

# EMPOWER OVERSIGHT

*Whistleblowers & Research*



November 15, 2024

## VIA ELECTRONIC TRANSMISSION

Chairman Patrick McHenry  
Committee on Financial Services  
U.S. House of Representatives

Ranking Member Maxine Waters  
Committee on Financial Services  
U.S. House of Representatives

Chairman French Hill  
Committee on Financial Services  
Subcommittee on Digital Assets, Financial  
Technology, and Inclusion  
U.S. House of Representatives

Ranking Member Stephen F. Lynch  
Committee on Financial Services  
Subcommittee on Digital Assets, Financial  
Technology, and Inclusion  
U.S. House of Representatives

Chairman Sherrod Brown,  
Committee on Banking, Housing and Urban  
Affairs  
U.S. Senate

Ranking Member Tim Scott  
Committee on Banking, Housing and Urban  
Affairs  
U.S. Senate

Dear Chairmen and Ranking Members:

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization 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.

Over the past few years Empower Oversight has filed a series of Freedom of Information Act (“FOIA”) requests for records involving former Securities and Exchange Commission (“SEC”) Chairman Jay Clayton—whom President-Elect Trump has announced will be his nominee to be the U.S. Attorney for the Southern District of New York—and former SEC Division of Corporation Finance Director William Hinman, both of whom served from May 2017 until December 2020 at the SEC. The records produced revealed conflicts of interest and possible self-dealing by officials involved in the SEC’s regulation of cryptocurrency. In May 2022, Empower Oversight referred this evidence to the SEC Office of Inspector General (“SEC OIG”), which opened an investigation. The SEC OIG should be issuing its report to the SEC shortly, if it has not already issued it.

This matter needs congressional oversight for several reasons. First, President-Elect Trump has vowed to make the United States the “crypto capital of the planet.”<sup>1</sup> In light of SEC

<sup>1</sup> <https://apnews.com/article/donald-trump-bitcoin-cryptocurrency-stockpile->

Chairman Gary Gensler’s crusade against crypto over the past few years, this case study may help Congress understand what steps might strengthen the United States’ ability to compete with China and others in this space.

Second, this matter highlights the perils of unclear statutory guidance giving a regulatory and enforcement agency free rein. The SEC’s unequal application of a 90-year-old law to similarly situated crypto entities, initiated under Chairman Clayton—bringing enforcement actions against some while giving a free pass to another—removes any predictability for investors. Government regulators should not be picking winners and losers in a free market. Understanding this matter may assist Congress in considering whether updates to the Securities Act of 1933 are necessary to provide legal clarity and market stability.

Third, this matter is a stunning example of selective regulatory capture—regulators who completely defer to certain segments of the industry with which they are friendly. Only some actors in the crypto industry benefited. SEC officials deferred to industry insiders with a ‘horse in the race’ who *wanted* the SEC to pick winners and losers. Then those agency officials later went to work for those who benefited from their actions at the SEC. While it may be impossible to completely prevent federal regulators making decisions based on the anticipation of a *future* personal financial interest, such as a particular offer of employment at the end of one’s term, Congress should assess whether current ethics laws and regulations are sufficient or whether additional legislation is needed.

Finally, this matter raises deeply troubling questions about self-dealing at the top of the SEC. Because of his continuing retirement compensation, Bill Hinman had a financial interest *while still at the agency*. This has had a serious negative impact on the public’s perception of the SEC’s decisionmaking. As the SEC’s top ethics attorney wrote to Hinman: “It’s . . . a serious optics issue – you can’t be seen to be granting special access to a firm you have a financial interest in.”<sup>2</sup> Yet that is exactly what the public has seen in Hinman’s actions. Since the law in this area is clear, Congress should conduct oversight of the ethics process in the Executive Branch—particularly at regulatory agencies with enforcement powers as consequential in the markets as the SEC.

With a new Administration and turnover in the SEC’s leadership imminent, we respectfully urge you to request the SEC OIG’s report on this matter in order to more fully understand how the SEC failed to mitigate conflicts of interest during Clayton’s and Hinman’s tenure.

## BACKGROUND

President Trump nominated Clayton as SEC Chairman in January 2017. As a partner at the law firm Sullivan & Cromwell, Clayton had spent two decades representing clients such as Morgan Stanley, Goldman Sachs, Barclays Bank, Deutsche Bank AG, UBS, and Ally Financial Inc.<sup>3</sup> His firm had innumerable more clients impacted by SEC decision-making, such as JPMorgan Chase.<sup>4</sup>

On March 3, 2017, the U.S. Office of Government Ethics (“OGE”) released Clayton’s Public Financial Disclosure Report (OGE Form 278e) and accompanying ethics agreement.<sup>5</sup> The

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<sup>2</sup> <https://empowr.us/wp-content/uploads/2022/04/2022-03-25-SEC-Responsive-Records-compressed.pdf> at 141.

<sup>3</sup> See <https://web.archive.org/web/20170226222028/https://www.sullcrom.com/lawyers/Jay-Clayton>.

<sup>4</sup> <https://web.archive.org/web/20210129161022/https://www.reuters.com/article/cbusiness-us-sec-conflicts-exclusive-idCAKCN1AX2D4-OCABS>.

<sup>5</sup> See <https://www.documentcloud.org/documents/4388156-Jay-Clayton-Financial-Disclosure.html>;  
<https://static1.squarespace.com/static/5722daf11d07c02f9c1739cc/t/58c4b2996a4963946ca00b1f/1489285786203/Clayton%2C+Walter+J.++finalEA.pdf>.

documents did not reveal the full list of clients Clayton had represented. Clayton outlined his plan to resign from the partnership of Sullivan & Cromwell if confirmed and to recuse for one year after that from matters in which Sullivan & Cromwell was a party or represented a party.<sup>6</sup> It is unclear why Clayton's ethics agreement only outlined recusing for one year rather than the two years required by Executive Order 13770.<sup>7</sup> In addition to the ethics agreement, Clayton was also bound by ethics regulations to "take appropriate steps to avoid an appearance of loss of impartiality in the performance of [his] official duties."<sup>8</sup>

When Clayton was nominated as Chairman, he made plans to bring Hinman to the SEC. Clayton had worked closely in private practice with Hinman, a partner at the law firm Simpson Thacher & Bartlett. Together, Clayton and Hinman led the Chinese company Alibaba to launch its successful initial public offering ("IPO") in 2014.<sup>9</sup> This was the largest IPO in history at a record-setting \$25 billion.<sup>10</sup> While it is unknown whether Clayton continued to advise Alibaba after the IPO, documents show Hinman represented the company up through his appointment to the SEC.<sup>11</sup>

On May 2, 2017, the Senate voted to confirm Clayton, and on May 4 he was sworn in as SEC Chairman.<sup>12</sup> On May 9, 2017, Clayton announced the appointment of Hinman as the Director of the SEC's Division of Corporation Finance.<sup>13</sup>

In preparation for his appointment, SEC Designated Ethics Official Shira Pavis Minton (the top ethics attorney at the agency) contacted Hinman on April 21, 2017 to introduce herself and walk Hinman through the ethics and financial disclosure process.<sup>14</sup> Hinman informed Minton:

I have negotiated with the firm to . . . receive fixed pension amounts through the end of 2020. These amounts would approximate what I would receive under the pension based on assumptions regarding firm income over that period. My amount will be approximately \$1.59 [million] per year, which is what the firm's projections indicate I was likely to receive under the plan.

The \$130,400 monthly pension payments from Simpson Thacher totaled approximately seven times Hinman's \$217,000 annual SEC salary.<sup>15</sup>

On April 28, 2017, Minton emailed Hinman with "initial guidance from OGE."<sup>16</sup> She wrote:

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<sup>6</sup> <https://www.documentcloud.org/documents/4388156-Jay-Clayton-Financial-Disclosure.html>.

<sup>7</sup> <https://www.federalregister.gov/documents/2017/02/03/2017-02450/ethics-commitments-by-executive-branch-appointees>. Recusal for two years may also have been required under 5 C.F.R. § 2635.503, depending on when Clayton received his last "covered payment" from Sullivan & Cromwell. Clayton seemed to agree in his nomination hearing that he was required to recuse for two years in any matter in which Sullivan & Cromwell represented a party. <https://www.govinfo.gov/content/pkg/CHRG-115shrg24998/pdf/CHRG-115shrg24998.pdf> at 23.

<sup>8</sup> 5 C.F.R. § 2635.501(a).

<sup>9</sup> <https://www.sec.gov/Archives/edgar/data/1577552/000119312514333674/d709111df1a.htm>.

<sup>10</sup> <https://www.ft.com/content/0f97cc70-4208-11e4-a7b3-00144feabdc0>.

<sup>11</sup> See <https://www.documentcloud.org/documents/22277221-21-02531-foia-june-15-2022-release>. Of note, Alibaba revealed in May 2016 that it was under investigation by the SEC.

<https://www.reuters.com/article/technology/sec-probes-alibaba-accounting-methods-shares-dive-idUSKCN0YG1TZ>. A press report in November 2016 indicated the SEC's investigation of Alibaba was being assisted by at least one internal whistleblower. <https://nypost.com/2016/11/01/high-up-alibaba-staffer-helping-sec-probe-into-tech-giant>; see also <https://www.barrons.com/articles/alibaba-stock-sinks-insider-aiding-sec-inquiry-1478008406>.

<sup>12</sup> <https://www.sec.gov/newsroom/press-releases/2017-94>.

<sup>13</sup> <https://www.sec.gov/newsroom/press-releases/2017-97>.

<sup>14</sup> <https://empowr.us/wp-content/uploads/2022/04/2022-03-25-SEC-Responsive-Records-compressed.pdf> at 15.

<sup>15</sup> <https://www.businessinsider.com/sec-simpson-partner-pay-biden-golden-parachutes-2021-1>.

<sup>16</sup> *Id.* at 74.

