

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

EMPOWER OVERSIGHT	)	
WHISTLEBLOWERS & RESEARCH,	)	
601 King Street, Suite 200	)	
Alexandria, VA 22313-3151	)	
	)	
Plaintiff,	)	
	)	Case No. _____
v.	)	
	)	
U.S. SECURITIES AND EXCHANGE	)	
COMMISSION,	)	
100 F Street NE	)	
Washington, DC 20549	)	
	)	
Defendant.	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiff Empower Oversight Whistleblowers & Research (hereinafter “Empower Oversight”) brings this action against Defendant U.S. Securities and Exchange Commission (“SEC”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (the “FOIA”), including obtaining access to records maintained by the SEC.

2. The records at issue in this case concern potential conflicts of interest by former high-level officials at the SEC relating to cryptocurrencies. In particular, the circumstances of certain former SEC officials’ declarations of whether particular cryptocurrencies constitute securities—and thus are subject to SEC regulation—raise significant questions regarding potential conflicts of interest.

3. For example, public reports indicate that William Hinman, previously a partner at law firm Simpson Thacher, worked as the Director of the Division of Corporate Finance at the SEC from May 2017 to December 2020. *See William Hinman Named Director of Division of*

*Corporation Finance*, U.S. SEC (May 9, 2017), available at <https://www.sec.gov/news/press-release/2017-97>. Hinman reportedly continued to receive millions of dollars from Simpson Thacher while at the SEC. See, e.g., Jack Newsham, *A top SEC official was receiving a \$1.6 million law-firm pension from Simpson Thacher that was 7 times his government salary*, BUS. INSIDER (Jan. 29, 2021), <https://www.businessinsider.com/sec-simpson-partner-pay-biden-golden-parachutes-2021-1>.

4. Simpson Thacher is a member of the enterprise Ethereum Alliance, an industry organization aiming to “drive the use of Enterprise Ethereum.” See *About*, ENTER. ETHERUM ALL. (last accessed Dec. 1, 2021), available at <https://entethalliance.org/about/>. In a June 2018 speech in his official capacity as an SEC official, Hinman declared that the Ethereum cryptocurrency, Ether, was not a security. See *Speech, Digital Asset Transactions: When Howey Met Gary (Plastic)*, U.S. SECS. & EXCH. COMM’N (June 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418>. After his declaration, Ether’s value rose significantly. Aul Vigna, *Crypto Market Rallies on SEC Official’s Ether Stance*, WALL ST. J. (June 14, 2018), available at <https://www.wsj.com/articles/crypto-market-rallies-on-secs-officials-ether-stance-1529007646>. After departing the SEC in late 2020, Hinman rejoined Simpson Thacher as a partner. See *Former SEC Division of Corporation Finance Director Bill Hinman Returns to Simpson Thacher*, Simpson Thacher & Bartlett LLP (Jan. 12, 2021), available at [https://www.stblaw.com/docs/default-source/related-link-pdfs/bill-hinman-rejoins-simpson-thacher\\_2021.pdf](https://www.stblaw.com/docs/default-source/related-link-pdfs/bill-hinman-rejoins-simpson-thacher_2021.pdf).

5. That same month, SEC filed a lawsuit against one of Ethereum’s rivals, Ripple, alleging that its XRP cryptocurrency was a security, such that the offering and sales of XRP was in violation of federal securities law. Press Release, *SEC Charges Ripple and Two Executives with*

*Conducting \$1.3 Billion Unregistered Securities Offering*, U.S. SECS. & EXCH. COMM'N (Dec. 22, 2020), available at <https://www.sec.gov/news/press-release/2020-338>. The value of XRP fell 25% immediately after the SEC's announcement of the lawsuit. See Bilal Jafar, *XRP Plummets 25% after SEC's \$1.3 Billion Lawsuit against Ripple* (Dec. 23, 2020), available at <https://www.financemagnates.com/cryptocurrency/news/xrp-plummets-25-after-secs-1-3-billion-lawsuit-against-ripple/>. Shortly after filing the lawsuit, the leader of the SEC Enforcement Division, Marc Berger, left the SEC and joined Hinman as a partner at Simpson Thacher. Marc P. Berger, *Former Acting Director of the SEC's Enforcement Division, to Join Simpson Thacher*, SIMPSON THACHER & BARTLETT LLP (Apr. 15, 2021), [https://www.stblaw.com/docs/default-source/related-link-pdfs/marc-berger-to-join-simpson-thacher\\_2021.pdf](https://www.stblaw.com/docs/default-source/related-link-pdfs/marc-berger-to-join-simpson-thacher_2021.pdf).

