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Crypto 2.0: The New Administration Recasts the Landscape for Crypto

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Since the November election, there has been much prognostication about how crypto regulation and enforcement may change under the Trump administration. The consensus before Inauguration Day was that we would see a significant change in how regulators approach crypto, with a shift away from enforcement and toward developing a new, practical regulatory framework. Now, just four weeks since the Trump administration took the reins, we can already see the broad outlines of a truly seismic change in the U.S. government's approach to crypto—one that promises to create never before seen opportunities for crypto to expand its presence and achieve an unparalleled level of integration into the U.S. and global financial systems.

This new crypto-enthusiastic regulatory approach started to come into sharper focus immediately after the election, when then-President-elect Donald Trump nominated former PayPal chief operating officer David Sacks as the new "AI and crypto czar" and put forth former SEC Commissioner Paul Atkins as the new Securities and Exchange Commission chair. Both Sacks and Atkins have been vocal proponents of crypto, and their selection signaled the incoming Trump administration's intent to work with the crypto industry on developing a friendlier regulatory regime. And this trend has continued. Last week, President Trump nominated former CFTC commissioner Brian Quintenz, now the head of policy for the crypto fund of venture capital firm a16z, to be the next Commodity Futures Trading Commission chair.

Courtesy photos

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These appointments, and the other steps taken in just its first few weeks, make clear that crypto now plays a central role in the new administration's regulatory priorities—a development that may fundamentally change its place in our financial markets.

President's Working Group

On Jan. 23, Trump issued an executive order establishing the "President's Working Group on Digital Asset Markets," chaired by Sacks, and consisting of representatives from the SEC, CFTC, Treasury, Department of Justice, and a number of other federal departments and offices. The working group has 180 days to submit recommended regulatory and

legislative proposals for digital assets, including a proposed regulatory framework covering market structure, oversight, consumer protection, and risk management.

The working group is also tasked with evaluating the potential creation of a national digital asset stockpile; last July, Sen. Cynthia Lummis, R-Wyoming, introduced legislation to establish a strategic bitcoin reserve.

There have been recent press reports that the presidential working group may be replaced with a series of "summits" on specific crypto policy issues involving a rotating group of crypto industry leaders.

SEC Crypto Task Force

The day after the inauguration, SEC acting Chair Mark Uyeda (who will lead the agency pending Atkins' confirmation by the Senate) announced the formation of a new crypto task force led by SEC Commissioner Hester Peirce—a fierce defender of crypto who has been long dubbed "crypto mom" by the industry. The announcement noted that the SEC's prior reliance on "enforcement actions to regulate crypto retroactively and reactively" has meant that "clarity regarding who must register, and practical solutions for those seeking to register, have been elusive," resulting in "an environment hostile to innovation and conducive to fraud." It added, "[t]he SEC can do better."

One of the task force's first orders of business was to rescind Staff Accounting Bulletin 121, guidance issued by SEC staff during the prior administration that advised financial institutions to include customers' crypto assets on their balance sheets, thus increasing capital reserve requirements and making crypto custody less feasible. SAB 121 triggered strong industry backlash, which culminated in Congress repealing the guidance last year—in the first-ever crypto-focused legislation to pass both houses of Congress—only to have President Joe Biden veto the legislation.

The task force's mandate began to take shape when Peirce released a Feb. 4 statement outlining its priorities. Peirce described the ultimate goal of the task force to be to create an environment "where people have great freedom to experiment and build interesting things, and which will not be a haven for fraudsters." Peirce also reiterated her strong criticism of the prior administration's approach to crypto, noting "the Commission's handling of crypto has been marked by legal imprecision and commercial impracticality."

The task force's initial statement addresses the fundamental question that many had been asking in the lead-up to the new administration—will the SEC cede jurisdiction over crypto assets altogether? The answer appears to be no. The new regulatory framework envisions that the SEC would retain jurisdiction over some crypto products but that its sister regulators, including the CFTC, would regulate others.

The task force's work can be broken down into two primary buckets: (1) determining what precisely is covered by existing federal securities laws, and thus under the SEC's jurisdiction; and (2) developing more practical solutions for those crypto market participants who fall under the SEC's jurisdiction to register with the commission or otherwise operate within the confines of the securities laws.

- Security or not? The SEC can regulate only assets that are "securities." Much of the battle between the SEC and the crypto industry in recent years has centered around the question of whether a particular crypto transaction constitutes a securities transaction under the federal securities laws. This question has been answered by a number of federal courts in different SEC enforcement actions (sometimes in support of the SEC's position and sometimes not). The task force will be taking on this central question as a part of its work. We expect that the ultimate result of this analysis will be a determination that certain types of crypto assets can be regulated by the SEC while others fall outside the SEC's ambit. Such guidance from the task force—even if it is not given through official commission action—will go a long way toward providing the much needed and long overdue regulatory clarity that the industry has been seeking for many years.
- Modifying paths to registration and compliance. For years, the crypto industry has complained that the SEC does not offer realistic paths for industry participants to register with the commission—and that the myriad and novel ways in which crypto can be transacted cannot easily fit within existing rules and regulations. The task force seems poised to address a number of these obstacles. For example, the task force is considering changes to

existing paths to registration including Regulation A and crowdfunding. Also on the task force's agenda will be providing clarity on whether crypto lending and staking programs are covered by the securities laws and, if so, how they can be registered. Peirce has previously criticized the SEC's decision to bring enforcement actions against staking programs instead of putting out guidance and a "workable registration process." Other areas of work for the task force involve developing custody solutions for investment advisers as well as guidelines to allow broker-dealers to custody crypto asset securities alongside non-securities.

