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BLOG

SEC Greenlights Exchanges to List Ether ETFs

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On May 23, 2024, in a surprise move, the Securities and Exchange Commission (SEC) issued an order that will allow exchanges to list Ethereum-based exchange-traded funds (ETFs). The SEC's order follows its recent decision to allow trading of Bitcoin ETFs, in what has been interpreted by some as a softening approach towards the regulation of digital assets. Shortly after the SEC's approval of Bitcoin ETFs, at least 10 asset managers—including BlackRock, Fidelity, Grayscale, and Invesco—initiated applications with the SEC to begin listing Ether ETFs.

Ether, the world's second-largest crypto asset after Bitcoin, is a token on the Ethereum blockchain, a software platform (or "network") analogous to Android and iOS that allows developers to build, operate, and market their technologies and applications on the platform. Unlike Bitcoin, which is traditionally seen as an alternative to fiat currencies, Ether facilitates operations on the Ethereum blockchain. Though smaller than Bitcoin in terms of market capitalization, Ether has historically boasted a market capitalization as high as $568 billion.

The classification of digital assets has been the subject of debate in academia and among government regulators and the public. In spite of the digital asset industry's recent court victory[1] that paved the way for token ETFs, the SEC, under Chair Gary Gensler, has firmly stood against the classification of digital assets as commodities and argued for the classification of digital assets as securities that fall under its regulatory purview. A series of bankruptcies by crypto exchanges in 2022, and the subsequent criminal convictions of Binance's Changpeng Zhao and FTX's Sam Bankman-Fried, have only heightened concerns over the lack of regulatory-disclosure and -compliance requirements for digital assets. These concerns have not resulted in much action by Congress until recently, when the House of Representatives passed the Financial Innovation and Technology for the 21st Century Act, which moved to make the Commodity Futures Trading Commission the primary regulator of digital assets.

Proponents have lauded the SEC's order as another victory in a string of decisions that affirm the legitimacy of Ether as a marketable commodity. While the order does not approve the Ethereum ETF itself, it does demonstrate the evolution of digital assets from instruments traded mostly on isolated exchanges to being front and center with Main Street investors. Critics, on the other hand, argue that the SEC's decision is antithetical to its mission of protecting both investors and markets because it does not take the volatility and potential vulnerabilities of digital assets into account.

Though the decision to allow trading of Ethereum ETFs seemingly suggests a retreat from the SEC's once-tougher stance, digital asset investors and firms should remain vigilant of the ongoing regulatory debate. While the industry has survived the SEC's most recent challenges, the many pending enforcement actions and lawsuits may continue to shape the regulatory environment for digital assets.

Winston's Digital Assets and Blockchain Group and Capital Markets and Securities Law Watch will continue to provide insights on the SEC's regulation of digital assets and post additional updates as they become available.

Ana Hallman and Joel Green, Summer Associates, contributed to this blog.

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[1] See SEC v. Ripple Labs, Inc., Bradley Garlinghouse, and Christian A. Larsen (collectively d/b/a Ripple), No. 1:20-cv10832 (S.D.N.Y. July 7, 2023)

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