Broker-Dealers

SEC walks fraught beat as 'crypto-cop'

SEC Chairman says he welcomes crypto-currencies but investors have to come first.

By **Bill Myers** - 1 day ago

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"Trust," longtime DC pundit **David Gergen** once said, "is the coin of the realm in politics."

As long as **SEC** Chairman **Jay Clayton** has his way, trust is going to be behind any other coins of the realms, too. The world's cryptocurrency market has exploded—there are now more than 2,000 companies offering virtual assets, and the 10 largest are valued at more than $200 billion—but Clayton and his colleagues have been reluctant to put their own seal of approval upon them.

Just last week, for instance, RCW reported that the Commission denied **Cipher Technologies'** second application to register a closed-end bitcoin fund because, in the SEC's words, "we disagree that bitcoin is a security" (*RCW*, Oct. 24, 2019). In other actions, though, the Commission has come down hard against initial coin offerings, without alleging fraud, that has some observers feeling that the agency's regulating cryptocurrencies as a security (*RCW*, April 26, 2018).

'Have at it'

Clayton says he's not sending mixed signals. "The promise of crypto-currency… is really significant because if you look at the international payments system, it's a system with a lot of drag," he said, speaking at the **2019 Securities Enforcement Forum** in Washington Oct. 23. "If you could use technology to make our processes more efficient while maintain investor protection… please have at it."

What Clayton's worried about above all, he says, is that the craze for virtual coins doesn't leave investors holding the all-too-real bag. "You may get to bypass some frictions of the market" with cryptocurrency, "but you don't get to bypass the rights of investors," he said.

Anarchy

That may seem nuanced on its face, but it's made the SEC the "most effective crypto-police force in the world," says **John Reed Stark**, a former Commission official who now runs his own consulting practice.

Companies paid $50 million in cryptocurrency just to buy off ransomware last year, Stark says—"it's anarchy, the way these things are priced and how they're done"—and the SEC is using its "extraordinary weaponry" to urge the markets to go slowly and carefully.

Few have challenged the SEC frontally on its handling of digital assets. An exception has been **Kik Interactive**, a Canadian cryptocurrency company the Commission sued earlier this year over its $100 million initial coin offering. **Ken Lench**, a partner with **Kirkland & Ellis**, is representing Kik and he appeared at the same conference with Stark and Clayton.

Open questions

Lench says that the SEC has still left a lot of questions unanswered. Kik wasn't issuing a currency so much as "a token" for its unique digital ecosystem, which shouldn't be subject to securities regulations, claims Lench.

"You have to make sure that people know what the rules are. Right now, there's some uncertainty," he says. "I think there's a real danger if the guidance isn't clear what you can do."

Nicole Moran, a consultant with **Cornerstone Research**, says the question over whether an offering is a "token" or a security is the most important ones for her clients. But she adds that—in part thanks to heightened regulatory scrutiny—the cryptocurrency market seems to have peaked, anyway.