

EMPOWER OVERSIGHT

Whistleblowers & Research



July 15, 2024

VIA ELECTRONIC TRANSMISSION: OIG@SEC.GOV

Deborah J. Jeffrey, Inspector General
Office of Inspector General
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

RE: REFERRAL OF EVIDENCE OF CONFLICTS OF INTEREST IN CRYPTO ENFORCEMENT ACTIONS

Dear Ms. Jeffrey:

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

Since August 2022, Empower Oversight has pressed the Securities and Exchange Commission (“SEC”) through a series of Freedom of Information Act (“FOIA”) requests for evidence of alleged conflicts of interest by senior officials, including William Hinman, and how the SEC mitigated or failed to mitigate those conflicts. The controversy arose following the SEC’s selective enforcement decisions on cryptocurrencies, raising suspicions about its objectivity and questions about its failure to develop clear, consistent regulation of the new industry.

On May 9, 2022, Empower Oversight sent a letter to the Office of the Inspector General of the Securities and Exchange Commission (“SEC-OIG”) requesting a comprehensive review of the SEC’s ethics officials’ failure to properly manage Mr. Hinman’s potential conflict of interest regarding cryptocurrency issues.¹ The letter detailed evidence that Mr. Hinman, who worked as the Director of the Division of Corporate Finance at the SEC from May 2017 through December of 2020, participated in matters in which he had a personal financial interest.

¹ See Empower Oversight, referral to SEC Inspector General (May 9, 2022) available at <https://empowr.us/wp-content/uploads/2022/05/2022-5-9-JF-to-SECOIG-Ethics-Office-Referral.pdf>.

Two years later, we have received no reply and seen no final work product released by your office related to the May 9, 2022 referral. On February 15, 2024, an SEC official claimed that the SEC-OIG had authorized disclosing to Empower Oversight in the course of responding to our FOIA requests that it was nearing the conclusion of an investigation related to financial conflict of interest issues identified and referred to the OIG by Empower Oversight.² This marks the first acknowledgment of an ongoing investigation into the matter. It has been *five months* since that SEC official claimed your office represented it was in the “in the final stages of completing” its report. Yet there has been no report released or produced to us in response to our FOIA request—which raises questions about (1) whether the SEC official accurately represented the status of your office’s work, (2) when the report will be complete if it is not, or (3) why it has not been released if it has been completed.

Additionally, Empower Oversight has learned that the scope of SEC-OIG work on this matter may be limited to Mr. Hinman, excluding possible conflicts of interest involving former SEC Chairman, Walter “Jay” Clayton. However, our referral to your office included information raising questions about potential conflicts involving both officials. Given the controversial regulatory decisions and enforcement actions during Mr. Clayton’s tenure, there has been public controversy over the extent to which Mr. Clayton may also have had conflicting interests related to Bitcoin and Ether that could impact his decisions related to the then-third largest cryptocurrency, XRP.³

BACKGROUND

A. Circumstances from Which Empower Oversight’s FOIA Request Arose

Mr. Clayton served as the chairman of the SEC from May 4, 2017⁴ to December 23, 2020, when he resigned.⁵ Previously, Mr. Clayton had been a partner at the law firm Sullivan & Cromwell, where he represented an array of Wall Street and corporate clients, many of which were subject to SEC regulation.⁶ Notably, Mr. Clayton worked closely with Mr. Hinman, who at the time was a partner at the law firm Simpson Thacher, and together, they led the Chinese company Alibaba to launch its successful initial public offering (“IPO”) in 2014.⁷ This was the largest IPO in history, at a record-

² Empower Oversight, *CONFIRMED: SEC Inspector General in “Final Stages” of Investigation on Crypto Conflicts Referred by Empower Oversight*, PRESS RELEASE (Feb. 15, 2024), available at <https://empowr.us/confirmed-sec-inspector-general-in-final-stages-of-investigation-on-crypto-conflicts-referred-by-empower-oversight>.