6. As another example, former SEC Chairman Jay Clayton publicly stated while at the SEC that Bitcoin was not a security. *SEC chairman: Cryptocurrencies like bitcoin are not securities*, CNBC (June 6, 2018), <https://www.cnbc.com/video/2018/06/06/sec-chairman-cryptocurrencies-like-bitcoin--not-securities.html>. Thereafter, the value of Bitcoin significantly rose. Olga Kharif & Eric Lam, *Cryptocurrency Rally Builds Steam as Bitcoin Surpasses \$7,500*, BLOOMBERG (July 17, 2018), <https://www.bloomberg.com/news/articles/2018-07-17/bitcoin-surges-after-breaking-back-through-7-000-level>. Shortly after he left the SEC, Clayton joined One River Asset Management, a cryptocurrency hedge fund that focuses exclusively on Bitcoin and Ether. Emily Graffeo, *Former SEC chair Jay Clayton will advise digital asset hedge fund One River on crypto*, MARKETS INSIDER (Mar. 29, 2021), <https://markets.businessinsider.com/news/currencies/bitcoin-hedge-fund-sec-chair-jay-clayton-one-river-crypto-2021-3>.

7. It is in the public's interest that the government's regulation of the emerging cryptocurrency market is based on objective legal principles. As a result, potential conflicts of interest in this space are of significant public importance. Accordingly, Empower Oversight filed the FOIA Request described herein.

### **JURISDICTION AND VENUE**

8. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

9. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(b) and 28 U.S.C. § 1391(e)(1).

### **PARTIES**

10. Plaintiff Empower Oversight is a nonprofit, nonpartisan educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. Empower Oversight has its principal place of business located at 601 King Street, Suite 200, Alexandria, VA 22313-3151. Empower Oversight works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, as well as work to hold authorities accountable to act on such reports.

11. Defendant SEC is a federal administrative agency within the meaning of 5 U.S.C. § 552(f)(1), with its principal place of business located at 100 F Street NE, Washington, DC 20549. Upon information and belief, the SEC has possession, custody, and control of the records, within the meaning of 5 U.S.C. § 552(f)(2), to which Empower Oversight seeks access.

### **LEGAL STANDARD**

12. FOIA requires a federal administrative agency to promptly make available requested, non-exempt agency records in response to a request that (a) reasonably describes such

records and (b) “is made in accordance with published rules stating the time, place, fees, . . . and procedures to be followed[.]” 5 U.S.C. § 552(a)(3)(A); *see also* 17 C.F.R. § 200.80(b)(3).

13. In making available such records, fees applicable to processing requests shall be limited to reasonable standard charges for document duplication when records are sought by a “representative of the news media,” defined as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(ii); *see also* 17 CFR § 200.80(g)(2)(vi). In contrast, other than those requests by representatives of the news media, educational institutions, or noncommercial scientific institutions, the SEC charges fees for processing (*i.e.*, document search and/or review) FOIA requests. 17 C.F.R. § 200.80(g)(3)(ii)(A).

14. FOIA requires an agency to respond to a valid request within twenty (20) days (exempting Saturdays, Sundays, and legal public holidays) (hereinafter “working days”) upon receipt of such request, including notifying the requestor immediately of its determination, the reasons therefor, and the right to appeal any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i); *see also* 17 C.F.R. § 200.80(d)(2).

15. In certain circumstances, an agency may instead provide notice to the requester that “unusual circumstances” merit additional time—up to an additional ten (10) working days—to respond to the request. 5 U.S.C. § 552(a)(4)(viii)(II)(aa); *see also* 17 C.F.R. § 200.80(d)(5). In the event the agency provides notice to the requester of “unusual circumstances,” and that it is not able to respond to the records request within the statutory deadline, the agency must provide the requester “an opportunity to arrange with the agency an alternative time frame for processing the request.” 5 U.S.C. § 552(a)(6)(B)(ii); *see also* 17 C.F.R. § 200.80(d)(5).

16. If an agency does not respond to a FOIA request by the statutory deadline, the requester is deemed to have exhausted administrative remedies and may immediately pursue judicial review. 5 U.S.C. § 552(a)(6)(C)(i).