Of particular note, OGE advised that if the proposal from [Simpson Thacher] would fix the payments only during your term of government service (i.e., if you would return to receiving retirement benefits that are in part calculated based on the profits of the firm at the conclusion of your government service), you would continue to have a financial interest in the firm's profitability while you are in government. This means you could not participate in any SEC particular matters that would directly and predictably affect the firm under 18 USC 208. In other words the future interest is enough to give you a full financial interest in the firm.<sup>17</sup>

The criminal conflict of interest statute at 18 U.S.C. § 208, "Acts affecting a personal financial interest," reads:

[W]hoever, being an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he . . . has a financial interest[.]<sup>18</sup>

Each violation of the statute is subject to up to five years imprisonment and/or a penalty of \$50,000 per violation—or "the amount of compensation which the person received or offered for the prohibited conduct[.]"<sup>19</sup>

Federal regulations at 5 C.F.R. § 2635 further interpret and implement 18 U.S.C. § 208. They read: "A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. . . . It is not necessary, however, that the magnitude of the gain or loss be known."<sup>20</sup> The regulation continues:

The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter . . . may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons.<sup>21</sup>

On May 12, 2017, Minton provided Hinman with a draft ethics agreement for Hinman to sign.<sup>22</sup> It read: "Under 18 U.S.C. § 208, I am disqualified from participating personally and substantially in any particular matter that would have a direct and predictable effect" on a list of entities, which included Simpson Thacher, Alibaba, and Ant Financial Services Group, Alibaba's \$60 billion financial arm.<sup>23</sup>

The memorandum further detailed a "screening arrangement I have implemented to ensure that I comply with my obligation to recuse myself from certain matters with which I have a financial interest, or a personal or business relationship."<sup>24</sup> The arrangement required that an

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<sup>17</sup> *Id.*

<sup>18</sup> 18 U.S.C. § 208(a).

<sup>19</sup> 18 U.S.C. § 216.

<sup>20</sup> 5 U.S.C. § 2635.402(b)(1).

<sup>21</sup> 5 C.F.R. § 2635.402(b)(3).

<sup>22</sup> <https://empowr.us/wp-content/uploads/2022/04/2022-03-25-SEC-Responsive-Records-compressed.pdf> at 108.

<sup>23</sup> *Id.* at 112.

<sup>24</sup> *Id.*

SEC employee “screen all SEC matters directed to my attention that involve outside entities or that require my participation, to determine if they involve any of the entities or organizations listed above” (such as Simpson Thacher or Alibaba).<sup>25</sup> The memo was finalized on May 15, 2017.<sup>26</sup>

Pursuant to regulations, Minton also provided Hinman with initial training on his obligations under the criminal conflict of interest statute and the ethics regulations.<sup>27</sup> As she later described in an email responding to Hinman seeking approval for a meeting including Simpson Thacher: “[Y]ou have a full financial conflict with your old firm, not just an impartiality one. [H]ence, you should not be having any meetings with your old firm, even group meetings.”<sup>28</sup> When Hinman requested a phone call to discuss the issue further, the ethics counsel emailed in response: “[Y]ou have a bar under the criminal financial conflict with Simpson [Thacher] because you have an ongoing financial interest in the firm. [M]eeting with them while having such a conflict is not permitted. **As we discussed during your briefing – even calls with them are not permitted.**”<sup>29</sup>

Like Clayton’s financial disclosure form, the public release of Hinman’s financial disclosure raised concerns given the extent of Hinman’s conflicts. In response to an August 2017 inquiry from a Reuters reporter, an SEC spokeswoman provided a comment that Hinman was “subject to and complying with all applicable ethics laws, rules, and regulations, and . . . working with the agency’s ethics counsel as needed.”<sup>30</sup>

### HINMAN’S DISREGARD OF ETHICS COUNSEL

In July 2017—less than a month before the Reuters story—a consultant emailed Hinman on his SEC email address “seeking an expert in investment banking and the IPO process in China” because “you were involved in the Alibaba IPO.”<sup>31</sup> Hinman responded by copying a Simpson Thacher partner in Hong Kong, who he said could provide the requested advice.<sup>32</sup>

While the SEC does not keep phone records for its officials, Hinman had frequent contact with Simpson Thacher partners over his SEC email account. It is unknown if he had additional contact over any personal email accounts, or what phone calls he had with attorneys at Simpson Thacher.

Hinman met in person with Simpson Thacher partners on multiple occasions. For example, he met with Joshua Bonnie on November 28, 2017; September 6, 2018; September 18, 2019; and September 17, 2020. Hinman’s meetings included Simpson Thacher attorneys with business pending before the SEC, as when he met *in SEC offices* with a Hong Kong-based partner with a \$100 million IPO under consideration by the SEC, as described later in this letter.<sup>33</sup>

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<sup>25</sup> *Id.* at 114.

<sup>26</sup> <https://www.documentcloud.org/documents/22277216-21-02533-foia-june-15-2022-release> at 1.

<sup>27</sup> 5 C.F.R. § 2638.304.

<sup>28</sup> <https://empowr.us/wp-content/uploads/2022/04/2022-03-25-SEC-Responsive-Records-compressed.pdf> at 137.

<sup>29</sup> *Id.* at 141.

<sup>30</sup> <https://web.archive.org/web/20210129161022/https://www.reuters.com/article/cbusiness-us-sec-conflicts-exclusive-idCAKCN1AX2D4-OCABS>.

<sup>31</sup> <https://www.documentcloud.org/documents/21274400-hinman-simpson-thacher-emails-21822> at 60.

<sup>32</sup> *Id.* The Simpson Thacher partner responded that he was “happy to discuss,” adding, “Bill, [t]hank you for thinking of me.” *Id.*

<sup>33</sup> See <https://empowr.us/wp-content/uploads/2022/05/2022-5-9-JF-to-SECOIG-Ethics-Office-Referral.pdf> at 9; see also <https://www.documentcloud.org/documents/22277221-21-02531-foia-june-15-2022-release>.

## RISE OF ENTERPRISE ETHEREUM ALLIANCE

At the time Clayton and Hinman began at the SEC in May 2017, their clients Alibaba and Ant Financial had recently started experimenting with the blockchain network Ethereum.<sup>34</sup> Ethereum was conceived by Canadian Vitalik Buterin, and used on its blockchain the native cryptocurrency Ether, which was traded on public exchanges.

One of Ethereum's co-founders, Canadian Joseph Lubin, held 9.5% of Ether when it became public on July 30, 2015. Lubin founded ConsenSys to develop applications running on the Ethereum blockchain and otherwise promote the use of Ethereum, which in turn increased the value of Ether. ConsenSys competed with companies like Ripple Labs, Inc., which developed software products operating on the XRP blockchain ledger. The blockchains' respective cryptocurrencies (Ether and XRP) also competed against each other in public exchanges.

In October 2016, Lubin hired a ConsenSys employee to work full-time building a coalition promoting Ethereum for corporate uses.<sup>35</sup> The coalition hosted a meeting in New York City on December 15, 2016.<sup>36</sup> An article describing the meeting called the rumored "Enterprise Ethereum" "[a] secretive project" "veiled behind an unusual degree of privacy."<sup>37</sup> The article continued: "So far, the reason for the secrecy appears to be concerns about the competition coming from other sectors of the blockchain industry. But, there's reason to be skeptical about this possible reasoning for the group's launch."<sup>38</sup>

On February 27, 2017, *The New York Times* reported that the new Enterprise Ethereum Alliance, set to be announced the next day, would include a number of corporate giants, like Microsoft and JPMorgan.<sup>39</sup> Both were longtime client of Simpson Thacher, which had represented Microsoft in transactions like its \$26 billion purchase of LinkedIn less than a year earlier<sup>40</sup> and its launch of a \$17 million bond in January 2017.<sup>41</sup> Simpson Thacher would continue to represent Microsoft and JPMorgan throughout Hinman's time at the SEC, such as when Microsoft acquired GitHub for \$7.5 billion in June 2018.<sup>42</sup>

On February 28, 2018 ConsenSys issued a formal press release listing 30 of the Enterprise Ethereum Alliance's founding members—"among others."<sup>43</sup> Although not listed in the

<sup>34</sup> [https://medium.com/@andrewkeys\\_88339/ethereum-growing-exponentially-in-china-31f1d24c8ee9](https://medium.com/@andrewkeys_88339/ethereum-growing-exponentially-in-china-31f1d24c8ee9); see also <https://bitcoinmagazine.com/culture/chinas-interest-and-investment-etheriums-blockchain-expands1>.

<sup>35</sup> <https://www.rootdata.com/member/Bob%20Summerwill?k=MTE1MjA%3D>; see also <https://bobsummerwill.com/2017/10/18/bobs-next-adventure>.

<sup>36</sup> <https://www.coindesk.com/markets/2017/01/05/what-is-enterprise-ethereum-details-emerge-on-secret-blockchain-project>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> <https://www.nytimes.com/2017/02/27/business/dealbook/ethereum-alliance-business-banking-security.html>.

<sup>40</sup> [https://www.stblaw.com/about-us/news/view/2016/06/14/microsoft-to-acquire-linkedin-for-\\$26.2-billion](https://www.stblaw.com/about-us/news/view/2016/06/14/microsoft-to-acquire-linkedin-for-$26.2-billion).

<sup>41</sup> <https://www.law360.com/articles/886714/simpson-thacher-guides-microsoft-s-17b-jumbo-bond>; see also [https://www.stblaw.com/about-us/news/view/2017/01/17/simpson-thacher-represents-jpmorgan-as-financial-advisor-to-reynolds-american-in-announced-\\$49-billion-merger-with-british-american-tobacco](https://www.stblaw.com/about-us/news/view/2017/01/17/simpson-thacher-represents-jpmorgan-as-financial-advisor-to-reynolds-american-in-announced-$49-billion-merger-with-british-american-tobacco); <https://www.stblaw.com/about-us/news/view/2017/04/11/simpson-thacher-represents-jpmorgan-as-financial-advisor-to-century-communities-in-announced-business-combination-with-ucp>; [https://www.stblaw.com/about-us/news/view/2017/06/09/simpson-thacher-represents-jpmorgan-in-committed-financing-for-clayton-dubilier-ric-s-\\$2.5-billion-acquisition-of-hd-supply-holding-s-waterworks-division](https://www.stblaw.com/about-us/news/view/2017/06/09/simpson-thacher-represents-jpmorgan-in-committed-financing-for-clayton-dubilier-ric-s-$2.5-billion-acquisition-of-hd-supply-holding-s-waterworks-division); <https://www.stblaw.com/about-us/news/view/2017/07/19/simpson-thacher-represents-jpmorgan-in-paragon-offshore-s-recently-effective-chapter-11-bankruptcy-cases>; [https://www.stblaw.com/about-us/news/view/2017/09/18/simpson-thacher-represents-jpmorgan-in-\\$8.5-billion-bridge-financing-for-northrop-grumman-s-announced-acquisition-of-orbital-atk](https://www.stblaw.com/about-us/news/view/2017/09/18/simpson-thacher-represents-jpmorgan-in-$8.5-billion-bridge-financing-for-northrop-grumman-s-announced-acquisition-of-orbital-atk); [https://www.stblaw.com/about-us/news/view/2017/10/03/simpson-thacher-represents-jpmorgan-in-bridge-financing-for-genuine-parts-company-s-approximately-\\$2-billion-acquisition-of-alliance-automotive-group](https://www.stblaw.com/about-us/news/view/2017/10/03/simpson-thacher-represents-jpmorgan-in-bridge-financing-for-genuine-parts-company-s-approximately-$2-billion-acquisition-of-alliance-automotive-group); <https://www.stblaw.com/about-us/news/view/2018/04/12/simpson-thacher-represents-jpmorgan-in-exchange-offer-and-credit-agreement-facilities-by-lions-gate>.