³ Nidhi Kolhapur, *Did Jay Clayton Have a Conflict of Interest When He Sued Ripple? Here’s the Truth.*, COINPEDIA (Aug. 25, 2023), available at <https://coinpedia.org/news/ripple-vs-sec-what-role-did-jay-clayton-truly-play-in-the-xrp-lawsuit> (last visited July 12, 2024).

⁴ SEC, *Jay Clayton Sworn in as Chairman of SEC*, PRESS RELEASE (May 4, 2017), available at <https://www.sec.gov/news/press-release/2017-94>.

⁵ SEC, *Statement of SEC Chairman Jay Clayton Regarding the Conclusion of His Tenure*, PRESS RELEASE (Dec. 23, 2020), available at <https://www.sec.gov/news/public-statement/clayton-2020-12-23>.

⁶ Dave Michaels, *SEC Chair Nominee Clayton’s Ethics Report Reveals Range of Possible Conflicts*, WALL ST. J. (Mar. 8, 2017), available at <https://www.wsj.com/articles/sec-chair-nominee-claytons-ethics-report-reveals-range-of-possible-conflicts-1488988744> (last visited July 12, 2024).

⁷ SEC, Amendment No. 6 to Form F-1 REGISTRATION STATEMENT, Alibaba Group Holding Limited, Registration No. 3330195736 (Sept. 5, 2014) (noting that William Hinman and Jay Clayton were the lead attorneys for their respective law

setting \$25 billion.⁸ In May 2017, just days after being sworn in as chairman, Mr. Clayton made his first appointment with his decision to tap Mr. Hinman as the Director of the SEC's Division of Corporation Finance.⁹

As a career Wall Street defense lawyer, Mr. Clayton's two decades at Sullivan & Cromwell representing clients such as Goldman Sachs, Barclays Bank, Deutsche Bank AG, UBS, and Ally Financial Inc. resulted in concerns that he would be the "most conflicted SEC chair ever."¹⁰

B. Empower Oversight's FOIA Requests

The SEC's handling of cryptocurrency issues, and the numerous appearances of conflicts of interest, raise substantial concerns that may negatively impact the public perception of the SEC's decision making and regulatory actions against some cryptocurrencies but not others.

In 2021, Empower Oversight submitted its first FOIA request in effort to ensure accountability to the public in light of the appearances former SEC Chairman Clayton's conflicts of interest.¹¹ This August 2021 FOIA requested communications between Mr. Clayton and any email address from the domain "@oneriveram.com" as well as "[a]ll records of communications, including calendar entries, notes or emails between Mr. Clayton and personnel in the SEC's Office of Ethics Counsel regarding Mr. Clayton's discussions and negotiations with One River Asset Management, including all communications regarding potential recusals or conflicts related to his potential employment with One River Asset Management."¹²

On January 19, 2022, Empower Oversight administratively appealed the SEC's "no records" responses to FOIA Request Numbers 21-02531-FOIA, 21,02532-FOIA, a21-02535-FOIA, AND 21-02537-FOIA. Then, on December 15, 2022, Empower Oversight filed a second FOIA request seeking, among other things, records regarding Mr. Clayton's communications with people associated with One River Asset Management, and filed a notice, thus informing the Court of this new request.¹³

firms, which were representing Alibaba in its IPO), *available at* <https://www.sec.gov/Archives/edgar/data/1577552/000119312514333674/d709111df1a.htm>.

⁸ Josh Noble & Nicole Bullock, *Alibaba IPO hits record \$25bn*, FINANCIAL TIMES (Sept. 22, 2014), *available at* <https://www.ft.com/content/0f97cc70-4208-11e4-a7b3-00144feabdc0> (last visited July 12, 2024).

⁹ Kara Scannell, *Clayton taps Silicon Valley lawyer for SEC role*, FINANCIAL TIMES (May 9, 2017), *available at* <https://www.ft.com/content/ab5f6120-34fb-11e7-99bd-13beb0903fa3> (last visited July 12, 2024).

¹⁰ Matt Taibbi, *Trump Nominee Jay Clayton Will Be the Most Conflicted SEC Chair Ever*, ROLLING STONE (Jan. 5, 2017), *available at* <https://www.rollingstone.com/politics/politics-features/trump-nominee-jay-clayton-will-be-the-most-conflicted-sec-chair-ever-117944> (last visited July 12, 2024).