17. On August 12, 2021, Empower Oversight submitted to the SEC a FOIA request focused on two areas: (1) Messrs. Hinman, Berger, and Clayton's (herein after "the former officials" or "the officials") communications with potential employers that held financial interests in particular cryptocurrencies that the SEC was evaluating for purposes of federal supervision; and (2) whether the officials sought advice from the SEC's Office of Ethics concerning such communications. *See* Exhibit A.

18. Specifically, Empower Oversight sought access to the following in its August 12, 2021 FOIA request:

- a. All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain "[@stblaw.com](mailto:@stblaw.com)";
- b. All records relating to communications from May of 2017 through December of 2020 between Mr. Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain "[@entethalliance.org](mailto:@entethalliance.org)";
- c. All records relating to communications, including calendar entries, notes or emails between Mr. Hinman and any personnel in the SEC's Office of the Ethics Counsel regarding Mr. Hinman's continued payments from Simpson Thacher while employed at SEC, his potential recusals or conflicts related to his prior or future employment at Simpson Thacher, as well as his discussions and negotiations with Simpson Thacher regarding rejoining the firm;
- d. All records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from Simpson Thacher, including calendar entries, notes or emails between Mr. Berger and any email address from the domain "[@stblaw.com](mailto:@stblaw.com)";
- e. All records relating to communications from May of 2017 through January of 2021 between Mr. Berger and any personnel from the Enterprise Ethereum Alliance,

including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@entethalliance.org”;

- f. All records relating to communications, including calendar entries, notes, or emails between Mr. Berger and any personnel in the SEC’s Office of the Ethics Counsel, regarding Mr. Berger’s discussions and negotiations with Simpson Thacher, including all communications regarding potential recusals or conflicts related to his potential employment with Simpson Thacher;
- g. All records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain “@oneriveram.com”; and
- h. All records of communications, including calendar entries, notes or emails between Mr. Clayton and personnel in the SEC’s Office of the Ethics Counsel regarding Mr. Clayton’s discussions and negotiations with One River Asset Management, including all communications regarding potential recusals or conflicts related to his potential employment with One River Asset Management.

19. On August 13, 2021, the SEC—via eight separate letters corresponding to each request (*i.e.*, items “a” through “h” in the immediately preceding paragraph)—acknowledged receipt of the August 12, 2021 FOIA request, assigned eight tracking numbers to the request matching the eight enumerated items above, *see supra* ¶ 18, and advised that the request “will be assigned to a Research Specialist for processing and you will be notified of findings as soon as possible.”<sup>1</sup> *See* Exhibit B.

20. In each letter, without identifying an “unusual circumstance” permitting a 10-day extension of the 20-working day deadline for rendering a “determination” on the August 12, 2021 request, the SEC stated, “If you do not receive a response after thirty business days from when we

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<sup>1</sup> The eight tracking numbers the SEC assigned to the Requests are as follows: 21-02531-FOIA (*see supra* ¶ 18(a)), 21-05232-FOIA (*see supra* ¶ 18(b)), 21-02533-FOIA (*see supra* ¶ 18(c)), 21-02534-FOIA (*see supra* ¶ 18(d)), 21-02535-FOIA (*see supra* ¶ 18(e)), 21-02536-FOIA (*see supra* ¶ 18(f)), 21-02537-FOIA (*see supra* ¶ 18(g)), 21-02538-FOIA (*see supra* ¶ 18(h)). However, as noted below, *infra* n. 2, tracking numbers 21-02536-FOIA (¶ 18(f)), and 21-02538-FOIA (¶ 18(h)) are not at issue in this lawsuit, and are thus not attached as part of Exhibit B.

received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS).”

21. On August 16, 2021, the SEC advised in a letter that it had classified Empower Oversight as an “other use” requester, which Empower Oversight appealed. On September 23, 2021, the SEC granted Empower Oversight’s appeal and clarified that Empower Oversight was a “news media” requestor for purposes of determining processing fees. *See* Ex. C at 2.

22. In that same September 23, 2021 letter, the SEC also stated: “The FOIA. . . precludes agencies from assessing duplication fees to news media requesters if the agency fails to meet the 20-day time limit for complying with a request and where no unusual or exceptional circumstances exist. **Because the FOIA Office has not complied with the 20-day time period for responding to your request (September 13, 2021) and because it has not informed you that unusual circumstances exist in processing your request, you cannot be assessed duplication fees at this juncture.**” *See id.*

23. In other words, the SEC explicitly admitted that it failed to comply with the 20-day time period and that it did not inform Empower Oversight that “unusual circumstances” exist, such that a delay may be warranted. 5 U.S.C. § 552(a)(4)(viii)(II)(aa); 17 C.F.R. § 200.80(d)(5).