<sup>42</sup> <https://news.microsoft.com/2018/06/04/microsoft-to-acquire-github-for-7-5-billion>.

<sup>43</sup> <https://entethalliance.org/enterprise-ethereum-alliance-launches>.

press release, Perkins Coie was also reportedly “a legal advisor to the [Enterprise Ethereum Alliance] since its launch.”<sup>44</sup>

According to February 27 *The New York Times* article, some corporations had made deep investments in Ethereum, “bet[ting] that Ethereum will win out in the race to become the standard blockchain for future business operations.”<sup>45</sup> The article specifically noted that JPMorgan, a frequent client of both Sullivan & Cromwell and Simpson Thacher, “has created a version of Ethereum known as Quorum that the bank has been using in tests to move money between JPMorgan branches in different countries. Quorum will become a part of the new version of Ethereum being developed by the alliance.”<sup>46</sup> Another article around this time noted that JPMorgan “has developed several projects based on” the Ethereum codebase.<sup>47</sup> Two months after the Enterprise Ethereum Alliance launched, JPMorgan would depart the bank consortium of Ethereum rival R3.<sup>48</sup>

At the same time, on April 26, 2017, Ripple announced that ten financial institutions had joined its global payments network,<sup>49</sup> which already included Bank of America, RBC, and UBS.<sup>50</sup> A May 11, 2017 Ripple blog post was titled “How We Are Further Decentralizing the XRP Ledger to Bolster Robustness for Enterprise Use.”<sup>51</sup> Later that month CNBC reported Ripple was “suddenly sitting on billions of dollars worth of cryptocurrency,” based on Ripple’s substantial holdings of the XRP token.<sup>52</sup>

Hinman later noted in a deposition: “I was someone in the firm [Simpson Thacher] that people came to with questions of that sort [regarding the application of the federal securities laws to transactions in digital assets]. . . . I had taken an interest in it and had studied it a little bit.”<sup>53</sup> Hinman acknowledges he was aware of Ether when he joined the SEC, but claims he was not aware of Ether’s market competitor, the XRP token, at the time.<sup>54</sup>

Soon after Clayton and Hinman took office in May 2017, the Enterprise Ethereum Alliance more than tripled in size when it added another 86 members.<sup>55</sup> The new members included Zcash, which had partnered with JPMorgan on its Ethereum-based Quorum.<sup>56</sup> XRP remained the third most valuable cryptocurrency, with reports in mid-July 2017 noting that XRP had risen 3977% in the first half of 2017.<sup>57</sup>

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<https://web.archive.org/web/20170903052936/https://www.financemagnates.com/cryptocurrency/news/perkins-coie-joins-enterprise-ethereum-alliances-legal-industry-group>.

<sup>45</sup> <https://www.nytimes.com/2017/02/27/business/dealbook/ethereum-alliance-business-banking-security.html>.

<sup>46</sup> *Id.* See also <https://www.coindesk.com/markets/2016/10/03/jp-morgan-is-quietly-developing-a-private-ethereum-blockchain>.

<sup>47</sup> <https://www.coindesk.com/markets/2017/02/13/jp-morgan-santander-said-to-join-new-ethereum-blockchain-group>.

<sup>48</sup> [https://www.reuters.com/article/us-jpmorgan-r-idUSKBN17T2T4/;](https://www.reuters.com/article/us-jpmorgan-r-idUSKBN17T2T4/)

<https://www.coindesk.com/markets/2017/04/27/r3-blasts-jp-morgan-consortium-exit-as-at-odds-with-global-banks>.

<sup>49</sup> <https://ripple.com/ripple-press/ten-financial-institutions-join-ripples-global-payments-network>.

<sup>50</sup> <https://www.cnbc.com/2017/05/26/bitcoin-rival-ripple-is-sitting-on-many-billions-of-dollars-of-xrp.html>.

<sup>51</sup> <https://ripple.com/insights/how-we-are-further-decentralizing-the-ripple-consensus-ledger-rcl-to-bolster-robustness-for-enterprise-use>.

<sup>52</sup> *Id.*

<sup>53</sup> <https://www.crypto-law.us/wp-content/uploads/2023/06/Part-1.pdf> at 37.

<sup>54</sup> <https://www.crypto-law.us/wp-content/uploads/2023/06/Part-1.pdf> at 50.

<sup>55</sup> <https://entethalliance.org/enterprise-ethereum-alliance-release-05-19-2017.pdf>; see also

<https://www.coindesk.com/markets/2017/05/21/enterprise-ethereum-alliance-adds-86-members-to-blockchain-consortium>.

<sup>56</sup> <https://www.coindesk.com/markets/2017/05/22/jpmorgan-partners-with-zcash-on-blockchain-security>.

<sup>57</sup> <https://www.cnbc.com/2017/07/21/ripples-xrp-digital-currency-rose-3977-percent-in-the-first-half-of-2017.html>.

## ETHEREUM ALLIANCE PLAYS POLITICS

On July 18, 2017, approximately two months after Clayton and Hinman were sworn in, the SEC released its first guidance on what makes it consider a digital token to be a security that should be registered with the SEC.<sup>58</sup> This guidance was outlined in a joint statement from Hinman's Divisions of Corporation Finance and the Division of Enforcement.<sup>59</sup> The SEC found that tokens issued on the Ethereum blockchain by The DAO, which had raised some \$150 million U.S. dollars' worth of Ether in exchange for the tokens, were securities.<sup>60</sup>

That same month, the Enterprise Ethereum Alliance revealed it was working to develop a working group on legal issues surrounding Ethereum,<sup>61</sup> and ConsenSys hired former Sullivan & Cromwell attorney Patrick Berarducci as its deputy general counsel.<sup>62</sup> According to press accounts, Berarducci "was quickly snatched up by the blockchain company ConsenSys to make sure the developing technology complies with existing laws and regulations."<sup>63</sup> Berarducci had worked with Clayton at Sullivan & Cromwell for seven years.<sup>64</sup>

The Enterprise Ethereum Alliance formally announced its Legal Industry Working Group ("EEA LIWG") on August 14, 2017.<sup>65</sup> It incorporated four banks that were already members of the Enterprise Ethereum Alliance, like JPMorgan, and ten law firms new to the Alliance, including Perkins Coie.<sup>66</sup> The stated purpose of the EEA LIWG was to "tackle important policy issues raised by" Ethereum.<sup>67</sup>

According to the ConsenSys employee who organized the Alliance,<sup>68</sup> by September 2017 Simpson Thacher was assisting with the EEA LIWG effort.<sup>69</sup> This is not surprising, given that huge Simpson Thacher clients such as JPMorgan and Microsoft were members of the Enterprise Ethereum Alliance.<sup>70</sup> Yet the involvement of either Simpson Thacher or its clients in the Alliance raises questions about Hinman's subsequent interactions to benefit Ethereum.

The EEA LIWG finally hit pay dirt when Lubin emailed SEC Division of Trading and Markets Deputy Director Gary Barnett on November 27, 2017, copying ConsenSys general

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<sup>58</sup> <https://www.sec.gov/newsroom/speeches-statements/corpfen-enforcement-statement-report-investigation-dao>.  
<sup>59</sup> *Id.*

<sup>60</sup> <https://www.sec.gov/files/litigation/investreport/34-81207.pdf>.

<sup>61</sup> <https://www.coindesk.com/markets/2017/08/14/legally-binding-smart-contracts-10-law-firms-join-enterprise-ethereum-alliance>.

<sup>62</sup> <https://www.linkedin.com/in/patrick-berarducci>.

<sup>63</sup> <https://news.bloomberglaw.com/business-and-practice/tech-savvy-attorneys-in-heavy-demand-amid-emerging-tech>.

<sup>64</sup> <https://www.linkedin.com/in/patrick-berarducci>.

<sup>65</sup> <https://entethalliance.org/ethereum-enterprise-alliance-legal-industry-working-group-press-release-2>.

<sup>66</sup> <https://www.financemagnates.com/cryptocurrency/news/perkins-coie-joins-enterprise-ethereum-alliances-legal-industry-group>.

<sup>67</sup> <https://entethalliance.org/ethereum-enterprise-alliance-legal-industry-working-group-press-release-2>.

<sup>68</sup> <https://www.rootdata.com/member/Bob%20Summerwill?k=MTE1MjA%3D>.

<sup>69</sup> [https://docs.google.com/presentation/u/1/d/1\\_RsFbP-bDnrO2GE3tPlyMmJ511ITozbWTBj4fCS3Btc/htmlpresent](https://docs.google.com/presentation/u/1/d/1_RsFbP-bDnrO2GE3tPlyMmJ511ITozbWTBj4fCS3Btc/htmlpresent). In a 2021 deposition, Hinman responded in the negative to the question: "[D]o you believe you represented any company, individual, or entity that was involved in the Ethereum Foundation . . . ?" <https://www.crypto-law.us/wp-content/uploads/2023/06/Part-1.pdf> at 38-39. Hinman also claimed: "I don't know all the entities that are affiliated with [the Ethereum Foundation], but I'm not aware of a connection between the firm and the Foundation." *Id.* at 41. Yet in addition to its apparent work on the Enterprise Ethereum Alliance's Legal Industry Working Group, Simpson Thacher had formally joined the broader Enterprise Ethereum Alliance at least by the summer of 2018. [https://entethalliance.org/wp-content/uploads/2018/08/EEA\\_July\\_Newsletter.pdf](https://entethalliance.org/wp-content/uploads/2018/08/EEA_July_Newsletter.pdf).

