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Blockchain Law
Policy versus process in effecting crypto reform

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The digital assets world is currently in a state of regulatory flux as Congress works on new laws to govern the space and regulatory bodies seek to revise or replace existing rules.

But until new changes to statutes and regulations are formally adopted, do regulators have leeway to effect changes from past practices—and if so, how and to what extent?

Three recent regulatory pronouncements have put such questions to the fore at the Securities and Exchange Commission (SEC), with two SEC Commissioners and staff voicing starkly divergent positions.

These recent episodes shine a light on the tension between policy and process in a changing regulatory environment.

Whether to treat transactions in meme coins as 'securities' transactions

On Feb. 27, 2025, the SEC Division of Corporation Finance staff issued a "Staff Statement on Meme Coins," in which the staff announced its view that transactions in meme coins "do not involve the offer and sale of securities under the federal securities laws."

The staff explained that it was issuing this statement "[a]s part of an effort to provide greater clarity on the application of the federal securities laws to crypto assets."

According to the staff statement, the term "meme coin" refers to "a type of crypto asset inspired by internet memes, characters, current events or trends for which the promoter seeks to attract an enthusiastic online community to purchase the meme coin and engage in its trading."

The staff statement asserted that "[m]eme coins typically are purchased for entertainment, social interaction and cultural purposes," and that "their value is driven primarily by market demand and speculation."

The staff statement thus characterized meme coins as being "akin to collectibles." It also asserted that meme coins "typically have limited or no use or functionality," and that because of their "speculative nature," meme coins "tend to experience significant market price volatility."

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The staff statement noted that such coins "often are accompanied by statements regarding their risks and lack of utility, other than for entertainment or other non-functional purposes."

On view of these features, the staff statement concluded that "transactions in the types of meme coins described in this statement, do not involve the offer and sale of securities under the federal securities laws."

For that reason, it said, "persons who participate in the offer and sale of meme coins do not need to register their transactions" with the SEC and do not fall within the exemptions from registration. Furthermore, as a result, "neither meme coin purchasers nor holders are protected by the federal securities laws."

The staff statement began its explanation for this conclusion by noting that a "meme coin does not constitute any of the common financial instruments specifically enumerated in the [statutory] definition of 'security' [under 15 U.S.C. §§77b(a)(1) and 78c(1)(10)] because, among other things, it does not generate a yield or convey rights to future income, profits or assets of a business."

Thus, it said, "[i]n other words, a meme coin is not itself a security."

The staff statement then discussed "whether a meme coin may be offered and sold as part of an investment contract under the 'investment contract' test [for 'securities'] set forth in *SEC v. W.J. Howey Co*.," 328 U.S. 293 (1946).

An investment contract under *Howey*, said the staff statement, requires "an investment in an enterprise premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

The staff statement cited two principal respects in which it said meme coin transactions did not satisfy the *Howey* test.

First, it said, "meme coin purchasers are not making an investment in an enterprise," because "their funds are not pooled together to be deployed by promoters or other third parties for developing the coin or a related enterprise."

Second, it said, "any expectation of profits that meme coin purchasers have is not derived from the efforts of others."

Rather, "the value of meme coins is derived from speculative trading and the collective sentiment of the market, like a collectible."

In addition, "the promoters of meme coins are not undertaking (or indicating an intention to undertake) managerial and entrepreneurial efforts from which purchasers could reasonably expect profit."

The staff statement did include several notes of caution, however.

First, it noted that the conclusions it set forth would "not extend to the offer and sale of meme coins that are inconsistent with the descriptions set forth [in the staff statement], or products that are labeled 'meme coins' in an effort to evade the application of the federal securities laws by disguising a product that otherwise would constitute a security" based on "the economic realities of the particular transaction."

In addition, the staff statement noted that even though the "offer and sale of meme coins may not be subject to the federal securities laws, fraudulent conduct related to the offer and sale of meme coins may be subject to enforcement action or prosecution."

