

Private Equity Regulatory Update - December 2021

December 31, 2021 | Client Update | 3-minute read

In this issue, we discuss recent remarks by SEC Chair Gary Gensler and SEC Commissioner Hester Peirce regarding regulation of crypto assets.

Industry update

[SEC Commissioner Peirce's remarks before the Investor Advisory Committee](#)

[SEC Chair Gensler's remarks before the Investor Advisory Committee](#)

Industry update

SEC Commissioner Peirce's remarks before the Investor Advisory Committee

On December 2, 2021, SEC Commissioner Hester M. Peirce delivered [remarks](#) before the Investor Advisory Committee (the Committee). Commissioner Peirce's comments focused on various aspects of investor protection relating to crypto that she believed merited consideration.

Commissioner Peirce began by emphasizing the need to "[prevent] people from falling prey to fraudsters peddling crypto," as there is "no shortage of such fraudsters." She then turned to discussing three different aspects of investor protection relating to crypto that she hoped the Committee could urge the SEC to address.

First, she touched on the importance of bringing regulatory clarity to the crypto field. She noted that the SEC has not provided clarity in crypto regulations, but instead adopted an approach that encourages enforcement actions but is "costly and treacherous for well-intentioned developers and their lawyers." To that end, she asked the Committee to urge the SEC to address questions including whether a token must always trade as a security, if it is sold as part of an investment contract; and if so, how that will work in practice. Additionally, she stated that the Committee should ask the SEC to consider whether a platform can trade crypto securities alongside traditional securities and non-securities and what implications it may have on the platform's registration with the SEC. Another question she believed merited examination was "who can custody crypto and how." Lastly, she suggested that the Committee should ask the SEC to consider what "aspects of non-fungible token markets might implicate the securities laws."

Secondly, Commissioner Peirce noted the need to approve spot bitcoin exchange-traded products (ETPs) and reaffirmed her objection to the SEC's continuing denials of such products. She stated that the SEC's refusal to allow a spot bitcoin ETP has contributed to the emergence of "[s]ubstitute products offering some level of exposure to bitcoin but usually at higher prices and without the same level of convenience...." She encouraged the Committee to "shine some light on [such] harm to investors...."

Commissioner Peirce concluded by noting the importance of preserving individual liberty in promulgating crypto regulations. She suggested that in regulating the crypto markets, the SEC should consider whether "unique aspects of the technology—its transparency and its objective participation criteria embedded in the code—make it possible for [the SEC] to regulate with a lighter hand...." For example, she warned against regulatory efforts to "[replace] stablecoins with central bank digital currencies and [decentralized finance] with the centralized intermediaries of traditional finance."

SEC Chair Gensler's remarks before the Investor Advisory Committee

In [remarks](#) before the Investor Advisory Committee, SEC Chair Gary Gensler noted that the SEC has ongoing projects focused on updating disclosure regimes for modern markets. Highlighting the emergence of crypto markets in particular as catalysts for change, Chair Gensler noted that crypto assets belong "inside public policy frameworks of looking after investors, guarding against illicit activity, and protecting our financial stability." In Chair Gensler's view, crypto markets are replete with fraudulent and abusive business practices, leaving investors unable to receive full and accurate information on tokens or trading and lending platforms. He expressed his concern that "we have a crypto market now where many tokens may be unregistered securities, without required disclosures or market oversight." Chair Gensler warned that to the extent crypto trading platforms include securities, or lending platforms offer securities, such platforms fall under SEC jurisdiction.