<sup>70</sup> In mid-October 2017 JPMorgan doubled down on its Ethereum investment, announcing the Interbank Information Network using the Ethereum-based Quorum. <https://www.cnbc.com/2017/10/16/jpmorgans-dimon-betting-on-blockchain-even-as-he-calls-bitcoin-stupid.html>. Meanwhile, Ripple CEO Brad Garlinghouse noted to CNBC around this time: "The global payments industry really has been ruled by an oligopoly, led by players like JPMorgan and Citi." <https://www.cnbc.com/2017/10/10/ripple-has-over-100-clients-as-mainstream-finance-warms-to-blockchain.html>.



counsel Matt Corva, deputy general counsel Berarducci, and EEA LIWG chair Aaron Wright:

As we discussed, we remain very interested in engaging in discussions with regulators . . . and probably the most important body is the SEC. . . . [W]e are . . . eager for our ecosystem to be able to operate in the United States with greatly reduced uncertainty. . . . [W]e would be very interested in speaking with relevant parties at the SEC so that we can offer ourselves as an educational resource . . . and so that we can talk through *how certain plans that we have regarding novel security structures[] might be perceived by your colleagues*. If you could help us navigate and make appropriate introductions, we would be appreciative.<sup>71</sup>

Barnett forwarded Lubin’s email to Hinman, writing: “Joe is reaching out to the regulatory world to provide help and pursue constructive discussion[.]”<sup>72</sup>

Three days later, on November 30, 2017, ConsenSys publicly announced that it was launching what it called “The Brooklyn Project.”<sup>73</sup> The announcement described it as “a company and industry-wide initiative to help fulfill the promise of tokenization by addressing head-on and — we hope — solving the issues that some regulators and others have raised over the last year regarding token launches.”<sup>74</sup> Further, it noted: “This project will be our top priority, and we will accordingly shift resources to this project for at least the next month or two before resuming execution of token launches.”<sup>75</sup> The announcement concluded:

[T]here still remains much uncertainty around the globe about the precise boundaries between and best ways to sell security and consumer tokens. Helping to reduce this uncertainty is central to The Brooklyn Project’s mission, as is providing market participants and regulators with powerful tools to protect consumers and enhance the integrity of token-based networks. Just as we have in the past . . . , we will and already have begun to work with . . . regulators . . . to achieve our goal of . . . promoting . . . new solutions.<sup>76</sup>

Berarducci, the former law associate of Clayton’s, was named the Co-Chair of the Brooklyn Project. He later explained: “The Brooklyn Project . . . started . . . in response to the increasing rhetoric from regulators and others regarding concerns about things that were happening in the blockchain technology industry, in particular, related to the sales of tokens.”<sup>77</sup>

On December 4, 2017, Hinman responded to Barnett’s November 27, 2017 email, writing that while his reply from an airplane didn’t go through the prior week, he was “[h]appy to participate in a meeting on this topic.”<sup>78</sup> The SEC meeting with ConsenSys was scheduled for December 13, 2017.<sup>79</sup>

In the meantime, on December 11, 2017, Chairman Clayton released a “Statement on Cryptocurrencies and Initial Coin Offerings.”<sup>80</sup> The statement noted: “It has been asserted that cryptocurrencies are not securities and that the offer and sale of cryptocurrencies are beyond the

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<sup>71</sup> <https://www.documentcloud.org/documents/23896077-11-hinman-emails-intro-to-joe-lubin-and-consensys-information> at 2 (emphasis added).

<sup>72</sup> *Id.* at 3-4.

<sup>73</sup> <https://consensys.io/blog/announcing-the-brooklyn-project-for-token-launches>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=4022&context=clevstrev> at 8.

<sup>78</sup> <https://www.documentcloud.org/documents/23896077-11-hinman-emails-intro-to-joe-lubin-and-consensys-information>.

<sup>79</sup> <https://www.documentcloud.org/documents/23896077-11-hinman-emails-intro-to-joe-lubin-and-consensys-information>.

<sup>80</sup> <https://www.sec.gov/newsroom/speeches-statements/statement-clayton-2017-12-11>.

SEC’s jurisdiction. Whether that assertion proves correct with respect to any digital asset that is labeled as a cryptocurrency will depend on the characteristics and use of that particular asset.”<sup>81</sup>

The next day, on December 12, 2017, ConsenSys emailed background materials to the SEC,<sup>82</sup> which were emailed to Hinman.<sup>83</sup> The email made clear that Lubin would be accompanied by a former Sullivan & Cromwell attorney (Berarducci) and mentioned the Enterprise Ethereum Alliance and the EEA LIWG.<sup>84</sup>

On December 13, 2017, Hinman and other SEC officials met with Lubin, Berarducci, ConsenSys general counsel Matt Corva, and EEA LIWG chair Aaron Wright.<sup>85</sup> ConsenSys’s PowerPoint presentation that day specifically highlighted the Enterprise Ethereum Alliance, which Hinman would later claim he didn’t learn of until after he left the SEC.<sup>86</sup> It highlighted six members of the Alliance—multiple of which were Simpson Thacher clients.

The slide deck it concluded with a slide labeled “On-going Collaboration,” which noted ConsenSys’s goals of:

- Input from regulators so we can properly account for concerns from a range of market participants. We are pleased to see the latest SEC releases on the subject, including Chairman Clayton’s recent statement.
- Establishing an ongoing dialogue between industry and SEC to increase the flow of information and provide updates on developments.<sup>87</sup>

After the meeting, SEC Corporation Finance Division official Amy Starr emailed Corva:

[W]e wanted to express our great appreciation for your willingness to share with us today and on an ongoing basis. We may be interested in having further discussions with you about the [redacted] and the circumstances in which you may view a token as not being a security. If you have availability to chat perhaps later this week that would be great.<sup>88</sup>

The next day, at Berkeley University panel, Corva stated: “What we’re really focused on is . . . building an Alliance with other blockchain companies, law firms, . . . **and regulators**. We’ve had some talks with the folks at the SEC about this.”<sup>89</sup>

ConsenSys’s hope for an “alliance” with regulators wasn’t just empty talk. ConsenSys had a *second* meeting with Hinman and SEC staff on December 20, 2017, less than a week after the first.<sup>90</sup> Late the night before, Corva emailed a four-page white paper to the SEC, writing: “While

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<sup>81</sup> *Id.*

<sup>82</sup> <https://www.crypto-law.us/wp-content/uploads/2021/08/Exhibit-B-to-SEC-Motion-Redacted-Version-of-Hinman-Deposition-08172021.pdf> at 29-31.

<sup>83</sup> <https://www.documentcloud.org/documents/23896077-11-hinman-emails-intro-to-joe-lubin-and-consensys-information> at 3.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 20. When asked in a 2021 deposition whether he was familiar with the Alliance, Hinman claimed: “Since I left the SEC I became aware of it.” <https://www.crypto-law.us/wp-content/uploads/2023/06/Part-1.pdf> at 42. Hinman also claimed not to recall the slide deck. <https://www.crypto-law.us/wp-content/uploads/2021/08/Exhibit-B-to-SEC-Motion-Redacted-Version-of-Hinman-Deposition-08172021.pdf> at 33. The records regarding the December 20, 2017 meeting had not yet become public at the time of the deposition, and are not referenced in the Hinman deposition transcripts public at this time.

<sup>87</sup> <https://www.documentcloud.org/documents/23896077-11-hinman-emails-intro-to-joe-lubin-and-consensys-information> at 39.

<sup>88</sup> <https://storage.courtlistener.com/recap/gov.uscourts.nysd.551082/gov.uscourts.nysd.551082.831.62.pdf> at 5.

<sup>89</sup> See <https://x.com/digitalassetbuy/status/1436034898469470209> (emphasis added).

<sup>90</sup> <https://www.documentcloud.org/documents/23901361-12-hinman-emails-dec-20-2017-meeting-materials-from-consensys> at 1.

we think this [document] might be helpful to guide the conversation, we're certainly open to any format your side finds most useful to you."<sup>91</sup>

The white paper, titled "Exploring Tokens That May Not Be Securities," read: "In our view, whether a consumer token implicates the U.S. federal securities laws largely will depend on analyzing both the rights or other functionality a token provides its holder (i.e., its intrinsic properties), as well as other factors such as the manner of sale (i.e., its extrinsic properties)." <sup>92</sup> It outlined the idea of "Consumer Tokens" and "User Activity Tokens."<sup>93</sup>

Other than Corva's email, which along with ConsenSys's white paper was forwarded to Hinman the morning of December 20, 2017, the SEC has inexplicably produced no calendar invite or notation of who actually attended the meeting with Corva—either from the SEC or ConsenSys, the EEA LIWG, or the Brooklyn Project. Nor again has the SEC publicly produced any notes from the meeting.

After the meeting, Corva emailed Starr: "[M]any thanks for another great meeting. . . . [W]e're thrilled with the engagement and couldn't be happier to have a dialogue in terms of next steps. . . . Perhaps we can set another meeting in early January?"<sup>94</sup>

In the last week of December 2017, XRP surpassed Ether for a time as the second largest in the market.<sup>95</sup>

### CLAYTON'S REGULATORY CAPTURE

It is unknown who else at the SEC received ConsenSys's white paper, such as Clayton, or whether Clayton and Hinman discussed in late December 2017 or early January 2018 the ConsenSys meetings, at least one of which included Clayton's former associate at Sullivan & Cromwell, Patrick Berarducci, now Co-Chair of the Brooklyn Project.

On January 22, 2018, Clayton gave a speech at the Securities Regulation Institute in which he declared: "Market professionals, especially gatekeepers, need to act responsibly and hold themselves to high standards. To be blunt, from what I have seen recently, particularly in the initial coin offering ('ICO') space, they can do better."<sup>96</sup> Clayton specifically explained "ICOs where the lawyers involved appear to be, on the one hand, assisting promoters in structuring offerings of products that have many of the key features of a securities offering, but call it an 'ICO,' which sounds pretty close to an 'IPO.'" <sup>97</sup> Clayton concluded: "I have instructed the SEC staff to be on high alert for approaches to ICOs that may be contrary to the spirit of our securities laws and the professional obligations of the U.S. securities bar."<sup>98</sup>

Two days later, on January 24, 2018, Clayton spoke at Stanford University. Despite the harsh rhetoric in Clayton's public speeches, Perkins Coie partner Lowell Ness later recounted that after the Stanford speech, Clayton "made his way over to see Andreesen Horowitz the next morning."<sup>99</sup> Andreesen was the largest venture capital firm in the crypto space—and heavily invested in Ether. In 2016 they had joined Union Square Ventures and others in investing \$10 million in cryptocurrency hedge fund Polychain Capital.<sup>100</sup> Polychain Capital reportedly went

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2.