Lastly, the staff statement noted that its views were "not dispositive of whether a specific meme coin itself is a security or whether it is offered and sold as part of an investment contract, which is a security," stating that "[a] definitive determination requires analyzing the specific facts relating to the meme coin and the manner in which it is offered and sold."

The staff statement did not arise in a vacuum. Its position on meme coins echoes statements that had been made a few weeks earlier by SEC Commissioner Hester Peirce in a Feb. 11, 2025 video interview on the "Bloomberg Crypto Show."

In that interview, Peirce explained that the SEC was framing its inquiry concerning meme coins by considering them together as a "category" of tokens rather than examining any specific, individual token in particular.

Under that perspective, she said, "many of the meme coins that are out there probably do not have a home in the SEC under our current set of regulations."

Peirce pointed out that Congress could act to modify the current regulations to bring meme coins within the reach of the SEC, but stated that as the law stands today, "many of those, I think, probably are not within our jurisdiction."

However, similar to the later staff statement, Peirce qualified her remarks by noting that "facts and circumstances matter" and "we always have to look at the facts and circumstances" when determining whether a transaction in a specific crypto asset labeled as a meme coin will be subject to SEC regulation.

Another SEC commissioner, Commissioner Caroline Crenshaw, though, did not share the same stance on meme coins as the staff and Peirce.

In her Feb. 27, 2025 "Response to Staff Statement on Meme Coins: What Does it Meme?," Crenshaw argued the staff had "advance[d] an incomplete, unsupported view of the law to suggest that an entire product category is outside the bounds of SEC jurisdiction."

Crenshaw first criticized the staff for failing to provide meaningful guidance on identifying "exactly what is a meme coin," other than "how a promoter chooses to label it."

She characterized the staff statement as referring merely in general terms to "an asset reflective of online or social trends, of speculative value, that tends to experience high volatility." But these, she asserted, "are near universal hallmarks of crypto assets."

She thus questioned what meaningful guidance the staff statement provided, "except perhaps as a roadmap for crypto enterprises looking to evade oversight by labeling themselves as a meme coin."

Crenshaw also disagreed with the staff's application of the *Howey* test.

Pointing to *Howey*'s intended flexibility "to meet [] countless and variable schemes," she contended that the staff statement, "rather than analyze the reasonable expectations of meme coin purchasers," instead "suggests promoters can get around *Howey* with disclaimers or other window dressing designed to downplay the significance of managerial efforts."

She argued:

> "Decades of controlling authority does not permit such easy avoidance of the federal securities laws. *Howey* demands a facts and circumstances analysis of the 'economic realities' of an offer or sale."

Crenshaw also took issue with the staff statement's depiction of "meme coins as cultural projects whose purpose is entertainment and social engagement."

Rather, she said, "[t]he reality is that meme coins, like any financial product, are issued to make money." She argued that under *Howey*'s "common enterprise" factor, "[t]he linked fortunes of purchasers and promoters—who will both make money as the coin value goes up—may itself satisfy *Howey*'s requirement."

Crenshaw's response similarly rejected how the staff statement had addressed *Howey*'s "efforts of others" prong, contending that "the reality is that trading and demand for meme coins do not exist in a vacuum."

She argued that the staff had understated the role of promoters, whom she observed "commonly structure offerings and impact market demand over time by limiting supply or ensuring scarcity," as well as sometimes by engaging in fraudulent practices.

She further argued that some promoters also claim to provide longer-term value, "including things like a 'massive ecosystem,' technological improvements or AI elements."

Ultimately, Crenshaw underscored that "the individualized inquiry *Howey* requires simply cannot be reconciled with the staff's conclusion that offers and sales of a vaguely defined category, consisting of hundreds of unique crypto assets, are generally not securities."

She thus flatly declared the staff statement "not a reasoned interpretation of existing law," and dismissed it as "a broad statement of general principles that provide little clarity or predictability as to any given coin."