¹¹ Empower Oversight, *FOIA Request to Acting SEC Chief FOIA Officer Olivier Girod* (Aug. 12, 2021), *available at* <https://empowr.us/wp-content/uploads/2021/08/2021-08-12-JF-to-SEC-FOIA.pdf>.

¹² *Id.* at 3.

¹³ Empower Oversight, *FOIA Request to Acting SEC Chief FOIA Officer Olivier Girod* (Dec. 15, 2022), *available at* <https://empowr.us/wp-content/uploads/2021/08/2021-08-12-JF-to-SEC-FOIA.pdf>.

In May 2023, Empower Oversight requested communications between Mr. Clayton and numerous people he many have interacted with regarding the SEC’s improper handling of cryptocurrency enforcement decisions.¹⁴ In August 2023, the SEC produced 324 pages of documents.¹⁵ However, these documents were only produced pursuant to the lawsuit that Empower brought in the District of Columbia after the SEC failed to respond the Empower’s 2022 FOIA request.¹⁶

Earlier this year, on March 14, 2024, Empower Oversight submitted a FOIA request for “all communications” between Mr. Clayton and Electric Capital has not resulted in the SEC turning over any communications or documents to Empower Oversight.¹⁷ Empower Oversight has not received any communications in response to this request.

Given the lack of records provided in response to its FOIA requests, it’s reasonable to question whether Mr. Clayton largely avoided using his SEC email for discussions related to the SEC’s regulatory approach to cryptocurrencies as well as its lawsuit against Ripple. On June 3, 2024, Empower Oversight filed a fourth FOIA requesting records, communications, invites, and notes, among other things, between numerous immediate staff members of Clayton as they relate to several cryptocurrencies, companies and domain names.¹⁸

C. ConsenSys and Ethereum

Mr. Clayton’s 2017 financial disclosure OGE Form 278e noted that he made \$7.6 million from 2017 to 2018 from his work at Sullivan & Cromwell.¹⁹ However, his disclosure excluded the names of nine of his clients at Sullivan & Cromwell due to confidentiality reasons.²⁰ Mr. Clayton specifically noted that two of those nine clients

¹⁴ Empower Oversight, *FOIA Request to FOIA Officer Raymond McInerney* (May 15, 2023), available at <https://empowr.us/wp-content/uploads/2023/05/2023-5-15-TL-to-SEC-FOIA-Re-SECOIG-Referral-w-Exh-A-Final.pdf>.

¹⁵ *SEC Email Release Re: FOIA 5 U.S.C. § 552 Request No. 23-00590-FOIA* (June 23, 2023), available at https://www.documentcloud.org/documents/23896040-sec_emailrelease.

¹⁶ Empower Oversight, *Empower Oversight Litigation Forces SEC to Release Additional Documents on Cryptocurrency Conflicts*, PRESS RELEASE (Aug. 3, 2023), available at <https://empowr.us/empower-oversight-litigation-forces-sec-to-release-additional-documents-on-cryptocurrency-conflicts>.

¹⁷ Empower Oversight, *FOIA Request to SEC Chief FOIA Officer* (Mar. 14, 2024), available at https://empowr.us/wp-content/uploads/2024/03/2024-03-14-TL-to-SEC-FOIA-Post-Employment-Focus-Final_Redacted2.pdf.

¹⁸ Empower Oversight, *FOIA Request to SEC Chief FOIA Officer* (June 3, 2024), available at <https://empowr.us/wp-content/uploads/2024/06/2024-06-03-SEC-FOIA-Clayton-Final.pdf>.

¹⁹ C. Ryan Barber, *Jay Clayton, SEC Chair Nominee, Pulled in \$7M From Sullivan & Cromwell Last Year*, NAT’L LAW J. (Mar. 9, 2017), available at <https://www.law.com/nationallawjournal/almID/1202780934645/> (last visited July 12, 2024).