Meanwhile, the commission has put the brakes on enforcement activity. On Feb. 20, the SEC announced the creation of the Cyber and Emerging Technologies Unit, replacing the Enforcement Division's Crypto Assets and Cyber Unit. This rebranded unit, which has been significantly reduced in size from its former iteration, will "focus on combatting cyber-related misconduct and protecting retail investors from bad actors in the emerging technologies space," including artificial intelligence, machine learning, blockchain technology, and crypto. The clear message from the SEC is that crypto is a small part of the new enforcement unit's mandate and that any future enforcement investigations will be cases involving fraud or manipulation—as opposed to the types of registration-focused cases the SEC brought against firms like Ripple and Coinbase (where the commission asserted that the companies ran afoul of the securities laws merely by failing to register with the commission). As for the SEC's ongoing litigations, commission staff is currently seeking stays or deadline extensions to allow the task force to develop a position on whether and how the commission will proceed with active cases. We expect most, if not all, of these litigations to be resolved on terms favorable to the defendants or even dismissed outright.

Recognizing that disentangling the many strands involved in its upcoming work will take time, the SEC task force is considering interim measures to provide relief to crypto industry players who remain in limbo while the task force works to develop new rules or recommend new legislation. A major area of current uncertainty is the commission's jurisdiction over secondary market sales of crypto tokens through exchanges like Coinbase. The task force has proposed publicly for consideration the idea that secondary market token transactions would be considered "non-securities" on an interim basis as long as the token issuer or some other entity provides certain disclosures about those offerings and agrees not to contest the commission's jurisdiction in the event the commission later seeks to bring a fraud case in connection with transactions involving these tokens.

This type of interim measure would be particularly significant for issuers who have so far avoided offering their tokens to U.S. customers, allowing them to expand their market presence. It also provides potential insight into the ultimate solution the task force may reach with respect to secondary token offerings—allowing tokens to be traded on exchanges pursuant to some type of disclosure regime that does not require issuers or intermediaries (like exchanges and broker-dealers) to register with the commission. This idea has echoes of Peirce's prior "safe harbor" proposals, where developers would be given a three-year exemption from the securities laws to allow them to bring their underlying networks to maturity, so long as they provide certain disclosures and the SEC's anti-fraud jurisdiction is preserved. It remains to be seen whether this type of safe harbor will be part of the task force's proposed regulatory framework for the SEC.

Finally, the task force has highlighted the commission's openness to providing exemptive relief from the SEC's jurisdiction. The crypto industry has long blasted the SEC staff for its reticence to issue "no-action letters" (essentially statements confirming that they do not anticipate recommending an enforcement action on a certain set of facts) in crypto cases. The task force is now inviting industry participants to directly request this type of relief. In addition, it is possible that the task force will explore other forms of exemptive relief, as Peirce has previously criticized the no-action process as "too formal and too expensive."

Legislative Efforts

These regulatory efforts will almost certainly be paired with new legislative activity. On Feb. 4, Rep. French Hill, R-Arkansas, and chair of the House Financial Services Committee, announced the

creation of a bicameral working group on digital assets to develop legislation that would deliver "clarity for a regulatory framework." We have already seen legislation introduced in both the House and the Senate concerning stablecoin regulation. And we can expect additional legislative solutions beyond stablecoins as well—perhaps in line with the Financial Innovation and Technology for the 21st Century, or FIT2, legislation the House passed last year with bi-partisan support.

Predictions for 2025

Back in 2019, Peirce aptly described the "choice" when it came to the regulation of crypto: "Either create a space for innovations to occur in our regulated markets or prepare for investors to seek out such innovations in less-regulated, or unregulated, spaces, such as foreign-registered products that lack the transparency that trading under our rules would provide." The SEC, and the U.S. government at large, have now chosen the former path.

The challenge, of course, will be to strike the right balance between innovation and consumer protection. This type of comprehensive regulatory overhaul has the best chance for success if it is approached through a collaborative, transparent process. The new administration's greater openness to engagement and collaboration with the crypto industry is much welcomed and will go a long way in this regard. As Peirce noted in her Feb. 4 statement, "[w] e invite builders, enthusiasts, and skeptics to engage with us to figure out what the final rules should be and what interim steps might help to foster innovation in the meantime." In this vein, the CFTC's acting chair, Caroline Pham, is launching a series of public roundtables on digital assts and has "renewed calls for open public engagement and increased transparency by the CFTC."

This new collaborative approach will not only result in a welcome end to crypto's antagonistic relationship with U.S. regulators but will also provide opportunities to craft a more practical and constructive regulatory framework for this new, innovative, and largely untapped asset class while still maintaining the important investor protections that are central to our capital markets.

As we look toward the next year, we can expect increasing clarity to the regulatory landscape for crypto assets. While we do not expect to have a comprehensive proposal that answers all of the many open questions in the coming months, we will likely start to see some answers.

Chief among them: How will the SEC and CFTC start to divide up regulatory jurisdiction? Will the SEC offer more feasible paths for registration? Will Treasury take oversight of stablecoins?

The bottom line is that Crypto 2.0 promises to be a long but fruitful journey toward cementing the United States' status as a leader in this burgeoning industry.

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