Whether or not to treat protocol staking activities as the offer and sales of "securities"

A somewhat similar clash within the SEC arose a few months later in regard to "protocol staking." On May 29, 2025, the SEC Division of Corporation Finance staff issued a "Statement on Certain Protocol Staking Activities."

In this document, the staff took the view that certain activities in connection with protocol staking "do not involve the offer and sale of securities within the meaning of [the Securities or Exchange Acts]," and thus participants in such activities "do not need to register" those transactions with SEC, nor do they fall within one of the statutory exemptions for such registration in connection with those protocol staking activities.

Similar to its earlier meme coin analysis, the staff invoked the *Howey* test to reach these conclusions.

This staff statement addressed "networks that use proof-of-stake ('PoS') as a consensus mechanism" to "verify network transactions and provide settlement assurances to users."

Proof-of-stake mechanisms involve "[p]ublic, permissionless networks" which "allow users to participate in the network's operation, including the validation of new transactions to the network in accordance with the network's consensus mechanism."

Staking of crypto assets is used, according to this staff statement, "to participate in and/or earned for participating in such network's consensus mechanism or otherwise used to maintain and/or earned for maintaining the technological operation and security of such network," thus enabling the network to validate network transactions involving its tokens.

As described by the staff statement, in order to participate in a staking network, a token owner must "stake" the network's token so that it is available "to be selected programmatically by the network's underlying software protocol to validate new blocks of data."

When an owner's token is "staked," the token is "'locked-up' and cannot be transferred for a period of time."

During that time, if an owner's token is selected to provide validation services, the owner is rewarded with either newly minted tokens or a percentage of network transaction fees.

The staff statement noted that staking can take several forms: (1) "self staking," where individual token owners directly participate in the network by providing validation services themselves, (2) "self-custodial staking directly with a third party," where the owner leverages a third-party provider to perform the validation or (3) various "custodial arrangements," where a custodian stakes tokens belonging to the owner but which the custodian holds on the owner's behalf.

But none of these, said the staff statement, satisfied the *Howey* test's requirement that the activity involve a "reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

A self-staker's rewards, the staff said, came from "merely engaging in an administrative or ministerial activity to secure the PoS Network and facilitate its operation," which it distinguished from "the efforts of others."

Self-custodial staking directly with a third party likewise was only "administrative or ministerial in nature, not entrepreneurial or managerial," according to the staff statement, because "the expected financial incentive is derived solely from such activity and not the success of the PoS Network or some other third party," and the third-party does not control the rewards earned.

So-called custodial arrangements were likewise "administrative or ministerial" in nature, with the custodian simply "acting as an agent in connection with staking the deposited [tokens] on behalf of the owner."

The staff statement also enumerated certain "ancillary services" related to staking in which it said that protocol stakers could engage (separately or together) without triggering *Howey* because these services were merely "facets of a general activity–protocol staking–that itself is not entrepreneurial or managerial in nature."

The staff statement identified such "ancillary services" as including "slashing coverage", "early unbonding," "alternate rewards payment schedules and amounts" and "aggregation of covered crypto assets."

This being said, the staff statement noted that it was addressing protocol staking only generally and not in all of its variations, and that it specifically did not address forms of staking "such as so-called 'liquid staking,' 'restaking' or 'liquid restaking.'"

Similar to the earlier staff statement on meme coins, this statement also included a disclaimer about the need to examine the specific facts of each particular case.

Concurrently with the issuance of this staff statement, Peirce released her own statement on May 29, 2025, "Providing Security is not a "Security"–Division of Corporation Finance's Statement on Protocol Staking".

Peirce celebrated the staff's guidance as "welcome clarity" that would enable staking networks to achieve their goals of "encourag[ing] users to voluntarily coordinate and cooperate to secure the network," asserting that "uncertainty about regulatory views on staking discouraged Americans from [participating in staking networks] for fear of violating the securities laws."