<sup>93</sup> *Id.*

<sup>94</sup> <https://storage.courtlistener.com/recap/gov.uscourts.nysd.551082/gov.uscourts.nysd.551082.831.62.pdf> at 10-11.

<sup>95</sup> <https://www.cnbc.com/2017/12/29/ripple-soars-becomes-second-biggest-cryptocurrency-by-market-cap.html>.

<sup>96</sup> <https://www.sec.gov/newsroom/speeches-statements/speech-clayton-012218>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> <https://x.com/digitalassetbuy/status/1440860750226935816>.

<sup>100</sup> <https://www.coindesk.com/markets/2016/12/09/a16z-usv-invest-10-million-in-blockchain-token-trading->

“all in” on Ether that year<sup>101</sup>—and in 2017 delivered a 2031% return.<sup>102</sup> In the spring of 2017 Andreessen secretly joined several of the same investors in backing cryptocurrency hedge fund MetaStable Capital, another investor in Ether.<sup>103</sup>

According to Ness, when Clayton visited Andreessen on January 25, 2018, he “invited Chris Dixon to round up the . . . industry players who were really kind of trying to do it the right way and ask for a couple of things: One, essentially, lay out in a very detailed written, footnoted memo what existing law says about utility tokens, and two, give us a proposal for where to go from here.”<sup>104</sup> It is unknown whether Clayton specifically discussed with Dixon Ether or Ethereum.

Representing Andreessen in all of its cryptocurrency investments was Lowell Ness at Perkins Coie—the firm in the EEA LIWG that had been working as counsel to the Enterprise Ethereum Alliance since its creation.<sup>105</sup> Thus, Ness would later recount, “I got the chance to be the one to write all that stuff [requested by Clayton]. . . . I pulled in Cooley [Godward, another law firm in the EEA LIWG] and I pulled in a couple other law firms so we’ve now got a nice little working group of law firms that are in the space that are doing this.”<sup>106</sup> Ness also involved the other venture capital firm heavily invested in Ether, Union Square Ventures. The group began calling themselves the “Venture Capital Working Group.”<sup>107</sup>

On February 6, 2018, the Senate Committee on Banking, Housing, and Urban Affairs held a hearing on virtual currencies. Clayton declared in his opening statement: “Proponents of [blockchain] technology assert that it will bring great efficiencies to our national and global economies, including our capital markets. I hope that it does. And the Commission looks forward to working with market participants who seek to bring efficiencies, including more effective oversight, to our markets.”<sup>108</sup> Clayton added: “A note for professionals in these markets: Those who engage in semantic gymnastics or elaborately structured exercises in an effort to avoid having a coin be a security are squarely within the crosshairs of our Enforcement Division.”<sup>109</sup>

Later, Senator Mark Warner stated: “[W]e are focusing a lot on Bitcoin . . . . But you have got a whole new platform called ‘Ethereum’ . . . . I am not sure what kind of assets those fall into? Are they potentially regulated within your realm?”<sup>110</sup> Clayton reiterated the basic definition of a security. Then Senator Warner asked: “[C]ertain ICOs the SEC has not stopped; others they have stopped. Are you going to go back and re-review the ones that have gone forward?” Clayton sidestepped the question.<sup>111</sup>

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firm; <https://siliconangle.com/2016/12/11/cryptocurrency-fund-polychain-capital-raises-10m-andreessen-horowitz-union-square>; <https://www.coindesk.com/markets/2017/04/17/millions-in-minutes-how-polychain-makes-sense-of-the-ico-wild-west>.

<sup>101</sup> <https://www.forbes.com/sites/stevenehrlich/2022/02/08/how-cryptos-original-bubble-boy-rode-ethereum-and-is-now-pulling-the-strings-of-the-defi-boom>.

<sup>102</sup> <https://qz.com/1593982/crypto-investors-andreessen-horowitz-and-polychain-are-heading-in-opposite-directions>.

<sup>103</sup> <https://fortune.com/2017/07/26/bitcoin-cryptocurrency-hedge-fund-sequoia-andreessen-horowitz-metastable>; <https://cointelegraph.com/news/leading-silicon-valley-vcs-sequoia-capital-and-andreessen-horowitz-invest-in-blockchain-hedge-fund>.

<sup>104</sup> <https://x.com/digitalassetbuy/status/1440860750226935816>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See [https://media.venturecapitaljournal.com/uploads/2018/04/safe\\_harbor\\_discussion\\_final.pdf](https://media.venturecapitaljournal.com/uploads/2018/04/safe_harbor_discussion_final.pdf). By contrast, Clayton told Ripple in an August 20, 2018 meeting that it was not a “proper forum” for discussing that Ripple was in “purgatory” due to uncertainty as to whether XRP was a security.

[https://storage.courtlistener.com/recap/gov.uscourts.nysd.551082/gov.uscourts.nysd.551082.831.135\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.nysd.551082/gov.uscourts.nysd.551082.831.135_1.pdf).

<sup>108</sup> <https://www.congress.gov/115/chrq/CHRG-115shrg28854/CHRG-115shrg28854.pdf> at 8.

<sup>109</sup> *Id.* at 9.

<sup>110</sup> *Id.* at 28.

<sup>111</sup> *Id.*

On February 14, 2018, ConsenSys deputy general counsel Berarducci gave a speech in which he stated:

We are exploring ways to enable industry participants to come up with codes of conduct, agree to codes of conduct, incentivize industry actors to follow rules that police the industry, and to identify frauds or people who are not following these rules. Because there could, potentially, be a cryptoeconomic incentive to follow these protocols, individuals would receive in exchange the ability to gain some scarce digital asset and further the goals of regulation. I think of this type of approach not necessarily as “self-regulation,” but, rather, “collaborative regulation.”<sup>112</sup>

In late March the Venture Capital Working Group set a meeting with Hinman and other SEC officials for March 28, 2018 to discuss the document Clayton had quietly requested from Andreesen Horowitz on January 25, 2018.

Two days in advance of the meeting, Ness sent the SEC the Venture Capital Working Group document, although the SEC has never made public any records regarding the transmittal. The document was titled “Token Sale Non-Exclusive Safe Harbor.”<sup>113</sup> The proposal’s introduction read:

We believe the law and guidance around what constitutes an investment contract should be clarified. We believe that the industry’s and the regulators’ interests are aligned in establishing clear rules and appropriate investor protections so that capital formation in blockchain technology is not derailed and development can continue to flourish in the United States.<sup>114</sup>

Yet the proposal only referenced one specific token: Ether. It stated in a footnote:

ETH is a good example of this type of protocol token that has become so decentralized it should not be deemed a security. For clarity, ETH is the protocol token for the Ethereum network, so this safe harbor provision would apply to ETH, but not necessarily to all ERC20 tokens running on top of the Ethereum network unless an ERC20 token is itself a protocol token.<sup>115</sup>

At least one Venture Capital Working Group member apparently disagreed with the footnote regarding Ether. In a conference later that year, Cooley partner Nancy Wotjas stated: “What’s interesting is, I don’t think Ether is decentralized. I think it’s fully functional, but I don’t think it’s decentralized.”<sup>116</sup>

The meeting between Hinman and other SEC officials and the Venture Capital Working Group took place on March 28, 2018.<sup>117</sup> The participants included individuals from Andreesen; Union Square Ventures, the other hedge fund with significant investment in Ether; the National Venture Capital Association; and attorneys from three firms: Enterprise Ethereum Alliance counsel and EEA LIWG member Perkins Coie (including document author Lowell Ness), EEA LIWG member Cooley Godward, and McDermott Will Emery.<sup>118</sup> Two law professors also joined by phone.<sup>119</sup>

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<sup>112</sup> <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=4022&context=clevstlrev>.

<sup>113</sup> [https://media.venturecapitaljournal.com/uploads/2018/04/safe\\_harbor\\_discussion\\_final.pdf](https://media.venturecapitaljournal.com/uploads/2018/04/safe_harbor_discussion_final.pdf).

<sup>114</sup> *Id.* at 1.

<sup>115</sup> *Id.* at 4 fn. 8.

<sup>116</sup> <https://x.com/digitalassetbuy/status/1443162434156511232>.

<sup>117</sup> [https://s3.documentcloud.org/documents/23896040/sec\\_emailrelease.pdf](https://s3.documentcloud.org/documents/23896040/sec_emailrelease.pdf) at 22.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

According to Ness, “The general reception I think we got when we visited the SEC . . . was actually really positive. And it was an interesting dichotomy between their public-facing . . . incredibly vituperative statements that they were making and this interesting . . . welcome that we got privately.”<sup>120</sup> Ness concluded: “I think they’re looking for industry to help solve this problem.”<sup>121</sup>

Just *one week* after Clayton received the written proposal he had requested from Andreessen Horowitz, he adopted its reasoning in an April 5, 2018 speech at Princeton University: “What we find in the regulatory world [is that] the use of a . . . token evolves over time. The use can evolve toward or away from a security.”<sup>122</sup> News publications later noted it was the first time “Clayton appeared to signal an openness to a fluid legal definition for digital tokens.”<sup>123</sup>

And on April 12, 2018, two weeks after the SEC met with the Venture Capital Working Group, Hinman emailed Lubin: “I greatly enjoyed meeting you and your team at our offices a couple of months ago. I was wondering if we could have a brief call in order to discuss the possibility of another meeting with you?”<sup>124</sup> Lubin responded asking whether the call should just be one-on-one or whether to include ConsenSys’s internal legal team “who have been in discussions with you and your colleagues.”<sup>125</sup> It is not clear from Lubin’s email or from the public records available whether Lubin was referencing additional discussions since the December 2017 meetings. Hinman replied: “Call is just to set up a possible meeting . . . to learn more about the Ethereum support network . . . I can give you more background on a call if you like.”<sup>126</sup>

The same day, on April 12, 2018, the SEC added XRP to its “Watch List,” a list of entities potentially subject to supplemental ethics rules.<sup>127</sup>

On April 18, 2018, Commissioner Pierce met with the Venture Capital Working Group, just as Hinman had.<sup>128</sup> That same day, *Politico* published the first public reporting of the Venture Capital Working Group’s March 26, 2018 proposal.<sup>129</sup> A story in *The New York Times* the next day titled “Venture Capitalists Seek ‘Safe Harbor’ for Virtual Currencies” first reported the March 28 meeting Andreessen Horowitz organized with the SEC.<sup>130</sup> According to the story:

Regulators have indicated in private meetings that they are considering whether virtual currencies — including Ether, the second most widely used digital token — should be categorized as a security, according to three people who have been in the meetings. That designation could cause a significant drop in the value of Ether.<sup>131</sup>

On April 23, 2018, Hinman had the call he had arranged with Lubin.<sup>132</sup> In the call,

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<sup>120</sup> <https://x.com/digitalassetbuy/status/1440860750226935816>.

