

# Roll Call



## Lawmakers' crypto focus strengthens voice of SEC's Peirce

Sarah Wynn

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Pressure from lawmakers to clear up open questions on financial technology could help Securities and Exchange Commission member Hester Peirce secure exemptions for fintech companies looking to experiment without running afoul of regulations.

Peirce, a Republican, is in the minority at the financial regulator. Dubbed “crypto mom” by the industry, she is known for her support of digital assets and is pushing the agency to give them better regulatory guideposts. Her advocacy on the issue comes as cryptocurrency regulation is also garnering attention from Congress.

“There is an opportunity for bipartisan-type cooperation at the SEC on crypto issues,” Jennifer Schulp, director of financial regulation studies at the right-leaning think tank Cato Institute, said in an interview. “We’re seeing it even in Congress right now with some bipartisan bills on crypto.”

Schulp said there’s widespread acknowledgment that regulatory clarity is needed, but there isn’t agreement on what a fintech end product should look like.

Some say the agency hasn’t been clear which digital assets qualify as securities and, therefore, are obliged to follow federal securities laws, creating confusion among innovators.

Lawmakers from both parties are joining together to try to clear up that confusion.

Reps. Patrick T. McHenry, R-N.C., and Stephen F. Lynch, D-Mass., introduced a bill that would direct the SEC and the Commodity Futures Trading Commission to establish a digital working group to recommend new standards.

A separate bill from three lawmakers would give the SEC a clearer path to determine whether digital assets are securities. The measure was proposed by Reps. Tom Emmer, R-Minn., Darren Soto, D-Fla., and Ro Khanna, D-Calif.

That bipartisanship could translate to the SEC. Chairman Gary Gensler taught courses on blockchain and digital currencies at the Massachusetts Institute of Technology and is well versed

in their potential. That could lead to collaboration within the agency despite the opposing views on most issues, said Kristin Smith, CEO of the Blockchain Association.

“I think their level of understanding is really deeper than almost anybody else in the government,” Smith said of Peirce and Gensler, referring to their fintech knowledge.

Peirce has proposed a three-year “safe harbor” to allow innovators to get blockchain-based digital token projects up and running without having to register and adhere to certain federal securities laws. In an interview, she said her proposal would “give people some time to build out their networks, and then it will be easier for us to determine that this isn’t an appropriate place for the securities laws to apply.”

Regulators currently determine whether a digital asset is a security through the Howey test, named for a U.S. Supreme Court case that held that if a transaction is an investment contract, it would be a security and subject to securities laws.

“I think we need to be more precise around what the characteristics are that would bring something into that investment contract bucket,” Peirce said.

When asked what it would take to persuade the Democratic majority at the agency, Peirce called it a learning process, providing everyone at the commission the opportunity to come to an agreement on how to best provide clear regulatory parameters. She said she was also open to commissioners’ suggestions other than her safe harbor proposal.

As for Congress, she said the lawmaker interest is helpful.

“It’s good to have the people who are fundamentally accountable to the American people involved in decisions about what a regulatory framework for a new asset class should look like,” she said.

### **‘Far afield’**

Peirce’s approach is “a little far afield” compared with the rest of the commission, said Paul Helms, a former SEC enforcement lawyer. He said it would be surprising if she got the policy outcome she wanted.

“You wonder with Peirce sometimes if it’s really about regulatory clarity or is it making sure that her perspective is what wins the day,” Helms said. “I don’t think she would be that thrilled if there was regulatory clarity that said very clearly that all digital tokens are securities. ... The part that’s harder to see is her worldview getting incorporated in that outcome, not that it won’t be considered and that it won’t affect pieces of it.”

Peirce has done a good job advancing her message through published speeches, said Paul Atkins, CEO of Patomak Global Partners LLC, a financial services consultancy firm. Atkins was a Republican SEC commissioner from 2002 to 2008.

“But as a commissioner, you don’t really have authority over what the commission does because the chair is the one under the current statutory framework who handles the agenda of the commission and has the staff,” Atkins said. “The staff reports to the chairman.”

Some chairs have been more collaborative than others, said Michael Piwowar, executive director of the Milken Institute Center for Financial Markets. Piwowar was a Republican commissioner at the SEC from 2013 to 2018 and was acting chairman in 2017.

It remains to be seen whether Gensler will be collaborative in looking for nonpartisan issues and including other commissioners in leading those efforts, he said. During his first few months, Gensler has raised concerns about gaps in investor protection in the cryptocurrency market, which may not bode well for Peirce's idea of a three-year window for leeway.

Gensler also has a packed agenda, and fintech items may have to wait. He has an explicit mandate from the Biden administration to address climate risk disclosure and plans to work on unfinished Dodd-Frank Act mandates. Cryptocurrency regulation did not make it onto the agency's short-term agenda published last month.

"You've got the climate risk disclosures plus the market structure issues to deal with, so then the question is how much bandwidth is left right now for cryptocurrency issues and how important is that," Piwowar said.

### **Enforcement balance**

The agency has a three-part mission: protecting investors; maintaining fair, orderly and efficient markets; and facilitating capital formation. Often the regulatory decisions the SEC makes are a trade-off between investor protection and capital formation, Piwowar said.

During Piwowar's time at the SEC, many initial coin offerings were fraudulent — some blatantly so. The SEC heard from outside law firms consulting on these digital offerings who felt "nine out of 10 of them were outright fraud," Piwowar said.

Former SEC Chair Jay Clayton, a self-described political independent who was appointed by President Donald Trump, shifted heavily toward investor protection with these initial coin offerings, Piwowar said.

"It was quite effective," he said. "The SEC brought a number of enforcement cases, the number of people trying to conduct these offerings has gone way down. But, over the last few years, perhaps the balance now has tipped in favor of the SEC allowing for more of these things to happen and being more accommodating for ones that aren't fraud."

But the SEC doesn't want wasteful capital formation, said Helms, the former SEC enforcement attorney.

"I do think one of the reasons they're being more thoughtful about this is because they want to encourage financial innovation and legitimate capital formation," Helms said.

Peirce could also make her voice heard through the enforcement process. In mid-July, she and fellow Republican Elad Roisman pushed back against an enforcement action against Coinschedule Ltd. for violating securities laws. They accused the agency of failing to identify which digital assets the company was touting qualified as securities, which might have given others insight in how to structure their digital offerings.

The dissent was a rarity, as enforcement actions traditionally are unanimous, Helms said.

“Even though she is in the minority, a lot of times the enforcement division will pay attention to that minority viewpoint and the chair will pay attention to the minority viewpoint as a way of preserving that unanimity,” Helms said.