IPOs of digital assets companies. In particular, ensuring that digital asset registration statements are reviewed by a single division, rather than multiple SEC divisions, could help reduce delays.

Cassels

The Chair could also push to withdraw *Staff Accounting Bulletin No. 121* (SAB 121),²⁰ which mandates that institutions holding digital assets must record them as liabilities on their balance sheets. Critics argue that the SEC overstepped in this mandate, as the country's accounting standard-setter is the Financial Accounting Standards Board, which employs a thorough, public process for policy changes. Recently, the current administration vetoed a resolution aimed at overturning SAB 121, despite bipartisan support for its repeal in both the House and Senate.²¹ This sparked considerable backlash from the industry. By withdrawing SAB 121, the new SEC Chair could address these concerns and ease the regulatory burden on digital asset innovation.

Looking Ahead

The SEC's short-term actions might ease immediate regulatory concerns, but in order for there to be long-term stability in the digital asset industry, Congress will need to pass legislation. A key development was the House of Representatives' passage of the [*Financial Innovation and Technology for the 21st Century Act \(FIT21\)*](#)²² in May despite the opposition of the SEC and Gensler. FIT21 aims to assign the CFTC new authority over digital commodities and clarify the SEC's role over digital assets in investment contracts, although the bill has not progressed in the Senate and faces opposition from the current administration.

While laws like FIT21 aim to create a clear federal regulatory framework for digital assets, state law issues that affect the digital asset sector—such as laws related to property ownership and legal liabilities—will not be addressed by such changes. For example, the warning phrase, “not your keys, not your crypto,” highlights the risks of centralized custody and the lack of recourse if access is lost due to hacks or insolvency. This legal uncertainty will likely persist despite federal changes. In addition, the legal status of decentralized autonomous organizations (DAOs) in the US remains unclear and is the subject of ongoing litigation. Despite DAO-specific laws being passed in states such as Wyoming and Delaware, most DAOs have declined to create formal legal entities under these laws. As a result, DAO members—token holders who participate in governance—can potentially be exposed to broad liability for the DAO's actions. For example, courts have found DAOs to be general partnerships under state law, with each member in the DAO deemed to be a general partner and, therefore, fully liable for its actions.

The work to modernize state law to address some of this uncertainty has begun apart from, and unrelated to, federal regulatory regimes. For example, the 2022 amendments to the Uniform Commercial Code added Article 12 to address both blockchain and distributed ledger technologies more broadly. The Article 12 amendments are designed to provide consistent legal treatment for digital assets and blockchain records by, for instance, establishing definitions and rules around “control” of electronic records (i.e., cryptographic keys) and “transfer” of interests. So far, Article 12 has been enacted by 25 states, with bill introductions in five further state legislatures. This development could inspire similar legislative changes in Canada, where no province currently has a framework for the regulation of digital assets in secured transactions. In this context, the recent registration of Balance Trust Company as an Alberta-based trust corporation under the

Cassels

*Loan and Trust Corporations Act*²³ is particularly relevant. Alberta's government issued the company its certificate of registration, making it the second registered digital asset custodian to be able to offer services to investors in Alberta and other authorized jurisdictions. This initiative mirrors the intent behind the UCC amendments to provide a clear legal framework for the management and transfer of digital assets. As such, while FIT21 seeks to unify federal regulations, the ongoing evolution of state laws will continue to shape the digital asset landscape and potentially influence the Canadian regulatory approach. Lenders to companies with digital assets are encouraged to contact our [Banking & Specialty Finance Group](#) for tailored advice and support.

Next Steps

The ambiguity regarding digital asset regulation in the US has been challenging for Canadian-based digital asset companies looking to break into the US market. While the US regulatory landscape remains fragmented, with ongoing conflicts between federal and state authorities, Canada has taken a more proactive approach to digital asset regulation. Of note, Canada has established a registration scheme for digital asset trading platforms, which has been adopted harmoniously across its provinces. The contrasting regulatory approaches between the jurisdictions have led to confusion among industry participants seeking to operate in both countries. The upcoming changes in SEC leadership could either heighten these regulatory asymmetries or lead to a more unified and predictable regulatory environment in North America. For these reasons, US, Canadian, and global digital asset industries will be closely monitoring how the new administration approaches the digital assets sector.