New SEC Chairman Paul Atkins shortly thereafter joined Peirce in endorsing this staff statement.

In his June 9, 2025 "Remarks at the Crypto Task Force Roundtable on Decentralized Finance", he charged that the prior administration had "discouraged Americans" from participating in staking networks "through lawsuits, speeches, regulation and threatened regulatory action."

Atkins argued that the SEC should not "stifle innovation" with "century-old regulatory frameworks," but instead should promote block chain-enabled decentralization.

He noted, though, that the staff statement "is not a duly promulgated rule with the force of law, so we cannot stop there."

He called for the SEC to enact "a regulation based on the authority that Congress has given us."

Crenshaw, by contrast, issued a very different take on the staff statement on protocol staking in her May 29, 2025 "Response to Staff Statement on Protocol Staking Activities: Stake it Till You Make It?".

Rather than praising the staff statement as a "clarification" of the law as Peirce did, she accused the staff of employing a "fake it till you make it" approach:

> "While acknowledging that its statement 'does not alter or amend applicable law,' staff ignores how its conclusions conflict with that applicable law... In multiple enforcement actions, the Commission alleged that staking-as-a-service programs were investment contracts under *Howey*. Two separate courts upheld the legal basis of these allegations.
>
> The Commission recently dismissed one of these actions and today, paving the way for this statement on staking, it dismissed the other. But abandonment of these enforcement actions does not erase the underlying court decisions." (Footnotes omitted.)

She continued:

> "The staff's analysis may reflect what some wish the law to be, but it does not square with the court decisions on staking and the longstanding *Howey* precedent on which they are based. This is yet another example of the SEC's ongoing 'fake it till we make it' approach to crypto – taking action based on anticipation of future changes while ignoring existing law."

Her response critiqued not just the substance of the staff statement but also the process being followed by the staff and others at the SEC:

> "Rather than initiate rulemaking or take other formal regulatory action, the Commission and the [SEC Crypto] Task Force have instead rolled out a flurry of staff statements, enforcement action dismissals and roundtables.
>
> These actions, while celebrated by industry, have not changed the law or set out a path to do so. Rather than promote clarity, this approach continues to sow uncertainty around what the law is and what parts of it the Commission is willing to enforce, which is bad for investors and the markets."

Crenshaw then proceeded through her own *Howey* analysis to argue that the activities addressed by the staff statement were not mere "administrative or ministerial services."

Rather, she explained, in a number of cases such activities had been held to be "investment contracts because, as alleged, they involved entrepreneurial efforts."

In conclusion, Crenshaw stated:

> "I continue to believe that these staff statements do more harm than good by purporting to carve out broad categories of crypto products without analyzing the realities of how they really work. These statements paint an incomplete picture that obfuscates, rather than clarifies, what the law is. Along the way, they minimize and often misstate the significant risks these products pose to investors and markets."

Similar debate over staff statement on protocol mining

There was a similar but less heated debate with Crenshaw in regard to an earlier March 20, 2025 "Statement on Certain Proof-of-Work Mining Activities" issued by the SEC Division of Corporation Finance staff.

Similar to the staff statement on protocol staking activities, this staff statement asserted that so-called "protocol miners," who earn rewards by providing validation services for transactions in crypto tokens that rely on "proof-of-work" consensus mechanisms, "do not [engage in] the offer and sale of securities" within the meaning of the federal securities laws and thus "do not need to register transactions" with the SEC.

The staff statement supported this conclusion by once again characterizing such activities as merely "administrative or ministerial" under similar *Howey* test reasoning.

Crenshaw criticized this statement in a March 20, 2025 response entitled "Crypto Mining Statement: The Flame in Plato's Cave."

She accused the staff statement of conveniently making a key factual assumption—"that miners choose to mine 'merely' to receive rewards in the form of crypto assets, not to profit from the managerial efforts of others"—that then preordained the desired outcome under the *Howey* test, which she dubbed "flawed logic."

