

Article Information

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Blockchain Bites: FCA speech welcomes Blockchain to Britain, Coinbase sues SEC seeking regulatory clarity, Canadian crypto platforms race to file pre-registration undertakings, Congress grills Gensler on Eth, SEC action seeks to render Bittrex bit-rekt?

Michael Bacina, Steven Pettigrove, Jake Huang, Luke Misthos, Luke Higgins and Kelly Kim of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

FCA speech welcomes Blockchain to Britain

Sarah Pritchard, Executive Director of Markets for the UK's Financial Conduct Authority (FCA), gave an uplifting [speech this week](#) highlighting the FCA's openness to blockchain based innovation and cryptoassets and its policy efforts to address potential consumer harms.

Ms Pritchard's speech was delivered at [City Week 2023](#), a forum organised in partnership with the UK Government, the City of London Corporation, UK Finance and leading City institutions. It brings together well-known names from the global financial services industry, the world of politics and the international regulatory community.

Ms Pritchard set the tone of her speech by beginning with an acknowledgement that crypto has become mainstream. She went on to emphasise the importance of regulation and the FCA's openness towards innovation:

Cryptoassets and blockchain offers opportunities for more efficient and innovative financial services and products. For example, they can make international cross-border payments faster and cheaper, which could support international trade or help our global workforce more easily send money to friends and family overseas. These are worth exploring.

Citing a Digital Asset Study by [Fidelity Institutional Investor](#), Ms Pritchard said crypto take-up is on the rise year-on-year despite the recent crypto winter.

Mr Pritchard canvassed the FCA's regulatory efforts in relation to digital assets:

1. The FCA has approved 41 crypto firms of all sizes for registration under anti-money laundering and counter-terrorism legislation (nearly three quarters of applications were declined or withdrawn);
2. FCA will issue [rules on financial promotions](#) for crypto once the UK government enacts planned legislation. These regulations will apply to all firms marketing cryptoassets to UK consumers, regardless of whether the firm - or perhaps even celebrity influencer - is based overseas or what technology is used to make the promotion;
3. FCA has been working closely with the UK government on its [proposals to regulate stablecoins](#) that can be used for payments, and on its broader [consultation on the regulation of cryptoassets](#) generally. As part of this effort, FCA is working together with the Treasury and the Bank of England (the [Cryptoasset Taskforce](#)) to assess the potential impact of cryptoassets and distributed ledger technology and what the policy response should be; and
4. FCA has joined forces with global regulators and organisations to explore the regulation of cryptoassets. For example, as part of the digital asset working group within the [IOSCO Fintech Task Force](#), FCA is leading on a key

workstream on crypto and digital assets (while the US Securities and Exchange Commission is leading on DeFi products and services).

Finally, Ms Pritchard mentioned FCA's current Discussion Paper on [updating asset management regulation in the UK](#):

which examines the potential regulatory changes for the tokenisation of funds, and the inclusion of tokenised assets or cryptoassets in fund portfolios.

In contrast to the United States' apparent clamp down on blockchain based innovation, Ms Pritchard's speech struck a balance between the need to protect consumers and a recognition that blockchain technology has entered the mainstream and offers significant benefits and opportunities. The speech is in keeping with the UK government's [progressive plans](#) to establish the UK as a crypto-asset technology hub. Indicating a sharp contrast with the SEC's approach in the United States, Ms Pritchard reiterated the FCA's willingness to work together with industry "to shape our rules and regulations to benefit markets, consumers and firms as crypto goes from niche to mainstream".

Coinbase sues SEC seeking regulatory clarity

Earlier this week, [Coinbase initiated legal action](#) against the US Securities and Exchange Commission (**SEC**) over its failure to respond to a Rulemaking Petition filed last year seeking a clear regulatory framework for digital securities in the United States.

The [petition, filed by Coinbase in July 2022](#), noted that the United States 'has not yet taken constructive steps' towards establishing regulation that 'meets the specific needs of the crypto market'. While drawing a contrast between digital assets which trade as commodities and digital securities, the Petition noted there is no functioning market in digital asset securities in the United States due to the lack of a clear and workable regulatory regime.

The Petition implored the Commission to:

Solicit broader input from the public to address all relevant questions and challenges related to the regulation of digital asset securities with the goal of informing an important rulemaking on this subject.

Coinbase's legal action this week follows months of silence from the SEC in response to the Petition. In respect of the SEC's inaction, Coinbase's Chief Legal Officer Paul Grewel stated:

We're absolutely convinced the SEC is violating the law, we feel like we have no choice but to take them to court.

Coinbase [filed proceedings under the Administrative Procedure Act](#) seeking a Court order requiring the SEC to respond to Coinbase's petition within 7 days. The filing read:

It is widely recognized...that existing SEC registration and disclosure requirements are incompatible with digital assets...The SEC at a minimum must set forth how those inapt and inapposite requirements are to be adapted to digital assets. But the SEC has refused to do even that.

