

# Crypto and Securities

BY DECLAN HARTY AND ROSMERY IZAGUIRRE AND GRANT SCHWAB | 07/19/2023  
05:00:00 AM EDT

## PRO POINTS

- **The Securities and Exchange Commission is clashing with the cryptocurrency industry over whether** the thousands of tokens trading today need to be treated in the same vein as stocks and bonds in the U.S.
- **Led by Chair Gary Gensler, the SEC has waged a sweeping enforcement campaign against the** market on the belief that many of the biggest players such as Binance and Coinbase are flouting the law by not registering with the agency as securities, which would place them under strict regulation.
- **Crypto executives and lawyers are refusing to meet the SEC's demands. They argue digital assets** are entirely different from securities and in need of new rules from Congress. House Republicans — and some Democrats — are attempting to push through legislation that would clarify crypto's place.
- **Up until mid-July, the SEC had a spotless record in the courts and through settlements defending** its position. But a federal judge's recent decision challenging some of the agency's power over crypto has given the market new hope.

## HOW WE GOT HERE

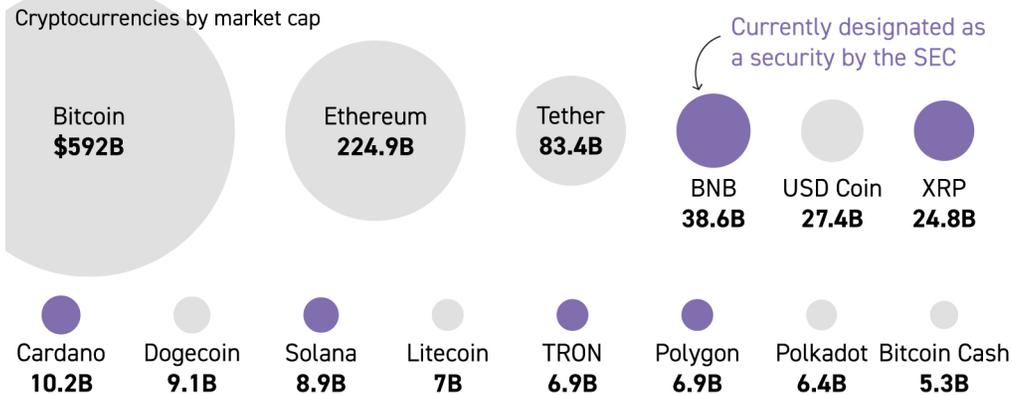
For the better part of the last decade, the Securities and Exchange Commission has argued that thousands of tokens trading in the cryptocurrency market must be treated no differently than stocks and bonds for the protection of investors.

The Gary Gensler-led agency says that in most cases the assets are a type of security known as an investment contract. Using a three-pronged standard called the Howey Test, the SEC has explicitly alleged that some of the market's biggest tokens, such as Solana, Cardano and Polygon, are securities. In turn, the agency says crypto should already be operating under the same rules that govern most of the financial industry's biggest players and the markets that millions of investors around the world trade in every day.

The crypto industry's refusal to register has sparked a flurry of enforcement actions from the SEC over the past year against companies like Binance, Coinbase and Kraken.

Executives and lawyers say that crypto tokens, which are built on a type of distributed ledger technology known as blockchain, are novel and in need of new specific rules from Congress. The SEC has acknowledged that some tokens are not securities, namely Bitcoin, the world's largest. Some say most crypto tokens are commodities and could be better overseen by the Commodity Futures Trading Commission, a far smaller agency in charge of U.S. derivatives markets. The SEC's regulations for financial middlemen dealing in securities, meanwhile, could negate the benefits of crypto entirely, they warn. Fees would spike, trades would take longer and the exchanges making it all possible would need to unsnarl their businesses – a possibly fatal move for the companies.

### Largest cryptocurrencies are not securities, per SEC



Note: As of 2:56 p.m. on July 11, 2023  
 Source: Coinmarketcap.com

The courts have found in favor of the SEC in the vast majority of crypto cases. But the industry landed a big win in July, when a federal judge in New York ruled against the SEC in a case over crypto company Ripple Labs's XRP token – a decision that has reignited a power grab over the future of crypto regulation and renewed calls for Congress to intervene.