<sup>121</sup> *Id.*

<sup>122</sup> <https://www.coindesk.com/markets/2018/04/05/sec-chief-touts-benefits-of-crypto-regulation>; *see also* <https://jrc.princeton.edu/news/sec-chairman-cryptocurrencies-and-initial-coin-offerings>.

<sup>123</sup> <https://www.politico.com/story/2018/04/18/venture-capital-firms-seek-regulatory-shelter-for-digital-token-startups-493293>.

<sup>124</sup> <https://www.documentcloud.org/documents/23901352-13-hinman-emails-apr-2018-hinman-approaches-lubin-for-call-about-ethereum-set-up-may-call-with-buterin> at 2.

<sup>125</sup> *Id.* at 1-2.

<sup>126</sup> *Id.* at 1.

<sup>127</sup> <https://casetext.com/case/sec-exch-commn-v-ripple-labs-inc-5>.

<sup>128</sup> [https://s3.documentcloud.org/documents/23896040/sec\\_emailrelease.pdf](https://s3.documentcloud.org/documents/23896040/sec_emailrelease.pdf) at 23.

<sup>129</sup> <https://www.politico.com/story/2018/04/18/venture-capital-firms-seek-regulatory-shelter-for-digital-token-startups-493293>.

<sup>130</sup> <https://www.nytimes.com/2018/04/19/technology/virtual-currency-securities.html>.

<sup>131</sup> *Id.*

<sup>132</sup> <https://www.documentcloud.org/documents/23901352-13-hinman-emails-apr-2018-hinman-approaches>.

Hinman apparently requested Lubin's assistance in setting up a meeting with Ethereum co-founder Vitalik Buterin.<sup>133</sup> It is unknown what further information Hinman provided Lubin, or whether Hinman and Lubin kept in touch after that. Yet from that date forward, Lubin spoke with great certainty about what the SEC might say about Ether.

On April 26, 2018, the House Committee on Appropriations' Financial Services and General Government Subcommittee had a hearing with Clayton. Clayton testified:

A pure medium of exchange, the one that's most often cited, is Bitcoin. As a replacement for currency, that has been determined by most people to not be a security. Then there are tokens, which are used to finance projects. I've been on the record saying there are very few—there's none that I've seen—tokens that aren't securities.<sup>134</sup>

On April 28, 2018, the House Committee on Financial Services had a hearing with Hinman. Representative Tom Emmer asked Hinman: "How can we improve the regulatory clarity for entrepreneurs here in the United States so that their contribution to something that may not be a security will not see enforcement actions by the SEC?"<sup>135</sup> Hinman responded: "One of the things we are doing is **meeting with the participants** who have these ideas, **that think that they may have a token that shouldn't be regulated as a security**, to work through with them how that may be structured."<sup>136</sup> Yet despite XRP being the third largest token, the SEC was having no such meetings with Ripple regarding XRP, which it had just added to its Watch List that month.

On May 1, 2018, *The Wall Street Journal* added to the reporting that regulators were looking at Ether: "Bitcoin has largely escaped government oversight, but regulators are examining whether other widely traded cryptocurrencies should be regulated as securities, according to people familiar with the matter."<sup>137</sup> The story continued:

Some regulators think ether is in a "gray zone," but believe its creation in 2014 was probably an illegal securities sale, the people said. Silicon Valley backers such as venture-capital firm Andreessen Horowitz disagree, saying no particular person or entity stands behind ether or is responsible for driving its value.<sup>138</sup>

Yet on May 3, 2018, an SEC staffer emailed Hinman an outline of a speech titled "When does a security stop being a security," with the subject line: "First stab at the digital asset security morphing issue."<sup>139</sup>

On May 10, 2018, Fox News Correspondent Charlie Gasparino tweeted: "Through an organization known as the 'The Brooklyn Project' . . . Blockchain/Crypto business seeks to create the first Self Regulatory Organization sanctioned by [the SEC]."<sup>140</sup> He repeated the information on *The Claman Countdown*. In response, the Brooklyn Project tweeted: "Big correction: We are building frameworks and tools to help the industry self-regulate based on voluntary consent and inclusive, transparent coordination. Not SEC sanctioned, and no current plans for a sanctioned organization."<sup>141</sup> Seven minutes later Gasparino tweeted back that Andrew Keys had "said the

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[lubin-for-call-about-ethereum-set-up-may-call-with-buterin](#) at 4.

<sup>133</sup> *See id.* at 6.

<sup>134</sup> <https://www.coincenter.org/sec-chairman-clayton-bitcoin-is-not-a-security>.

<sup>135</sup> <https://www.congress.gov/115/chrq/CHRG-115hhrq31435/CHRG-115hhrq31435.pdf> at 25.

<sup>136</sup> *Id.*

<sup>137</sup> <https://www.wsj.com/articles/worlds-second-most-valuable-cryptocurrency-under-regulatory-scrutiny-1525167000>.

<sup>138</sup> *Id.*

<sup>139</sup> [https://storage.courtlistener.com/recap/gov.uscourts.nysd.551082/gov.uscourts.nysd.551082.831.136\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.nysd.551082/gov.uscourts.nysd.551082.831.136_1.pdf).

<sup>140</sup> <https://x.com/CGasparino/status/994660857362763776>.

<sup>141</sup> [https://x.com/TheBKP\\_Official/status/994672145874718720](https://x.com/TheBKP_Official/status/994672145874718720).

goal was to be an SEC sanctioned self regulator.”<sup>142</sup>

On May 17, 2018, Lubin said in an interview: “We’re very confident that we understand how to do that without regulatory bodies considering those tokens securities.”<sup>143</sup>

On May 21, 2018, ex-JPMorgan official Tom Lee stated on CNBC that “Ethereum is likely to be viewed as a utility token” by the SEC (and therefore not a security).<sup>144</sup>

On May 22, 2018, ConsenSys general counsel Matt Corva emailed Vitalik Buterin and several three other individuals from the Ethereum Foundation, introducing them to Hinman’s Senior Special Counsel Michael Seaman and confirming that all would be on a video call the next morning.<sup>145</sup> Corva copied EEA LIWG Chair Wright and Brooklyn Project Co-Chair Berarducci, writing “one of us would like to join if the Staff is amenable with us serving as a familiar face for both sides . . . .”<sup>146</sup> The SEC apparently provided a list of questions in advance of the call.<sup>147</sup>

But the next morning, one of the Ethereum Foundation board members emailed the group: “Our sincerest apologies, but due to unforeseen circumstances, we’re going to need to postpone this video conference. We’ll reach out again as soon as we can reschedule.”<sup>148</sup> Corva responded to Seaman alone, which Seaman forwarded to Hinman:

My apologies . . . . I thought we were all systems go. Let us do some gentle digging on what happened and see what we can try to do to get this back on course. If I had to guess, someone on their side is too caught up in a world of WSJ and CoinDesk stories and they haven’t had the personal interaction we’ve had with Staff to appreciate the thoughtful process . . . . Please send my apologies to Bill and the rest of the team. We know this is important and remain committed to being as helpful as we can.<sup>149</sup>

The following day, on May 24, 2018, Lubin was interviewed about “the conversations you’re having with regulators at the moment.”<sup>150</sup> He declared:

We’re mostly focused on securities law. We are able to issue investor tokens, or tokenized securities. We’re also able to issue consumer utility tokens that wouldn’t be considered securities, and we’re focused on getting very clear definitions and helping regulators around the world understand . . . . As long as these projects are selling tokens to token buyers that make use of the token, and they’re not selling in large quantities to speculators who are hoping to make money from the actions of others, that is a good clean definition of a consumer token.<sup>151</sup>

Similarly, in a May 28, 2018 interview, Lubin laid out an enormous amount of detail about “the SEC’s opinion” that the public was not privy to:

We have many different projects that are consumer utility tokens and would not be considered securities. Even in this context, at this point in time there’s a lot of

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<sup>142</sup> <https://x.com/CGasparino/status/994673687382151168>.

<sup>143</sup> <https://x.com/digitalassetbuy/status/1435260988522213383>.

<sup>144</sup> <https://x.com/digitalassetbuy/status/1432328512745189380>.

<sup>145</sup> <https://www.documentcloud.org/documents/23901353-14-hinman-emails-may-2018-call-w-buterin-canceled-ask-to-reschedule> at 3-4.

<sup>146</sup> *Id.*

<sup>147</sup> See <https://www.documentcloud.org/documents/23901355-16-hinman-emails-emails-confirming-jun-8-2018-call-with-buterin-6-days-before-speech> at 2.

<sup>148</sup> *Id.* at 2.

<sup>149</sup> *Id.* at 1.

<sup>150</sup> <https://x.com/digitalassetbuy/status/1428033733626638339>.

<sup>151</sup> *Id.*



uncertainty and doubt that has been raised by regulators around the world. The SEC has made certain pronouncements about consumer tokens or utility tokens. Early statements were to the effect that all these tokens are probably securities. . . . So the SEC has this dilemma . . . . The problem is that there are a lot of great projects, there are a lot of bad projects, a lot of fraudulent projects, a lot of projects that are selling what could and should be good well-constructed consumer utility tokens, but they're selling them to investors in enormous quantities, in quantities far greater than they could actually use. So they're really selling them as an investment. And so, the SEC's opinion, from what we've discerned, is that those things constitute securities. So we have a framework that enables us to sell consumer utility tokens, not in enormous quantities, not with discounts for large investors, not to investors—you essentially have to be a technically-accredited token buyer. You have to answer questions, you have to demonstrate that you will use these tokens on these platforms. And so that's a good clean way to sell a token that represents some sort of access or consumption of a resource on these new business models, these network business model platforms.<sup>152</sup>

Lubin also seemed to call for specific action from the SEC: “We certainly need bodies like the SEC to scare many projects straight, to create the context of concern so that many different projects think twice and do their legal homework before releasing a token.”<sup>153</sup>

#### **HINMAN ANNOUNCES ETHEREUM'S FREE PASS**

On Monday, June 4, 2018, Hinman sent an email with the subject line “Ether speech” to SEC senior staff, including Clayton's chief of staff Lucas Moskowitz and deputy chief of staff Sean Memon.<sup>154</sup> In the email, Hinman wrote:

Attached please find a draft of the speech I had mentioned, which suggests that we do not need to see a need to [sic] regulate Ether, as it is currently offered, as a security. That language is in brackets and would be used if we are all in agreement. We also have a call with Buterin later this week to confirm our understanding of how Ethereum Foundation Operates.<sup>155</sup>

His email to colleagues did not identify his financial interest in Simpson Thacher or its participation in the EEA LIWG.