²⁰ See Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278e) (hereinafter referred to as “Clayton Disclosure”) (Mar. 3, 2017), available at <https://www.wsj.com/public/resources/documents/ClaytonDisclosure03-08-2017.pdf>.

were not disclosed because they were “the subject of a pending non-public investigation.”²¹

Sullivan & Cromwell represented ConsenSys during the final year of Mr. Clayton’s tenure at the SEC, according to the firm’s website post in September 2020.²² ConsenSys, which is the company created by Ethereum co-founder Joe Lubin, is known to have guided SEC officials, specifically Mr. Hinman, as he and his team in the SEC’s Division of Corporation Finance developed the speech from November 2017 through June 2018 which ultimately gave Ether a free pass, declaring it was not a security.²³

Shortly after Mr. Hinman’s June 2018 speech declaring that Ether was not a security, then-SEC Chairman Clayton publicly supported the analysis laid out by Mr. Hinman that neither Bitcoin nor Ether were considered by the SEC to be a security.²⁴ Mr. Clayton continued to confirm that Ether was not a security during the following years of his chairmanship.²⁵

Thus, the scope of the SEC-OIG’s review should not be arbitrarily limited only to issues relating to Mr. Hinman. It should also examine whether Mr. Clayton may have had a conflict of interest with Consensys, Sullivan & Cromwell, and the SEC’s determination that Ether wasn’t a security.

D. One River Asset Management

During Mr. Clayton’s first year as the chairman of the SEC he made it clear that Bitcoin was not a security,²⁶ and the value of Bitcoin rose.²⁷ In 2019, acting in his capacity as the SEC Chair, Mr. Clayton stated that Ether was not a security.²⁸

²¹ *Id.* at page 11.

²² Sullivan & Cromwell LLP, *S&C Advises ConsenSys in Acquiring Quorum Enterprise Blockchain Platform from JP Morgan* (Sept. 9, 2020), available at <https://www.sullcrom.com/About/News-and-Events/Highlights/2020/September/SC-Advises-ConsenSys-in-Acquiring-Quorum-Enterprise-Blockchain-Platform-from-JPMorgan>.

²³ SEC, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (June 14, 2018), available at <https://www.sec.gov/news/speech/speech-hinman-061418>.

²⁴ Chairman Jay Clayton, *Remarks on Capital Formation at the Nashville 36|86 Entrepreneurship Festival*, SEC SPEECH (Aug. 29, 2018), available at <https://www.sec.gov/news/speech/speech-clayton-082918>.

²⁵ Jerry Brito, *SEC Chairman Clayton just confirmed Commission staff analysis that found Ethereum (and cryptos like it) are not securities*, COIN CENTER (Mar. 12, 2019), available at <https://www.coindesk.com/markets/2019/03/12/sec-chair-clayton-affirms-agencys-stance-ether-is-no-longer-a-security> (last visited July 12, 2024).

²⁶ *See supra* note 3.

²⁷ Olga Kharif and Eric Lam, *Cryptocurrency Rally Builds Steam as Bitcoin Surpasses \$7,500*, BLOOMBERG (July 17, 2018), available at <https://www.bloomberg.com/news/articles/2018-07-17/bitcoin-surges-after-breaking-back-through-7-000-level> (last visited July 12, 2024).

²⁸ Nikhilesh De, *SEC Chair Clayton Affirms Agency’s Stance Ether is No Longer a Security*, COINDESK (Mar. 12, 2019), available at <https://www.coindesk.com/markets/2019/03/12/sec-chair-clayton-affirms-agencys-stance-ether-is-no-longer-a-security> (last visited July 12, 2024).

Before Mr. Clayton resigned from his post as the Chairman of the SEC in December 2020, a cryptocurrency-focused hedge fund, One River Asset Management, “accumulated about \$600 million worth of Bitcoin and Ether in late 2020” and the hedge fund “generated massive gains following a massive crypto rally in early 2021.” The timing of its \$600 million investment in Bitcoin and Ether is notable, as it occurred just a few weeks before Mr. Clayton’s Director of Enforcement at the SEC, Mark Berger, filed suit against Ripple over its business activity related to the XRP Ledger and its native token XRP, which was Ethereum’s biggest competitor at that time.²⁹ Additionally, on December 23, 2020, the day after the SEC announced its lawsuit against Ripple for selling its cryptocurrency as an unregistered security, Mr. Clayton resigned as SEC Chairman.³⁰

