

SEC Chairman Gensler's New Speech on Exchanges, Stablecoins and Tokens Expected to Bring New Regulatory Focus

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On April 4, 2021, SEC Chairman Gary Gensler gave a [new speech](#) on crypto-related issues at the University of Pennsylvania Law School. The speech focused on three main topics: (1) crypto exchanges and other trading and lending platforms, (2) stablecoins, and (3) "Tokens." Chairman Gensler's speech provides new insight into the approach the SEC will be taking in each of these three key areas.

Exchanges

Chairman Gensler clearly indicated that new regulation of crypto exchanges, trading, lending, and decentralized finance (DeFi) platforms is coming. He noted that the bulk of crypto transactions occur on a handful of exchanges and that these existing trading platforms "likely are trading securities" and therefore within the SEC's jurisdictional mandate.

Gensler indicated that he had instructed SEC staff to focus efforts on three specific areas relating to exchanges and other platforms:

1. *SEC Registration.* Gensler clearly telegraphed his view that crypto exchanges should operate as registered exchanges, indicating that SEC staff has been instructed to "get[] these platforms themselves registered and regulated much like exchanges." He rejected the idea that the alternative trading system model used principally by institutional investors is suitable for crypto platforms, which are used principally by retail customers buying and selling without a broker.
2. *CFTC Coordination.* For those exchanges that (arguably) trade in securities and commodities (presumably like Bitcoin), Gensler indicated that the SEC staff has been instructed to work with the CFTC to come up with a joint approach to registering and regulating platforms "that might trade both crypto-based security tokens and some commodity tokens."
3. *Custody.* Gensler's speech also vaguely touched on the issue of crypto custody. After noting the risk of loss on custodial crypto exchanges, Gensler indicated that he has requested SEC staff learn how to work with platforms "to get them registered and regulated and best ensure the protection of customers' assets." Interestingly, he went on to note that one particular solution could be "whether it would be appropriate to segregate out custody." It is unclear what Chairman Gensler meant by this last statement. Is self-custody a preferred model, or was the Chairman referring to specialized, institutional custody for crypto exchanges?

Stablecoins

Chairman Gensler's speech described the size and significant role stablecoins have assumed in the crypto space and identified three "important sets of policy issues" implicated by them: (1) potential impacts on financial stability; (2) use of stablecoins in illicit activity; and (3) investor protection issues implicated by counterparty risk and the absence of redemption rights. The speech did not propose any new regulatory approach to stablecoins (or directly suggest the SEC has or would assume jurisdiction over them).

"Tokens"

Chairman Gensler began his discussion of "all the other crypto tokens" with the "fact" that "most crypto tokens involve a group of entrepreneurs raising money from the public in anticipation of profits." This is a clear indication that the SEC Chairman views many existing tokens as securities subject to SEC regulation, excluding the "few" that are like digital gold and "even fewer, if any, ... actually operating like money."

The speech walked through the basics of the Howey case, concluding in no uncertain terms that "most crypto tokens are investment contracts under the Howey test." He concluded that "many entrepreneurs are raising money from the public by selling crypto tokens, with the expectation that the managers will build an ecosystem where the token is useful and which will draw more users to the project." Chairman Gensler made clear that these offerings must be registered and meet disclosure requirements or satisfy an exemption.

Expect A New Regulatory Push

Chairman Gensler's speech is perhaps the clearest indication of the SEC's current regulatory focus in the crypto space. We can expect inbound regulatory efforts in each of the three areas he addressed, with potential SEC-CFTC coordination on exchange registration requirements and some form of regulation or increased enforcement efforts with respect to stablecoins and tokens. The SEC clearly intends to step up regulation and enforcement in these areas and, in particular, seems to be set on mandating registration for crypto trading platforms.

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