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RE: The Importance of Distinguishing Between Doctrinal and Functional Answers

Dear Task Force Members:

For the past 20+ years my research has focused on securities regulation and the effects on capital markets of the tools available to regulators, particularly disclosure mandates.¹ I am excited about the Task Force's work and believe that the set of questions in "There Must Be Some Way Out of Here," Commissioner Hester M. Peirce (Feb. 21, 2025), provides an excellent starting point.

I offer here one suggestion. I recommend that the Task Force be explicit as to whether it is an answer to a question that involves: a) doctrinal analysis or b) functional analysis. Making this distinction explicit should prove helpful in analyzing and reaching recommendations about whether or how to regulate crypto assets.

Let me explain briefly.² Many of the questions we face in securities regulation are doctrinal. For example, the question of whether a transaction involves a security is usually answered by reference to the text of § 2(a)(1) of the Securities Act of 1933 (the "Securities Act") and precedent such as *US v. Howey*.³ A different set of questions and answers involve understanding the functional effects of regulatory intervention.⁴ For example, we might ask what information about a particular transaction should be required to be disclosed if we want to: 1) protect investors, 2) maintain fair, orderly, and efficient markets, and 3) facilitate capital formation.

Ideally, answering doctrinal questions (such as whether an asset is a security) would relate directly to answers to functional questions (such as when certain disclosures should be mandatory). Famously, this is the approach the Supreme Court took in the *SEC v. Ralston Purina*⁵ case where the Court looked to the purposes of the Securities Act to better understand the distinction in § 4(a)(2) between private and public offerings. However, as someone who teaches and has studied Securities Regulation for decades, I can assure you that such a direct alignment between answers to questions from a doctrinal perspective and from a functional perspective rarely exists.

Let me provide an example of the extent to which a doctrinal answer can diverge from a functional answer in the context of regulating crypto assets. To determine if a crypto asset is a

security from a doctrinal perspective, we consider factors such as the degree to which investors are “relying on the efforts of others” and the extent to which a purchase is made for an investment purpose rather than a consumption purpose. However, these particular doctrinal distinctions would seem to be of considerably less import if we are trying to determine the appropriate boundaries for crypto asset regulation so as to best 1) protect investors, 2) maintain fair, orderly, and efficient markets, and 3) facilitate capital formation. Failing to maintain a clear distinction between doctrinal and functional answers will make identifying sound policy choices more difficult.

A more specific example of the value of maintaining this distinction between doctrinal and functional answers can be illustrated using Question 13 of the questions posed by Commissioner Peirce. Question 13 asks, in part, how to determine whether a network is “sufficiently decentralized or functional [that] registration of the tokens would not be required.” This question could be answered from two different perspectives: one doctrinal, the other functional. The doctrinal answer would look largely to precedent with respect to what counts as decentralization. Such a doctrinal analysis need not be entirely devoid of functional considerations, but function alone would not drive the analysis. The functional analysis, on the other hand, would focus on the ways that decentralization might lessen either the need for or benefits from regulatory intervention. My claim is not that one approach is better than the other, but rather that they involve answering different questions, and that clarity about which question is being asked and answered will prove vital.

I appreciate that separating out doctrinal and functional answers could be problematic from the perspective of a Task Force housed in the SEC. Functional answers may involve recommending regulations that reach beyond the jurisdiction of the SEC. However, when dealing with a novel asset class the benefits of including functional answers outweigh the costs. Moreover, after *West Virginia v. EPA*,⁶ which requires that major questions be addressed by Congress rather than delegated to an administrative agency, there are increased benefits of getting new direction from Congress on how to regulate crypto assets, and the SEC has a long history of providing informed guidance to Congress.

I hope these brief comments are of help as you begin the crucial work of this Task Force. The distinction I bring attention to here is a simple one, but one that I believe could enhance the Task Force’s contributions. Please let me know if there are any questions you may have regarding these suggestions, or if there is any other ways I can be of assistance to the Task Force.

Respectfully yours,



Professor Michael D. Guttentag

¹ Michael D. Guttentag, What Inside Information Is Worth and Why It Matters, book chapter in *Research Handbook on Insider Trading* (Stephen Bainbridge ed., 2nd edition, 2025, Edward Elgar Publishing Ltd.); Michael D. Guttentag, Shorting Crypto Assets and Insider Trading, 105 *Iowa Law Review Online* 59 (2021); Michael D. Guttentag, Selective Disclosure and Insider Trading, 69 *Florida Law Review* 519 (2017); Michael D. Guttentag, On Requiring Public Companies to Disclose Political Spending, 2014 *Columbia Business Law Review* 593 (2014); Michael D. Guttentag, Shareholder Primacy and the Misguided Call for Political Spending Disclosure by Public Companies, 62 *UCLA Law Review Discourse* 66 (2014); Michael D. Guttentag, Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules that Require Firms to Make Periodic Public Disclosures, 88 *Indiana Law Journal* 151 (2013); reprinted in 46 *Securities Law Review* (2014); Michael D. Guttentag, Protection from What? Justifications for Investor Protection and the JOBS Act, 13 *U.C. Davis Business Law Journal* 207 (2013); Michael D. Guttentag, Evolutionary Analysis in Law: On Disclosure Regulation, 49 *Arizona State Law Journal* 963 (2016); Michael D. Guttentag, On Requiring Public Companies to Disclose Political Spending, 2014 *Columbia Business Law Review* 593 (2014); Michael D. Guttentag, Shareholder Primacy and the Misguided Call for Political Spending Disclosure by Public Companies, 62 *UCLA Law Review Discourse* 66 (2014); Michael D. Guttentag, Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules that Require Firms to Make Periodic Public Disclosures, 88 *Indiana Law Journal* 151 (2013); reprinted in 46 *Securities Law Review* (2014); Michael D. Guttentag, Protection from What? Justifications for Investor Protection and the JOBS Act, 13 *U.C. Davis Business Law Journal* 207 (2013); Michael D. Guttentag, Stumbling Into Crime: Stochastic Process Models of Accounting Fraud in *Research Handbook on the Economics of Criminal Law*, Alon Harel and Keith Hylton, editors (2012); Michael D. Guttentag, Brandeis' Policeman: Results from a Laboratory Experiment on Corporate Fraud (with Christine Porath and Samuel Fraidin), 5 *The Journal of Empirical Legal Studies* 239 (2008) (peer reviewed); Michael D. Guttentag, Accuracy Enhancement, Agency Costs, and Disclosure Regulation, 3 *The Review of Law and Economics* 15 (2007) (peer reviewed); Michael D. Guttentag, An Argument for Imposing Disclosure Requirements on Public Companies, 32 *Florida State Law Review* 123 (2004) reprinted in 38 *Securities Law Review* (2006) translated into Chinese (2022).

² If I recall correctly, Commissioner Peirce has expressed a preference for brevity over law review length comments.

³ 328 U.S. 293 (1946).

⁴ To answer functional questions, we need to understand the many causal relationships between regulatory levers, such as disclosure mandates, liability regimes, and market structure regulations, and the desired outputs (e.g., investor protection, orderly markets, and capital formation). This kind of functional analysis is the main area of focus of my research cited above.

⁵ 346 U.S. 119 (1953).

⁶ 597 U.S. 697 (2022); see also, Donna M. Nagy, The SEC and "Major Questions Doctrine" Questions, 26 *University of Pennsylvania Journal of Business Law* 1142 (2024).