Although countless calls have been made by industry participants for clearer rulemaking by the SEC relating to cryptocurrencies, the SEC's chair, Gary Gensler has maintained the position that existing laws are sufficient. Gensler emphasized this again during a [hearing before the House Financial Services Committee last week](#):

We have a clear regulatory framework built up over 90 years.

Earlier this year, the [SEC issued a Wells Notice to Coinbase](#) indicating that it may take action against the firm for allegedly listing and offering of unregistered securities. Coinbase's response to the allegations is anticipated shortly.

While the scope of Coinbase's current action is limited and Coinbase cannot force the SEC to exercise its rulemaking authority, were the SEC to respond to Coinbase's petition refusing to exercise that authority, Coinbase could challenge

that decision in court and plead its case for formal rulemaking by the SEC. With [growing pressures](#) on the SEC to provide regulatory clarity, including from Congress, it remains to be seen how the SEC will respond to Coinbase's legal action.

Canadian crypto-asset platforms race to file pre-registration undertakings

Canadian securities regulators and the Ontario Securities Commission have released a list of crypto-asset businesses which have filed pre-registration undertakings as part of ongoing regulation of crypto-asset businesses in Canada.

Submitting a pre-registration undertaking does not guarantee registration for a platform. Nevertheless, unregistered crypto asset trading platforms commit to investor protections when filing their pre-registration undertakings. These commitments usually align with the standards imposed on registered platforms.

According to the [Canadian Securities Administrators website](#), the following pre-registration undertakings have been submitted and reviewed:

- ByteX Financial Ltd.
- Catalx CTS Ltd.
- Coinbase Canada, Inc.
- Foris DAX, Inc.
- DigiFinex Canada Limited.
- Gemini Trust Company, LLC.
- Payward Canada Inc.
- NDAX Canada Inc.
- Satstreet Inc.
- Shakepay Inc.
- Uphold Worldwide Ltd.

The undertakings for crypto-asset trading platforms came following an [announcement in December 2022](#) by the Canadian Securities Administrator where the regulator announced its plans to strengthen its approach to overseeing crypto trading platforms by expanding existing requirements for platforms operating in Canada.

The December announcement was followed up by a [press release in February](#) announcing the publication of a notice that describes enhanced investor protection commitments. Unregistered crypto-asset trading platforms that were operating at the time of the February notice were required to submit a pre-registration undertaking to their primary regulatory authority within 30 days of the notice.

Platforms are committing to enhanced expectations regarding the segregation and custody of crypto assets held on behalf of Canadian clients, as well as prohibitions on margin, credit or other forms of leveraging offers to Canadian clients. Additionally, the CSA requires platforms to seek approval before issuing or making available stablecoins to investors.

Platforms that do not wish to submit an undertaking with the CSA will be expected to take appropriate off-boarding steps to prevent Canadian users from accessing their platform.

Congress grills Gary on ETH

The Chair of US Securities and Exchange Commission (**SEC**), Gary Gensler refused to comment on whether ether (**ETH**) was a security or a commodity during a [hearing](#) before the House Financial Services Committee on 18th of April. Gensler avoided providing a clear response, saying it depends on the facts and the law, despite being told he knows exactly what the facts are and was there to give his opinion on the law.

Despite this, in his written [testimony](#), Gensler emphasized that in his view a 'vast majority of crypto tokens are securities' and 'it follows that many crypto intermediaries are transacting in securities and have to register with the SEC.' but unfortunately there is no pathway for them to do so and all the projects which have tried to register have seemingly failed.

Jason Gottlieb, Partner at Morrison Cohen & Chair of the Digital Assets Department commented on podcast [Unchained](#), explaining the reason behind this discrepancy was because:

[t]he SEC has a statute of limitations and ETH was first issued before five years ago. There is really very little that the SEC could do about that right now...Gary Gensler is facing an uncomfortable reality.

Jason further opined that if Gensler declared ETH was a security, it could have 'terrible knock-on effects in the market' which could in turn cause a devastating effect on the consumers that the SEC is 'purporting to try to protect'. If a token is

declared to be a security under US law, its value would likely decline immediately due to 'doubt in the marketplace' arising from regulatory uncertainty.

On the other hand, Jason noted that if Gensler declined to call ETH a security, then there are concerns of '100,000 Crypto projects claiming ... we are just like ETH. What's the problem?'. This concern was echoed in Gensler's written testimony, where he alleged that the crypto market is 'rife with noncompliance' which places 'real people's life savings at risk'. Again, he did not expand upon what kind of compliance could occur, other than crypto-asset businesses abandoning the web3 models which bring their very innovation to the market.

The House Financial Services Committee's Chair Patrick McHenry broadly criticized the lack of regulatory clarity in the crypto industry, pointing out Gensler's lack of a definitive answer to the question of whether ETH is a security as a prime example:

We're finding out as we go, as you file suit, as people get Wells notices, on what is a security in your view, in your agency's view.