24. Yet, to date, Empower Oversight has received no further correspondence from the SEC concerning its August 12, 2021 FOIA request as to six of the eight tracking numbers (the “Six Requests”).<sup>2</sup>

25. Empower Oversight has been forced to expend resources to prosecute this action as to the Six Requests.

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<sup>2</sup> As to just two of the eight Requests, 21-02536-FOIA and 21-02538-FOIA (in deferring to the eight separate tracking numbers assigned by the SEC upon receipt of Empower Oversight’s August 12, 2021 Request), the SEC did reply to Empower Oversight in November 2021, indicating that the SEC had no responsive records. Therefore, this action focuses solely on the remaining Six Requests.



**CLAIMS FOR RELIEF**

**Count I**

**Failure to Comply with Statutory Deadlines in Violation of FOIA, 5 U.S.C. § 552(a)(6)**

26. Plaintiff realleges and incorporates by reference each of the foregoing allegations, contained in paragraphs 1-25, as if fully set forth herein.

27. To date, Defendant has failed to respond to the Six Requests identified above.

28. More than 20 working days have passed since each of the Six Requests was received by the SEC, as confirmed in the August 13, 2021 letter. *See supra* ¶ 19; *see also* Ex. B.

29. FOIA requires the SEC to have provided a final determination within 20 working days of each of the Six Requests. The SEC may extend this 20-day period in the event of “unusual circumstances,” as defined by 5 U.S.C. § 552(a)(6)(B)(iii), for a maximum of 10 working days, but must provide Empower Oversight with notice to do so. *See* 5 U.S.C. §§ 552(a)(4)(A)(viii)(II)(aa), 552(a)(6)(B)(ii); *see also* 17 C.F.R. §§ 200.80(d)(2), (d)(5).

30. The SEC failed to provide a final determination within 20 working days of the Request. *See* 5 U.S.C. § 552(a)(6). In fact, the SEC acknowledged to Empower Oversight that “the FOIA Office has not complied with the 20-day time period for responding to your request (September 13, 2021) and . . . has not informed you that unusual circumstances exist in processing.” *See* Ex. C at 2.

31. The SEC has thus failed to timely make the statutorily required determination on Empower Oversight’s Six Requests, in violation of FOIA. *See* 5 U.S.C. § 552(a)(6).

32. Empower Oversight’s mission will be adversely affected by the SEC’s continuing failure to timely render a final determination as to the Six Requests.

33. Empower Oversight has constructively exhausted all administrative remedies required by FOIA as to each of the Six Requests. *See* 5 U.S.C. § 552(a)(6)(C)(i).

34. Empower Oversight is entitled to declaratory and injunctive relief in connection with the SEC's unlawful failure to make a determination as to the Six Requests. *See* 5 U.S.C. § 552(a)(6).

**Count II**  
**Unlawful Withholding of Agency Records in Violation of FOIA, 5 U.S.C. § 552(a)(3)**

35. Plaintiff realleges and incorporates by reference each of the foregoing allegations, contained in paragraphs 1-34, as if fully set forth herein.

36. FOIA requires Defendant to process records requests and promptly provide the requested records or the reasonably segregable portion of records not subject to a FOIA exemption. 5 U.S.C. § 552(a)(3)(B).

37. However, the SEC has neither provided Empower Oversight any responsive documents in response to any of the Six Requests, nor has it claimed that any responsive records are exempt from disclosure.

38. Empower Oversight is entitled to declaratory and injunctive relief in connection with the SEC's unlawful failure to timely produce responsive records as to the Six Requests. 5 U.S.C. § 552(a)(3)(B).

**RELIEF REQUESTED**

**WHEREFORE**, Plaintiff prays that this Court:

- A. Declare that the SEC failed to make timely determinations on each of Empower Oversight's Six Requests, in violation of FOIA, 5 U.S.C. § 552(a)(6)(A)(i);
- B. Declare that the SEC failed to promptly provide records responsive to each of Empower Oversight's Six Requests, in violation of FOIA, 5 U.S.C. § 552(a)(3);
- C. Order the SEC to immediately conduct a reasonable search for all responsive records, as required by FOIA, 5 U.S.C. § 552(a)(3)(C);

- D. Order the SEC to immediately provide determinations on each of Empower Oversight's Six Requests, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i);
- E. Order the SEC to promptly disclose to Empower Oversight all responsive, non-exempt records, as required by FOIA, 5 U.S.C. § 552(a)(3);
- F. Award Empower Oversight its costs and reasonable attorneys' fees incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- G. Grant such other relief as the Court may deem just and proper.

