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BLOG

# FinHUB Announces Crypto Forum to Be Held on May 31, 2019; Commissioner Pierce Blasts FinHUB's Digital Asset "Framework"

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**FinHUB Forum**

The SEC's Strategic Hub for Innovation and Financial Technology (FinHUB) has announced that it will be hosting a forum on May 31, 2019, at the SEC's Washington, D.C. headquarters, to discuss distributed ledger technology and digital assets. The forum is open to the public on a first come, first served basis.

While the forum will begin at 9:30 a.m. ET, doors will open at 8 a.m. ET. Guests attending should bring photo identification and are encouraged to time their arrival with the understanding that they will be screened by security before entering the forum. No registration is required to attend the event.

A live webcast will be available on the SEC's main website and will be archived on the FinHUB page on the SEC's website for later viewing.

More details, including the four-panel agenda and speaker list, can be found here.

**Commissioner Pierce's Latest Attack on SEC's General Approach to Digital Assets**

SEC Commissioner Hester M. Pierce has been a prominent, vocal and forceful critic of the SEC's approach to the regulation of crypto assets. In a series of speeches including "Beaches and Bitcoin," "Motherhood and Humble Pie," "Pickups and Put-Downs," "Regulatory Apparitions," "Regulation: A View from Inside the Machine ," and the recent "How We Howey" (delivered on May 9, 2020, to the Securities Enforcement Forum in East Palo Alto, California), and in her dissent to the SEC's refusal to permit the listing and trading of shares in a trust that would hold Bitcoin, Pierce has not only articulated her objections to the SEC's approach in a crisp and elegant manner but has also offered thoughtful and compelling reasons for taking those objections seriously.

In her Palo Alto speech, Commissioner Piece questions whether the FinHUB's recent (April 3, 2019) issuance of its "Framework for 'Investment Contract' Analysis of Digital Assets" can be said to have achieved its purpose—that is, to provide greater clarity to market participants regarding the status of crypto assets as "securities" under the federal securities laws:

> "While *Howey* has four factors to consider, the framework lists 38 separate considerations, many of which include several sub-points. A seasoned securities lawyer *might* be able to infer which of these considerations will likely be controlling and might, therefore, be able to provide the appropriate weight to each. Whether the

> framework gives anything new to the seasoned securities lawyer used to operating in the facts and circumstances world of *Howey* is an open question. I worry that non-lawyers and lawyers not steeped in securities law and its attendant lore will not know what to make of the guidance. Pages worth of factors, many of which seemingly apply to all decentralized networks, might contribute to the feeling that navigating the securities laws in this area is perilous business. Rather than sorting through the factors or hiring an expensive lawyer to do so, a wary company may reasonably decide to forgo certain opportunities or to pursue them in a more crypto-friendly jurisdiction overseas."

We raised in the same objection in our blog post dated April 17, 2019, where we noted that the Framework can be said to provide certainty to market participants in the sense that it unequivocally embraces the SEC's prior stance that it is necessary to apply the so-called *Howey* test to a digital or virtual asset, on a case-by-case basis, to determine whether the asset is a security. So, that much is certain. The problem with this type of "certainty" is that it inevitably leads to uncertainty. Despite whatever guidance the SEC staff may provide on the application of the *Howey* test to digital assets as a general class, that test by its very nature involves an intensive "facts and circumstances" analysis—an analysis that must be applied on a case-by-case basis to every digital asset. And, far from simplifying the application of the *Howey* test to digital assets, the Framework (which contains over 60 factors, spanning approximately nine pages of text), piles on additional complications that market participants must consider when applying the test.

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