At Cassels, we will be keeping a close watch on the Canadian regulatory landscape to determine if changes in US regulations prompt Canadian authorities to adopt changes to their regulatory framework. In the meantime, if you or your organization have questions regarding fulfilling obligations to Canadian regulators, we encourage you to reach out to members of our [Blockchain & Digital Assets Group](#), [Securities Group](#), or [Banking & Specialty Finance Group](#) for assistance.

¹ US Securities and Exchange Commission, "SEC Chair Gary Gensler to Step Down in January 2025" (21 November 2024), online: <sec.gov/newsroom/press-releases/2024-182>.

² For more information on the SEC's "regulation by enforcement" approach to digital asset regulation, please see our Cassels Comment on the [SEC's Amended Proceedings Against Binance](#).

³ CNN, "Trump taps crypto enthusiast Paul Atkins to lead the SEC and Gail Slater as the new tech antitrust cop" (4 December 2024), online: <<https://edition.cnn.com/2024/12/04/tech/paul-atkins-sec-gail-slater-antitrust/index.html>>.

⁴ *Ibid.*

⁵ See *Reorganization Plan No. 10 of 1950*, 15 FR 3175, 64 Stat. 1265, which provides that the Chair has authority with respect to the appointment and supervision of personnel, the distribution of business among staff and administrative units, and the use and expenditure of funds.

⁶ US Congress, *Dazed and Confused: Breaking Down the SEC's Politicized Approach to Digital Assets Hearing Before the Subcommittee on Digital Assets, Financial Technology and Inclusion of the Committee on Financial Services*, 118th Cong., 2024 (Jennifer J. Schulp) [Schulp Testimony].

⁷ 15 U.S.C. § 77a et seq.

⁸ 15 U.S.C. § 78a et seq.

⁹ See *SEC v Howey Co.*, 328 U.S. 293 (1946) (*Howey*). *Howey* provides that a “contract, transaction, or scheme” is an investment contract where there is: (1) an investment of money (2) in a common enterprise, (3) with an expectation of profits from the efforts of others.

¹⁰ *SEC v Ripple Labs, Inc, Bradley Garlinghouse and Christian A. Larsen*, 20 Civ. 10832 (AT).

¹¹ *SEC v Terraform Labs Pte. Ltd.*, 2023 WL 8944860.

¹² Schulp Testimony, *supra* note 4.

¹³ *SEC v Binance Holdings Limited et al.*, No. 1:23-cv-01599 (D.D.C.).

¹⁴ *Ibid* at 21.

¹⁵ *Securities and Exchange Commission v Binance Holdings Limited et al*, Plaintiff SEC’s Memorandum of Law in Support of Motion for Leave to Amend the Complaint, (DC Cir 2024).

¹⁶ *Securities and Exchange Commission v Binance Holdings Limited et al*, Joint Motion to Dismiss Amended Complaint Against Defendants, (DC Cir 2024).

¹⁷ New York State Department of Financial Services, “Virtual Currency Businesses - Licensing and Resources” (2024), online: <dfs.ny.gov/virtual_currency_businesses>.

¹⁸ California Department of Financial Protection and Innovation, “Digital Financial Assets” (2024), online: <dfpi.ca.gov/regulated-industries/digital-financial-assets/>.

¹⁹ Interestingly, Jay Clayton has been nominated by the President-elect to serve as US Attorney for the Southern District of New York where high-profile SEC cases, including against Ripple Labs and Terraform Labs, have been tried.

²⁰ US Securities and Exchange Commission, *Staff Accounting Bulletin No. 121* (31 March 2022), online: <sec.gov/regulation/staff-interpretations/accounting-bulletins/old/staff-accounting-bulletin-121>.

²¹ See Joseph R Biden Jr, “Message to the House of Representatives on the President’s Veto of H.J.Res. 109” (31 May 2024), online: <whitehouse.gov/briefing-room/presidential-actions/2024/05/31/a-message-to-the-house-of-representatives-on-the-presidents-veto-of-h-j-res-109/>.

²² US Congress, Bill H.R.4763, *Financial Innovation and Technology for the 21st Century Act*, 118th Cong., 2024, online: <congress.gov/bill/118th-congress/house-bill/4763>.

²³ RSA 2000, c L-20.