Less than ninety days after resigning from the SEC, it was reported that Mr. Clayton had accepted a position at One River Asset Management, a \$2.5 billion firm which strictly invested in Bitcoin and Ethereum, not XRP or any other cryptocurrencies.³¹

Thus, the scope of the SEC-OIG’s review should not be arbitrarily limited only to issues relating to Mr. Hinman. It should also probe of Mr. Clayton’s communications with One River Asset Management, and its funding partners, Goldman Sachs and Coinbase in order to determine whether there were any conflicts of interest during Mr. Clayton’s tenure at the SEC.

E. Electric Capital

Mr. Clayton was named as an adviser for Electric Capital in August 2022. According to its website, Electric Capital has existed since 2018, at which time Mr. Clayton was already serving as the SEC Chair, determining which cryptocurrencies would be subject to SEC regulations and which ones would get a pass. Electric Capital is a crypto venture capital firm, which raised \$1 billion for its crypto investments from January 2022 until August 2022, which is when Mr. Clayton joined the firm as an advisor.³² Notably, Electric Capital has invested in Consensus, which is a developer of Ether.³³

²⁹ SEC, *SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering*, PRESS RELEASE, 220-338 (Dec. 22, 2020), available at <https://www.sec.gov/news/press-release/2020-338>.

³⁰ Jay Clayton, *Statement of SEC Chairman Jay Clayton Regarding the Conclusion of His Tenure*, SEC NEWSROOM (Dec. 23, 2020), available at <https://www.sec.gov/news/public-statement/clayton-2020-12-23>.

³¹ Erik Schatzker, *Ex-SEC Chairman Clayton to Advise Brevan-Backed Firm on Crypto*, Bloomberg (Mar. 29, 2021), available at <https://www.bloomberg.com/news/articles/2021-03-29/ex-sec-chairman-clayton-to-advise-brevan-backed-firm-on-crypto> (last visited July 12, 2024).

³² Hannah Miller, *Crypto VC Electric Capital Names Ex-SEC Chair Clayton as Adviser*, BLOOMBERG (Aug. 24, 2022), available at <https://www.bloomberg.com/news/articles/2022-08-24/crypto-vc-electric-capital-names-ex-sec-chair-clayton-as-advisor> (last visited July 12, 2024).

³³ Ashley Rindsberg, *Consensus Faces Shareholder Vote Over Controversial Transfer of Company Assets*, CoinDesk (June 8, 2023), <https://www.coindesk.com/consensus-magazine/2023/06/08/consensus-faces-shareholder-vote-over-controversial-transfer-of-company-assets>.

Thus, the scope of the SEC-OIG's review should not be arbitrarily limited only to issues relating to Mr. Hinman. It should also probe Chairman Clayton's communications with Electric Capital's personnel during his tenure at the SEC.

CONCLUSION

For years, the crypto industry has voiced significant concerns about the regulations and rulings in the cryptocurrency sector. The evidence presented shows that Mr. Clayton had at least an appearance of conflict that warrants further inquiry. It is essential for the SEC to assure the public that any guidance, rules, or regulations it issues are free from the appearance of conflict and bias. The SEC must strive for greater transparency in its decision-making processes regarding cryptocurrency issues in enhance public confidence in the integrity of its decisions.

The decisions made by Mr. Clayton during his three and a half years as the SEC Chairman should be evaluated by the SEC-OIG to ensure that he properly avoided any financial conflicts of the sort that Mr. Hinman and the SEC's Ethics Office apparently failed to avoid or mitigate. Failure to include those issues in the SEC-OIG's upcoming report, or a subsequent one, would continue to erode the public's faith in the ability of the SEC, its Ethics Office, and its Inspector General to identify, mitigate, and hold officials accountable for conflicts of interest like those that generated this controversy.

Thank you for your time and consideration of these important issues.

Cordially,

[/Tristan Leavitt/](#)

Tristan Leavitt
President