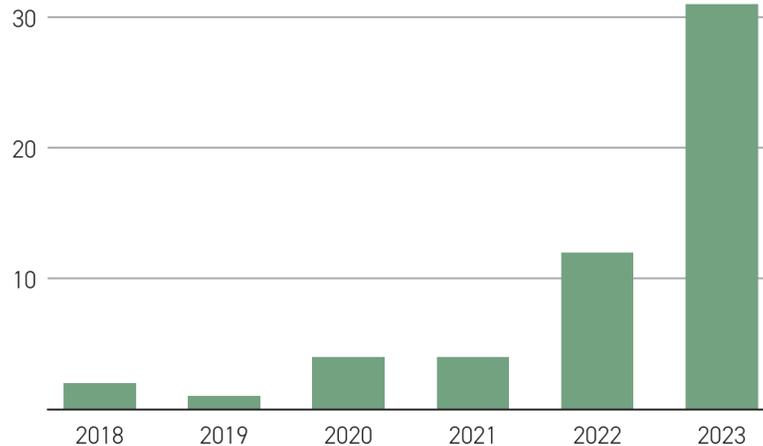
Lawmakers – mostly Republicans though some Democrats as well – have voiced sympathy for industry concerns about the SEC's posture toward crypto.

House Financial Services Chair [Patrick McHenry](#) (R-N.C.) and Agriculture Chair [G.T. Thompson](#) (R-Pa.) are pushing legislation to erect new rules around the market that would, among other things, [give crypto tokens an off-ramp from SEC regulation](#) in favor of the CFTC if decentralized enough.

Sens. [Cynthia Lummia](#) (R-Wyo.) and [Kirsten Gillibrand](#) (D-N.Y.) have similarly proposed to make the CFTC the chief crypto overseer.

## SEC on track for most aggressive year yet in naming cryptocurrencies as securities

Cryptocurrencies named securities in SEC lawsuits



Source: U.S. Securities and Exchange Commission

### WHAT'S NEXT

Perhaps the most immediate question surrounding the future of crypto regulation is how the SEC will respond to the Ripple ruling.

Judge Analisa Torres of the U.S. Southern District of New York found the agency's charges that Ripple violated the securities laws in \$1.4 billion of XRP sales and distributions didn't hold up. Executives and lobbyists immediately began framing the ruling as a definitive rebuke of the SEC's claims over crypto, though Torres did rule in favor of the agency in another \$728 million of XRP sales to institutional investors. Lawmakers like Rep. [Tom Emmer](#) (R-Minn.) said the decision underscores the need for Congress to step in.

Whether to appeal may not be a clear-cut decision for the SEC. If the agency were to lose, securities lawyers warn that Torres's findings could become precedent for all cases in the Southern District of New York. But even a win overriding her decision could create problems for the SEC: Ripple could then ask the conservative-leaning Supreme Court to take up the case.

The case, either way, is already reverberating throughout the market. Some of the world's biggest exchanges re-listed XRP for trading soon after. And Coinbase has made clear that it plans to use the Ripple decision in its defense against the SEC.

Beyond Ripple, Crypto market players are turning their attention to Grayscale Investments' lawsuit against the SEC, challenging the agency's rejection of its application for a Bitcoin-based exchange-traded fund. The investment vehicle is widely seen as having the potential to open up crypto to the masses. Some giant Wall Street firms, such as BlackRock and Invesco, recently submitted new applications with the SEC to launch Bitcoin ETFs themselves.

In the meantime, congressional efforts to set up a crypto regulatory framework are taking shape — especially after the Ripple case.

“Outcomes like this are what happens when regulators force courts to make policy instead of Congress,” said McHenry and Thompson, whose bill will be marked up in July, in a statement after the Ripple decision. “Our comprehensive market structure legislation will give all investors, customers, and market participants the same longstanding protections found in traditional financial markets.”



## POWER PLAYERS

- **Rep. Maxine Waters:** The California Democrat has been one of the SEC's most adamant supporters on Capitol Hill when it comes to cracking down on crypto. Now, with McHenry pushing to court Democratic interest for his joint bill with Thompson, Waters' support as the House Financial Services Committee's top Democrat could prove critical to any near-term hopes of crypto legislation.
- **SEC Enforcement Director Gurbir Grewal:** For the last two years, the former New Jersey attorney general has steered the SEC's enforcement efforts. With the crypto industry more emboldened than it has been in months, watch for whether Grewal, along with the broader agency, pulls back and revisits the SEC's approach to crypto enforcement — or pushes ahead undeterred.
- **Mary Jo White and Andrew Ceresney:** The former SEC chair and enforcement director, who are now both at Debevoise & Plimpton, were critical in representing Ripple against the SEC over the last two-plus years and may quickly — if they aren't already — come in high demand from other crypto companies squaring off with the agency.