The draft speech began:

There has been considerable discussion recently in the press and at legal conferences regarding whether a digital asset offered as a security can over time become something other than a security. . . . I think a better line of inquiry is: “Can a digital asset or token that was originally offered in a securities offering ever be sold in a manner that does not constitute a securities offering?”<sup>156</sup>

The key language about Ether “in brackets” in the draft read: “[B]ased on our understanding of the present state of Ether and the Ethereum network, regulating Ether as a security does not seem to be warranted.”<sup>157</sup> Again, Hinman's speech did not identify his financial interest in Simpson Thacher.

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<sup>152</sup> <https://x.com/digitalassetbuy/status/1435765639730315265>.

<sup>153</sup> <https://x.com/digitalassetbuy/status/1435931389371850757>.

<sup>154</sup> <https://www.documentcloud.org/documents/23901354-15-hinman-emails-june-4-2018-hinman-circulates-draft-speech-and-says-have-call-with-but-re-ether>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2.

<sup>157</sup> *Id.* at 7.

On Tuesday, June 5, 2018, Memon forwarded the draft speech to Clayton.<sup>158</sup>

That same day, Mike Novogratz, a former roommate and close friend of Lubin’s who bought 500,000 ETH from Buterin in 2015,<sup>159</sup> stated at a conference: “I’d bet dimes to donuts [the SEC] will say ‘Ethereum probably was a security, but it’s not anymore.’”<sup>160</sup>

On Friday, June 8, 2018, Hinman and other SEC officials had a video conference with Buterin and other Ethereum Foundation officials, as well as Ethereum Foundation their attorneys.<sup>161</sup> Although the SEC has not made public its transmittal, the SEC had provided Buterin in advance with a list of questions, which the SEC agreed to stick to in the call.<sup>162</sup>

The SEC’s first question was about the early days of Ethereum development—something Hinman brushed aside in his speech.<sup>163</sup> The other questions were more technical, but the final question was extremely subjective: “Do you feel that there is a good correlation between the price/value of Ether and the value of its utility?”<sup>164</sup>

After the Ethereum Foundation meeting, Hinman and Corporation Finance Division officials apparently met that afternoon with the SEC’s Office of General Counsel (“OGC”).<sup>165</sup>

Near the end of the day, Hinman’s Senior Special Counsel Michael Seaman emailed OGC attorneys the most recent version of Hinman’s draft speech, writing: “Based on our understanding of the present state of Ether and the Ethereum network and how it operates, regulating the offer and sale of Ether as a security would not appear to further the policy objectives of the securities laws.”<sup>166</sup>

OGC attorney Laura Jarsulic emailed in response: “Attached are our comments for the draft that you circulated last week . . . . We haven’t updated the comments to take into account what we learned from you today.”<sup>167</sup> Regarding the statement on Ether in Hinman’s draft speech, OGC wrote in the document’s comments: “We are still discussing this internally. We also want to hear what [Corporation Finance] learns from its anticipated conversation with Buterin.”<sup>168</sup>

On Monday, June 11, Coinbase unexpectedly announced it would be listing Ethereum Classic on its exchange.<sup>169</sup> As Forbes Magazine noted four days later: “Coinbase, which has been careful not to list any cryptocurrencies that might be a security, would likely only add Ethereum Classic if it was sure Ethereum and its kin had officially escaped the label.”<sup>170</sup>

On Tuesday, June 12, SEC OGC attorney Laura Jarsulic emailed Stephanie Szczepanik comments on the Friday draft of Hinman’s speech.<sup>171</sup> The comment regarding Ether read: “We

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<sup>158</sup> <https://www.crypto-law.us/wp-content/uploads/2023/06/830-151.pdf>.

<sup>159</sup> <https://blockchain.news/news/mike-novogratz-500-000-ethereum-vitalik-buterin-2015>.

<sup>160</sup> <https://x.com/digitalassetbuy/status/1435217171215486980>.

<sup>161</sup> See <https://www.documentcloud.org/documents/23901355-16-hinman-emails-emails-confirming-jun-8-2018-call-with-buterin-6-days-before-speech> at 1.

<sup>162</sup> See *id.* at 2.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See <https://www.crypto-law.us/wp-content/uploads/2023/06/156.pdf> at 2.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 8.

<sup>169</sup> <https://www.coinbase.com/blog/adding-ethereum-classic-support-to-coinbase>.

<sup>170</sup> <https://web.archive.org/web/20180615233905/https://fortune.com/2018/06/15/the-ledger-ethereum-cofounder-on-sec-blessing-tethers-bitcoin-domination-ripple-vs-stellar-lumens/>; see also <https://modernconsensus.com/cryptocurrencies/ethereum/coinbase-ethereum-classic-sec>.

<sup>171</sup> <https://www.crypto-law.us/wp-content/uploads/2023/06/830-152.pdf>.

still have reservations about including a statement directly about Ether in the speech. Even with the caveats in the sentence, it seems it would be difficult for the agency to take a different position on Ether in the future.”<sup>172</sup>

On Wednesday, June 13, the SEC circulated a memo discussing whether XRP was a security.<sup>173</sup> To this day, the memo has not been made public.

On Thursday, June 14, Hinman delivered his speech at the Yahoo Finance All Markets Crypto Summit in San Francisco, California.<sup>174</sup> As Lowell Ness would later note, the speech “tracks my [March 26] memo pretty well”;<sup>175</sup> it has ultimately come to be known as Hinman’s “free pass” speech for Ether.<sup>176</sup> Once again, Hinman failed to disclose in the speech his financial interest in a member of the Enterprise Ethereum Alliance.

When Lubin followed Hinman on stage, the interviewer asked Lubin, “What do you think’s going to happen to Ripple with this new ruling?” Lubin’s response suggested he had read parts of Hinman’s speech in advance: “I don’t know the answer to that. . . . I wasn’t able to read through Bill’s entire speech, and I wasn’t here. I don’t know . . . if he spoke about XRPs at all . . . .” When the interviewer clarified, “He didn’t specifically mention anything about it,” Lubin replied, “That’s interesting.”<sup>177</sup>

The same day, Hinman repeated his points in a press interview.<sup>178</sup> Ether’s value rose 11% by close of day.<sup>179</sup>

On June 21, 2018, Clayton appeared for an oversight hearing before the House Committee on Financial Services. In his testimony, Clayton specifically endorsed Hinman’s speech regarding Ether, stating: “Our Corporation Finance Division Director recently further outlined the approach staff takes to evaluate whether a digital asset is a security.”<sup>180</sup>

Four days later, on June 25, 2018, Andreesen Horowitz—from which Clayton had solicited the rationale Hinman ultimately used in his “free pass” speech—announced the launch of a \$350 million venture fund that would invest exclusively in crypto companies and protocols.<sup>181</sup> The fund was founded and led by Chris Dixon,<sup>182</sup> the Andreesen partner Clayton made the request of on January 25, 2018.

### HINMAN’S MEETING WITH LIN

As described above, Hinman continued throughout his tenure at the SEC to disregard the ethics counsel he had received. Documents demonstrate meetings with Simpson Thacher partner Joshua Bonnie on September 6, 2018; September 18, 2019; and September 17, 2020.

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<sup>172</sup> *Id.* at 11.

<sup>173</sup> <https://x.com/JohnEDeaton1/status/1447400538308481030>.

<sup>174</sup> <https://www.sec.gov/newsroom/speeches-statements/speech-hinman-061418>.

<sup>175</sup> <https://x.com/digitalassetbuy/status/1695051510655168947>.

<sup>176</sup> See <https://www.crypto-law.us/the-ethereum-free-pass-fair-notice-and-the-fight-ahead>.

<sup>177</sup> <https://x.com/digitalassetbuy/status/1439180890391842818>.

<sup>178</sup> <https://www.youtube.com/watch?v=CF-0LeL8pk>.

<sup>179</sup> <https://finance.yahoo.com/news/u-sec-official-says-ether-202107751.html>.

<sup>180</sup> <https://financialservices.house.gov/uploadedfiles/hhrg-115-ba00-wstate-iclayton-20180621.pdf> at 15.

Similarly, in an August 29, 2018 speech in Nashville, Tennessee, Clayton stated: “Bill [Hinman] recently outlined the approach we take to evaluate whether a digital asset is a security, and I encourage you to take a look at Bill’s speech.” <https://x.com/nerdnationunbox/status/1485807893895131139?s=12>. The SEC transcript of the speech changed Clayton’s statement from “the approach we take” to “the approach *staff* takes.” See <https://www.sec.gov/newsroom/speeches-statements/speech-clayton-082918>.

<sup>181</sup> <https://a16z.com/introducing-a16z-crypto>.

<sup>182</sup> <https://a16z.com/author/chris-dixon>; <https://www.nytimes.com/2018/06/27/business/dealbook/blockchain-stars.html>.

Another of Hinman's partners at Simpson Thacher, Chris K.H. Lin from the firm's Hong Kong office, represented Canaan, Inc., a Chinese company producing cryptocurrency mining equipment primarily for Bitcoin and Ether (not XRP). On July 23, 2019, Lin confidentially submitted a draft registration statement to the SEC for a U.S. IPO.<sup>183</sup>

On the morning of August 5, 2019, Lin emailed Hinman requesting a meeting on August 21. Lin wrote: "I thought I should pay you a visit while I am in town to report what is going on in China." Hinman forwarded the email to several people in his office that morning, one of whom replied: "To clarify – is this a meeting you want to take? You have time and I can set it up with Chris." Hinman responded, "I will reply to him."

