

October 5, 2021

The Honorable Gary Gensler  
Chair  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, D.C. 20549

Dear Chair Gensler:

The SEC's ability to fulfill its mission—to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation—is closely connected to the clarity of the Commission's communications with market participants. There are far-reaching consequences for the SEC's decisions as to whether and how to deploy the agency's powerful tools. For that reason, investors and other market participants expect the SEC to act based on an impartial assessment of the law and the facts as determined by the Commission, not the Chair's impromptu public pontifications.

You have made a series of concerning and apparently self-contradicting public statements regarding crypto assets and other innovative technologies. I request that you clarify these comments promptly to avoid further confusion in the marketplace.

### *Crypto Exchanges*

In May, you testified to the Financial Services Committee that there are gaps in the regulation of cryptocurrency trading platforms. Specifically, you stated, "I think it's only Congress that could really address it, it'd be good to consider – if it was – if you asked my thoughts, to consider whether to bring greater investor protection to the crypto exchanges."<sup>1</sup> The same week, you stated, "while the [SEC's] sister agency, the Commodity Futures Trading Commission, has some limited anti-fraud and anti-manipulation authority, there is no federal authority to actually bring a regime to the crypto exchanges... [the SEC] will be working with Congress, if they see fit to try to bring some protection for people who want to invest in this asset class."<sup>2</sup>

You subsequently indicated in August, however, that the Commission does not need additional authority to police crypto exchanges. Specifically, you stated, "a typical trading platform has more than 50 tokens on it. In fact, many have well in excess of 100 tokens. While

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<sup>1</sup> SEC Chairman Gensler Remarks before the United States House Financial Services Committee (May 5, 2021), available at <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=407748 - LiveStream>.

<sup>2</sup> "SEC Chairman Gary Gensler says more investor protections are needed for bitcoin and crypto markets" CNBC (May 7, 2021), available at <https://www.cnbc.com/2021/05/07/sec-chairman-gary-gensler-says-more-investor-protections-are-needed-for-bitcoin-and-crypto-markets.html>.

each token’s legal status depends on its own facts and circumstances, the probability is quite remote that, with 50 or 100 tokens, any given platform has zero securities.”<sup>3</sup>

Then, when you appeared before the Senate Committee on Banking on September 14, 2021, you testified, “[the SEC has] a great deal of clarity on, I think, what’s a security, but the gaps [are] the coordination amongst our agencies.”<sup>4</sup>

Most recently, in yet another interview, you stated, “it’s highly likely that they have on these platforms securities, investment contracts, or notes or others, that fit the definition of security.”<sup>5</sup>

In light of the robust ongoing discussion about potential regulatory gaps within the digital asset ecosystem, your evolving statements about the SEC’s authority have caused significant confusion for market participants and stakeholders in Congress.

### ***Stablecoins***

In an interview with the *Washington Post* on September 21, 2021, you stated, “stablecoins are acting almost like poker chips at the casino right now; so, add to the Wild West analogy. I mean, we’ve got a lot of casinos here in the Wild West and the poker chip is these stablecoins, you know, at the casino gaming tables.”<sup>6</sup>

Poker chips, of course, are not securities. Moreover, neither the managerial efforts of a casino nor the reasonable expectation of profits (by the casino or a gambler) make the casino’s sale of poker chips a securities offering. In the same interview, you further stated that stablecoins “may have attributes of investment contracts, have some attributes like banking products, but the banking authorities right now don’t have the full gamut of what they need, and how we work with Congress to sort through that.”<sup>7</sup>

These remarks suggest you believe that Congress needs to act in order for most or all stablecoins to fall under the SEC’s regulatory authority.<sup>8</sup> But during your testimony to the Senate, you agreed that “some of these tokens have been deemed to be commodities and many of them are securities.”<sup>9</sup>

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<sup>3</sup> SEC Chairman Gensler Remarks Before the Aspen Security Forum (Aug. 3, 2021), available at <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03>.

<sup>4</sup> SEC Chairman Gary Gensler before the United States Senate Committee on Banking, Housing, and Urban Affairs (Sept. 14, 2021), available at <https://www.banking.senate.gov/hearings/09/10/2021/oversight-of-the-us-securities-and-exchange-commission>.

<sup>5</sup> “The Path Forward: Cryptocurrency with Gary Gensler” *Washington Post* (Sep. 21, 2021), available at <https://www.washingtonpost.com/washington-post-live/2021/09/21/transcript-path-forward-cryptocurrency-with-gary-gensler/>.

<sup>6</sup> See “The Path Forward: Cryptocurrency with Gary Gensler,” *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> An item or agreement that has *some* attributes of an investment contract is, of course, not a security unless it contains *all* attributes of an investment contract.

<sup>9</sup> See Gensler, *supra* note 5.

As is the case for your statements about the SEC’s authority to regulate crypto exchanges, your inconsistent remarks about the nature of stablecoins have similarly caused confusion.

To resolve the confusion that your comments created about the SEC’s crypto asset agenda and to help the Committee understand whether congressional action may be needed, please provide a written response to the following questions:

1. In your view, does the SEC need additional legislative authority to regulate crypto trading platforms?
2. Does the SEC determine whether individual crypto assets trading on platforms are a security prior to bringing an action against a trading platform for operating as an unregistered securities exchange?
3. If the Commission has not made such determinations in the unregistered-exchange context, has the Commission otherwise determined whether individual crypto assets are securities without making such analysis public?
4. If the Commission does in fact determine whether individual crypto assets are securities in a non-public forum, please provide such analysis and explain why the Commission has not made these analyses public.
5. Does the SEC currently consider all or some stablecoins to be securities? If so, please provide the SEC’s analysis for such determination(s), to include an explanation of how a stablecoin that does not pay interest to its holders could be offered with a reasonable expectation of profits, a required component of an investment contract under the *Howey* test.<sup>10</sup>
6. Where are the “gaps” in coordination between the CFTC and SEC (per your recent comments)? Please specify whether additional congressional action is necessary to address those gaps.

Please provide responses no later than October 19, 2021. If you have any questions, please do not hesitate to contact Allison Behuniak, at (202) 225-7502. I look forward to continuing our discussion on these critical issues.

Sincerely,



Patrick McHenry  
Ranking Member

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<sup>10</sup> See *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946).

cc: The Honorable Hester M. Peirce  
The Honorable Elad L. Roisman  
The Honorable Allison Herren Lee  
The Honorable Caroline A. Crenshaw