Moreover, she said, because the statement "purports to address only 'PoW [Proof of Work] generally' and not 'all of PoW's variations or any specific PoW protocol'", the net effect was to say that "this non-binding statement generally applies to mining. Except when it doesn't."

Lastly, she said, because this statement likewise concedes in its footnotes that definitive determinations would require a particularized analysis of "economic realities and real-world arrangements," the end result is that "the statement leaves us exactly where we started: with a facts and circumstances application of *Howey*."

She concluded, "I hope that the statement on crypto mining is more accurately understood for what it is and is not. Beware of any headlines that herald a wholesale exemption for mining."

What is the proper path to reform?

If a majority of the SEC commissioners now believe that prudent, pro-innovation, pro-entrepreneurial regulation in the crypto or digital asset space requires different policies than those that were pursued under previous presidential administrations, what is the proper path toward effecting reform?

Crenshaw accused the SEC Division of Corporation Finance staff of disregarding existing law and issuing pronouncements that misrepresented policy changes desired by the staff as actual descriptions of the law as it currently stands, while paying only lip service to the need to evaluate each case based on its own individual facts and circumstances.

Atkins himself acknowledged that, however desirable the staff statements might be from a crypto policy standpoint, they lacked "the force of law" and needed to be supported by regulations based on existing SEC statutory authority.

Until such time as new digital assets legislation is passed, then, just how far can the SEC go in reforming the current environment?

Given that a number of past legal arguments on crypto-related issues—including ones made by the SEC itself—have been held by a variety of courts to constitute proper application of existing law, must the SEC therefore continue to enforce those positions until such time as new laws are formally enacted or existing laws are formally amended by Congress?

The US Supreme Court has never definitively ruled on the correctness of those past legal arguments.

Whatever momentum either side in those legal debates might claim to have, the fact remains that many such issues were until recently still percolating through district and appellate courts with varying degrees of success on both sides.

The US Supreme Court in *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 95 (2015), unanimously rejected lower court decisions under the Administrative Procedure Act, 5 U.S.C. §551, et seq., that had required an agency to "use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted."

In fact, during recent presidential administrations of both parties, there have been increasing numbers of instances where the Executive Branch or regulatory bodies suddenly announced upon a change of administration that they no longer adhered to prior positions they had taken regarding the interpretation or application of various laws or regulations.

Sometimes such shifts occurred even after the previous administration had filed a merits brief before the US Supreme Court arguing the prior position.

Given these circumstances, it is not clear whether there is much constraint on the SEC's adopting new legal positions regarding crypto assets beyond simply the persuasiveness or not of the arguments it makes on the legal merits of these issues.

Do the staff statements even implement any reform?

Perhaps most fundamentally, though, whether the staff statements are sound or misguided, is the SEC actually changing any law? Or is all this simply theatre for the investing public?

Atkins noted that staff statements have no binding force of law. The recent staff statements all concede (albeit in footnotes) that their general pronouncements do not supersede any analysis of the particular facts and circumstances of each individual situation.

Moreover, whatever fresh interpretations of existing congressional statutes or SEC rules the staff statements may now offer, recent Supreme Court decisions like *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), would seem to limit to what extent, if any, courts would be bound in particular lawsuits to abide by such interpretations.

Viewed in this light, the staff statements appear to be doing little more than expressing predictions (with which Crenshaw clearly disagrees) about what the proper legal outcome more likely than not will be in the wide run of cases involving meme coins, protocol staking and protocol mining.

While such views may affect in which areas the SEC will choose to devote its enforcement energies, they would seem to have little if any legal significance in terms of changing the outcome of particular litigated cases, such as those brought by private parties.

In short, if crypto reform is desired, staff statements—whether viewed as well-founded or misguided—seem unlikely to be a significant vehicle for achieving it. Those who seek to truly effect reform would be advised to look elsewhere to achieve their goals.

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