

# The Distributed Ledger

## Blockchain, Digital Assets and Smart Contracts

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

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### Congressional Blockchain Caucus Challenges SEC Chairman on Web3 Enforcement

The Web3 community has long expressed frustration at the lack of clarity emanating from the SEC regarding the treatment of cryptocurrencies and other digital assets under current securities laws, with many characterizing the agency’s activities as “regulation by enforcement.” The community now has an important ally in the so-called Congressional Blockchain Caucus, a bipartisan group of approximately 35 Congress members who describe themselves as those “who believe in the future of blockchain technology, and understand that Congress has a role to play in its development. As a Caucus, we have decided on a light touch regulatory approach.”

On March 16, 2022, Rep. Tom Emmer (R-MN) and seven other Congressional Blockchain Caucus members sent a letter to SEC Chairman Gary Gensler questioning the commission’s use of the Division of Enforcement and Division of Examination to obtain information related to “cryptocurrency and blockchain firms.”

Specifically, the members assert that the SEC has been using the Enforcement Division’s investigative functions to gather information from cryptocurrency and blockchain companies in a manner inconsistent with the commission’s standards for initiating investigations and “at odds with” the Paperwork Reduction Act (PRA). The PRA, which was enacted in 1980, imposes certain approval requirements on government agencies seeking to obtain information from the public in order to minimize the burden on those from whom information is sought. In order to better understand the SEC’s authority to secure the information it seeks from blockchain firms — and to ensure these requests “are not over-burdensome, unnecessary, and do not stifle innovation” — the letter poses 13 questions to the SEC that center around the SEC’s activities in this space over the last five years. These questions include:

- Over the past five years, how many voluntary document requests has the SEC sent to individuals, project teams or entities regarding activities related to cryptocurrency, digital assets or other uses of blockchain technology, and on average how many questions were asked.
- On average, year-by-year for the last five years, what are the expected compliance costs imposed on relevant entities to respond to your commission’s voluntary document requests?

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- Has the SEC conducted a cost-benefit analysis to determine the fairness and efficacy of its requests?
- What proportion of all approximate number of hours spent over the past five years on voluntary document requests are allocated toward cryptocurrency and blockchain subject matter as compared to all other SEC-interested subject matters?
- The SEC is required to determine a specific objective met by the collection of information and develop a plan for future use of the information. Is the requested firm clearly made aware of the specific objective and the SEC's plan for future use of the information collected?

### **Key Takeaway**

Over the past year, certain Congress members have expressed frustration with Chairman Gensler's approach to cryptocurrency, voicing concerns that it may stifle innovation and prevent the U.S. from being the global market leader in this area. While legislation to address how cryptocurrencies and digital assets fit within the federal securities laws' framework is likely not on the short-term horizon, reliance on the PRA could provide an interesting angle by Congress to act as a check on the SEC's efforts to collect information in this space.