On the morning of August 19, 2019, Lin sent Hinman another email requesting to meet the afternoon of August 22.<sup>184</sup> Hinman confirmed the appointment at the SEC building. That same day, the SEC issued correspondence to Canaan requesting additional documents related to their registration.<sup>185</sup>

SEC visitor logs confirms that Lin arrived at 3:10 PM on August 22, 2019.<sup>186</sup> Given his financial interest in Simpson Thacher, it is difficult to imagine how Hinman would not have known that this meeting violated his ethics agreement. Canaan's November 21, 2019 IPO on NASDAQ would raise \$100 million.<sup>187</sup>

## SEC INVESTIGATION OF RIPPLE AND XRP

In February 2020, press accounts reported that JPMorgan was in talks with ConsenSys regarding ownership of JPMorgan's Ethereum-based product Quorum.<sup>188</sup> The deal closed on August 25, 2020,<sup>189</sup> with Sullivan & Cromwell representing ConsenSys.<sup>190</sup> But according to a later lawsuit, on August 14, 2020, ConsenSys transferred "fundamental intellectual property and subsidiaries" to a new entity in which JPMorgan had a 10% stake.<sup>191</sup>

December 4, 2020 was Hinman's last day at the SEC.<sup>192</sup> On January 12, 2021, Simpson Thacher announced Hinman's return as a partner.<sup>193</sup> Hinman had received approximately \$5.6 million from Simpson Thacher while serving as an SEC official.<sup>194</sup>

On December 16, 2020, *Bloomberg* published an article titled "Bitcoin Whale Emerges

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<sup>183</sup> <https://www.sec.gov/Archives/edgar/data/1780652/000095012319006580/filename1.htm>; see also <https://www.coindesk.com/markets/2019/11/14/bitcoin-miner-maker-canaan-sets-100-million-target-for-us-ipo>.

<sup>184</sup> <https://s3.documentcloud.org/documents/23896182/3-2019-08-19-22-chris-lin-hinman-email-and-arrival.pdf>; see also <https://www.law360.com/articles/1219889>.

<sup>185</sup> <https://www.sec.gov/Archives/edgar/data/1780652/000000000019012633/filename1.pdf>.

<sup>186</sup> <https://s3.documentcloud.org/documents/23896182/3-2019-08-19-22-chris-lin-hinman-email-and-arrival.pdf> at 3.

<sup>187</sup> <https://www.bloomberg.com/news/articles/2019-11-21/bitcoin-mining-company-canaan-raises-90-million-in-u-s-ipo>.

<sup>188</sup> <https://www.reuters.com/article/us-jp-morgan-blockchain-exclusive/exclusive-jpmorgan-in-talks-to-merge-blockchain-unit-quorum-with-startup-consensys-sources-idUSKBN2051AW>; see also <https://cryptobriefing.com/jpmorgan-lead-consensys-funding-round-with-20-million-investment>.

<sup>189</sup> <https://consensys.io/blog/consensys-acquires-jpm-quorum>.

<sup>190</sup> <https://www.sullcrom.com/About/News-and-Events/Highlights/2020/September/SC-Advises-ConsenSys-in-Acquiring-Quorum-Enterprise-Blockchain-Platform-from-JPMorgan>.

<sup>191</sup> <https://www.prnewswire.com/news-releases/blockchain-company-consensys-faces-multi-billion-dollar-audit-as-shareholders-claim-board-breaches-fiduciary-duties---attributed-to-arthur-falls-301493433.html>; <https://bitcoinist.com/ethereum-consensys-secretly-sold-business-jp-morgan>; <https://protos.com/consensys-lawsuit-jpmorgan-owns-critical-ethereum-infrastructure>.

<sup>192</sup> <https://www.sec.gov/newsroom/speeches-statements/statement-bill-hinman-120420>.

<sup>193</sup> <https://www.stblaw.com/docs/default-source/related-link-pdfs/bill-hinman-rejoins-simpson-thacher-2021.pdf>.

<sup>194</sup> <https://www.businessinsider.com/sec-simpson-partner-pay-biden-golden-parachutes-2021-1>.

With \$1 Billion, Alan Howard’s Backing.”<sup>195</sup> It reported that \$2.5 billion hedge fund One River Asset Management had established a new One River Digital Asset Management and quietly bought more than \$600 million in Bitcoin and Ether in November 2020—with commitments that would bring those holdings to \$1 billion by early 2021.<sup>196</sup>

On December 17, 2020, former SEC Commissioner Joseph Grundfest sent the SEC a letter stating his view that “a decision to advance enforcement proceedings at this time is highly problematic[.]”<sup>197</sup> Grundfest noted:

The staff has articulated no material distinction between the operation of Ether and of XRP that is relevant to the application of the federal securities laws. Imposing securities law obligations on XRP while leaving Ether untouched raises fundamental fairness questions about the exercise of Commission discretion. . . . Ether and XRP should be treated similarly.<sup>198</sup>

On December 22, 2020, the SEC filed a lawsuit against Ripple alleging that its XRP cryptocurrency was a security.<sup>199</sup> The value of XRP fell 25% immediately after the announcement of the SEC’s lawsuit.

Twelve hours later, on December 23, 2020, Clayton resigned as SEC Chairman.<sup>200</sup> On March 29, 2021, One River Assets revealed it had hired Clayton as an advisor.<sup>201</sup>

On January 12, 2021, the SEC announced that Marc Berger, Acting Director of the Enforcement Division that brought the lawsuit against Ripple, would depart that month.<sup>202</sup> On April 15, 2021, Simpson Thacher announced that it had hired Berger.<sup>203</sup>

### **EMPOWER OVERSIGHT REFERRAL TO SEC OIG**

Empower Oversight filed its first FOIA request with the SEC on August 16, 2021.<sup>204</sup> The SEC failed to properly respond to FOIA requests, forcing Empower Oversight to file in December 2021 the first of several lawsuits against the SEC to force its compliance with FOIA.<sup>205</sup>

In February and March 2022, the SEC finally produced some 1,300 pages of records to Empower Oversight. The records revealed Hinman’s direct financial interest.

Accordingly, on May 9, 2022, Empower Oversight wrote to the SEC OIG requesting a comprehensive review of the SEC’s ethics officials’ failure to properly manage conflicts of interest regarding cryptocurrency issues.<sup>206</sup> Specifically, the letter asked that the SEC OIG:

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<sup>195</sup> <https://www.bloomberg.com/news/articles/2020-12-16/bitcoin-whale-surfaces-with-1-billion-and-alan-howard-s-backing>.

<sup>196</sup> *Id.*

<sup>197</sup> <https://www.crypto-law.us/wp-content/uploads/2021/12/FOIA-12092020-Grundfest-Ltr-to-SEC-Commsnrs-Copy.pdf>.

<sup>198</sup> *Id.* at 3.

<sup>199</sup> <https://www.sec.gov/files/litigation/complaints/2020/comp-pr2020-338.pdf>; *see also* <https://www.sec.gov/newsroom/press-releases/2020-338>.

<sup>200</sup> <https://www.sec.gov/newsroom/speeches-statements/clayton-2020-12-23>.

<sup>201</sup> <https://www.bloomberg.com/news/articles/2021-03-29/ex-sec-chairman-clayton-to-advise-brevan-backed-firm-on-crypto>.

<sup>202</sup> <https://www.sec.gov/newsroom/press-releases/2021-5>.

<sup>203</sup> [https://www.stblaw.com/docs/default-source/related-link-pdfs/marc-berger-to-join-simpson-thacher\\_2021.pdf](https://www.stblaw.com/docs/default-source/related-link-pdfs/marc-berger-to-join-simpson-thacher_2021.pdf).

<sup>204</sup> <https://empowr.us/empower-oversight-seeks-information-on-conflicts-of-interest-in-cryptocurrency-at-sec>.

<sup>205</sup> <https://empowr.us/empower-oversight-sues-sec-for-access-to-foia-documents-amid-crypto-conflict-of-interest-concerns>.

<sup>206</sup> <https://empowr.us/wp-content/uploads/2022/05/2022-5-9-JF-to-SECOIG-Ethics-Office-Referral.pdf>.

- 1) Understand the degree to which the conflicts involving Hinman and Clayton exacerbated the perception that the SEC’s enforcement actions have selectively targeted some cryptocurrencies while giving others a free pass;
- 2) Explain to the public how the SEC’s Ethics Office failed to effectively ensure compliance with its clear directives; and
- 3) Evaluate the SEC’s policies and procedures to identify ways to more effectively monitor compliance with ethics guidance.

On January 31, 2024, an SEC FOIA official informed Empower Oversight that the SEC OIG had authorized disclosing that it was in the final stages of an investigation into the matter.<sup>207</sup>

On July 15, 2024, Empower sent another letter to the SEC OIG urging it to ensure that its investigation’s scope included former SEC Chairman Jay Clayton, given the financial ties that may have influenced his actions.<sup>208</sup> The letter also asked for clarification about whether the SEC FOIA official accurately represented the status SEC OIG investigation.<sup>209</sup> To date, the SEC OIG has not responded.

## CONCLUSION

The American people rely on public officials to ensure their decisions are made based on the interests of the public. Congress has established criminal conflict of interest laws to prevent self-interested dealing, and they are accompanied by a host of ethics regulations promulgated by the Office of Government Ethics.

However, if conflict of interest laws and regulations can simply be ignored, regulators can use their public office to financially benefit themselves and their associates while harming their competitors. Government regulators should not be picking winners and losers *at all* in a free market—much less in a manner that benefits themselves.

Given the seriousness of these apparent conflicts of interest and the importance of the public being able to trust that the SEC can regulate the cryptocurrency sector impartially in the future, we respectfully urge that your committees request from the SEC OIG:

1. The current status of the SEC OIG’s investigation;
2. If not completed, an expected timeline for the completion of the report; and
3. If completed, an unredacted copy of the report.

Thank you for your time and attention to these important issues.

Cordially,

/Tristan Leavitt/  
Tristan Leavitt

President  
Empower Oversight

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<sup>207</sup> <https://empowr.us/confirmed-sec-inspector-general-in-final-stages-of-investigation-on-crypto-conflicts-referred-by-empower-oversight>. The SEC official proposed that Empower accept a copy of the SEC OIG report with “appropriate redactions” in lieu of searches in response to particular FOIA requests.

<sup>208</sup> <https://empowr.us/empower-oversight-presses-SEC-OIG-on-long-awaited-crypto-conflicts-probe>.

<sup>209</sup> <https://empowr.us/wp-content/uploads/2024/07/2024-07-15-TL-to-SEC-OIG-Clayton-1.pdf>.