There has been contradictory opinion produced previously on the legal classification of the second-largest cryptocurrency by market cap, with the former Director of the SEC's Corporate Finance Division and CFTC Chair stating that ETH is not a security and New York's Attorney General asserting that ETH is a security under US law in a claim against KuCoin.

While Gensler's position was not clarified in the recent hearing, it calls into the light the ongoing absence of a regulatory pathway in the USA, and highlights the sensible actions being undertaken in common law countries such as Australia, where consultation for a fit for purpose crypto-exchange regime continues, seeking to provide sensible protection for purchasers of crypto-assets without simply requiring compliance with regulation which is fundamentally incompatible with how crypto-exchanges operate.

Latest SEC action seeks to render Bittrex bit-rekt?

The SEC has continued its approach of regulation by enforcement, charging Bittrex Inc. and its former CEO William Shihara with operating an unregistered national securities exchange, broker, and settlement and clearing service in the USA. The action represents the first time a US-based cryptocurrency exchange has been charged with operating a non-compliant national securities exchange. Bittrex's foreign affiliate, Bittrex Global GmbH, has also been charged with failing to register as a national securities exchange.

[The complaint](#) alleges that Bittrex facilitated the buying and selling of crypto-assets that were offered and sold as securities, earning at least USD\$1.3 billion in revenues from transaction fees from investors from 2017 through 2022, without registering with the SEC. The charge further alleges that Bittrex and Shihara coordinated with issuers seeking to have their crypto-assets made available for trading on Bittrex's platform to delete certain "problematic statements" from public channels that Shihara believed would lead a regulator, such as the SEC, to investigate the crypto-asset as the offering of a security. Bittrex and Shihara allegedly instructed issuer-applicants to delete statements that related to "price predictions", "expectation of profit", and other "investment related terms" to avoid regulatory scrutiny.

The SEC Chair, Gary Gensler, said in a public statement that crypto-businesses essentially need to change their models to fit within the existing regime which has no specific accommodation at all for the advantages of web3:

Today's action, yet again, makes plain that the crypto markets suffer from a lack of regulatory compliance, not a lack of regulatory clarity.

Gurbir S. Grewal, director of the SEC's Division of Enforcement, presented a narrative that Bittrex repeatedly chose profits over investor protection, but there has been no allegation that any user has suffered loss on Bittrex due to any specific lack of investor protection (other than users being able to purchase crypto-assets on the exchange, which are not available on any of the [other national securities exchanges](#)). The SEC alleges that Bittrex's business model was based on circumventing the registration requirements of the federal securities laws, counselling issuers of crypto-asset securities to do the same by altering their offering materials, presenting an interesting spin on the exchange trying to assist token issuers from inadvertently presenting their tokens as investments/securities, and the SEC alleges that by combining multiple market intermediary functions under one roof Bittrex was infringing the law. The action also expressly states it is aimed at sending a message to other allegedly non-compliant crypto market intermediaries. There are rumors that most, if not all, crypto exchanges in the USA have received *Wells Notices* indicating they may be prosecuted.

The SEC's complaint further alleges that Bittrex and Bittrex Global should have registered as an exchange as they brought

together the orders for securities of multiple buyers and sellers using established, non-discretionary methods under which such orders interacted, and the buyers and sellers entering such orders agreed to the terms of a trade. The complaint further alleges that Bittrex should have registered as a clearing agency because it acted as an intermediary in making payments and deliveries upon matching sell and buy orders and maintained custody of customer assets. Finally, the complaint alleges that Bittrex should have registered as a broker because it regularly engaged in the business of effecting transactions for the accounts of others in crypto-assets that were offered and sold as securities.

In October 2022, [Bittrex agreed to pay \\$29 million USD in fines to the U.S. Treasury Department](#) for “apparent violations” of sanctions on certain countries and anti-money laundering laws.

The SEC and Gensler have been no stranger to controversy in recent months, with the ‘regulation by enforcement’ wave sweeping the US. Many in the industry believe the SEC has been ensnaring crypto companies on vague and ambivalent laws given the lack of purpose-built legislation and regulation. However, given [Gensler’s repeated clear comments in recent times that most tokens are securities](#), crypto companies operating in the US appear to be mitigating risk by moving offshore or shutting down US operations as it appears impossible for them to comply with the US rules, for example a US national securities exchange can only offer trading to brokers, not to the general public, which is of course a feature of most crypto markets.

As usual, SEC Commissioner Hester Pierce has remained a sole voice for enabling technology in the US, publishing a dissent to a proposed rule change concerning the definition of ‘exchange’ which would encompass DeFi and centralized crypto-asset exchanges and have, to her view, a similar impact to when the SEC considered alternative trading systems over a decade ago, noting that:

The SEC could have required them to register as national securities exchanges, but doing so would have rendered the innovation “kaput”

Her full dissent [is here](#) and is on point in relation to how the SEC is more broadly approaching crypto exchanges. It appears unlikely that the US is going to present a technology enabling path to compliance for crypto-exchanges in the near to medium term, likely rendering on-shore US exchanges in their present form ‘kaput’.