

[Securities Regulation Daily Wrap Up, CORPORATE FINANCE—CorpFin director expects digital asset guidance to be ready by early 2019, \(Nov. 13, 2018\)](#)

Securities Regulation Daily Wrap Up

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By [John Filar Atwood](#)

The staff of the Division of Corporation Finance is working on plain English guidance on tokens and other digital assets, and expects it to be released later this year or early in 2019, according to division director William Hinman. In remarks at Practising Law Institute's securities regulation conference, he noted that the guidance will take his June 14 "[When Howey Met Gary](#)" speech and elaborate on the issues therein.

Among other things, the guidance will provide the staff's current thinking on custody and disclosure issues surrounding digital assets, he said. It also will discuss issues that should be considered by entities thinking about registering their tokens or other digital assets.

There are some no-action letter requests pending in the digital asset space, and Hinman was asked if the staff plans to resolve various crypto-related issues this way. He said that it is too early to provide a safe harbor that says if a digital asset or offering has certain characteristics, then it is exempted from registration. He advised entities that think their digital assets are exempt to approach the staff and discuss it with them.

Hinman said that there are a few dozen draft filings at the Commission in the digital asset space. The filings are moving forward, he noted, but the staff is taking its time because the issues presented are complex.

Quarterly reporting. Other items on the division's agenda in the coming year include the development of a concept release on quarterly reporting, according to Hinman. The release will explore whether quarterly reporting promotes short-termism, among other issues, he said.

The concept release also will ask for feedback on the value of a Form 10-Q that is filed after an earnings release, which contains much of the same information, he noted. The staff plans to ask whether the Commission can somehow piggyback on the earnings release for Form 10-Q reporting, he added.

The staff plans to move forward with the FAST Act proposing release, which was written prior to Hinman's arrival at the SEC. Of particular interest to industry participants is the proposed new approach to confidential treatment of certain documents and information, he noted.

Currently if a company wants to redact portions of its public filings, it has to file a request to do so with the SEC, Hinman said. Under the FAST Act proposals, companies will be allowed to redact pieces of filings without filing the formal request. He noted that the staff already encourages companies to exclude personally identifiable information from their public filings.

Hinman advised that the staff will review the use of this provision closely to see if it thinks companies are over-redacting. The staff will issue comments when appropriate, he added.

Testing the waters. Another initiative on the staff's agenda is expanding the test-the-waters capabilities to more companies, Hinman said. The ability to gauge interest in a potential offering without publicly filing with the Commission is currently available to emerging growth companies. EGCs have found testing the waters very useful, he noted, and the staff feels that it may help other entities such as unicorns that want to find their valuation by testing market interest.

The staff thinks it can expand test-the-waters privileges without new legislation, Hinman said. However, he acknowledged that expansion will bring up some Reg. FD issues that could limit the applicability of broadening the test-the-waters provision.

Hinman indicated that the division also will work to move forward the Commission's efforts to expand companies' use of stock compensation under Rule 701. The comment period on the concept release on this issue recently closed, so rulemaking is the next step. Among other things, the initiative recognizes the changes in how companies pay their employees, and the evolving relationships between companies and the individuals who work for them, and will likely propose to broaden the rule's definition of employee in light of the "gig economy."

Dodd-Frank rulemaking. Hinman said the staff will be working on the Dodd-Frank-mandated rules on hedging, which were initially proposed back in 2015. The rules call for proxy statement disclosure of whether employees or members of the board of directors are permitted to engage in transactions to hedge or offset any decrease in the market value of equity securities granted to the employee or board member as compensation, or held directly or indirectly by the employee or board member.

Asked about possible progress on other unfinished Dodd-Frank rulemaking, Hinman said that Chairman Clayton wants to do them serially, so once the hedging proposals are out the staff will move on to the others. He noted that the market has been working out some issues with regard to clawbacks and pay-versus-performance metrics, so any proposals will benefit from that.

Other projects the division expects to undertake in the coming year, according to Hinman, are proposals on Item 3-05 of Regulation S-X, harmonizing the private placement exemptions, codifying Guide 3, and extending Regulation A exemptions to more companies. With regard to the Reg. A initiative, he said that the staff plans to follow Congress's instructions very closely on that effort.

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