December 8, 2021

Respectfully submitted,

/s/ Michael J. Schrier

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*Attorneys for Plaintiff Empower Oversight  
Whistleblowers & Research*

# EXHIBIT A

# EMPOWER OVERSIGHT

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*Whistleblowers & Research*



August 12, 2021

VIA ELECTRONIC TRANSMISSION: FOIAPA@SEC.GOV

Olivier Girod, Acting Chief FOIA/PA Officer  
Office of FOIA Services  
100 F Street NE  
Washington, DC 20549-2465

## **RE: FREEDOM OF INFORMATION ACT REQUEST**

Dear FOIA Officer:

### **Introduction**

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seek to hold those authorities accountable to act on those reports by, among other means, publishing information to inform the public.

### **Background**

We write today seeking information regarding the appearance of conflicts of interest by former high-level officials at the SEC relating to cryptocurrencies. It is in the public’s interest that the government’s emerging regulatory approach to cryptocurrencies is based on objective legal principles, without the appearance that conflicted SEC officials may be picking cryptocurrency winners and losers based on personal financial interests. The way in which these former SEC officials declared whether particular cryptocurrencies were securities—and thus subject to SEC regulation—raises public integrity concerns.

As publicly reported, Mr. William Hinman worked as the Director of the Division of Corporate Finance at the SEC from May 2017 through December of 2020, having previously been a partner at the law firm Simpson Thacher.<sup>1</sup> Mr. Hinman reportedly continued to receive millions of dollars from Simpson Thacher while employed at the

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<sup>1</sup> “William Hinman Named Director of Division of Corporation Finance,” SEC ([May 9, 2017](#)).

SEC.<sup>2</sup> Notably, Simpson Thacher is a member of the Enterprise Ethereum Alliance, an “industry organization whose objective is to drive the use of Enterprise Ethereum.”<sup>3</sup> In a June 2018 speech in his official capacity as an SEC official, Mr. Hinman declared that the Ethereum cryptocurrency, Ether, was not a security, stating that “based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions.”<sup>4</sup> After his declaration, Ether’s value then rose significantly.<sup>5</sup> When Mr. Hinman departed the SEC in December of 2020, he rejoined Simpson Thacher as a partner.<sup>6</sup>

That same month, the SEC filed a lawsuit against one of Ethereum’s rivals, Ripple, alleging that its XRP cryptocurrency was a security, such that the company’s offering and sales of XRP had been in violation of federal securities laws.<sup>7</sup> The value of XRP fell 25% immediately after the announcement of the SEC lawsuit.<sup>8</sup> Of note, the leader of the SEC’s Enforcement Division that brought the suit, Marc Berger, then left the SEC shortly thereafter, joining Mr. Hinman as a partner at Simpson Thacher.<sup>9</sup>

Additionally, there are potential concerns regarding former SEC Chairman Jay Clayton. As with Mr. Hinman and Ether, while at the SEC, Mr. Clayton publicly stated that Bitcoin was not a security,<sup>10</sup> and the value of Bitcoin rose.<sup>11</sup> The SEC’s lawsuit against Ripple was filed at the end of Mr. Clayton’s tenure there. Shortly after he left, he reportedly joined One River Asset Management, a cryptocurrency hedge fund that focuses exclusively on Bitcoin and Ether—not XRP.<sup>12</sup>

The SEC’s handling of cryptocurrency issues is of significant public importance, and these appearances of conflicts of interest raise substantial issues. Transparency from the SEC is the only way to ensure accountability to the public. In light of this, we are filing this FOIA request to seek the facts.

### Records Request

1. All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar

<sup>2</sup> “A top SEC official was receiving a \$1.6 million law-firm pension from Simpson Thacher that was 7 times his government salary,” *Business Insider* ([Jan 29, 2021](#)).

<sup>3</sup> Enterprise Ethereum Alliance (<https://entethalliance.org/about/>).

<sup>4</sup> “Digital Asset Transactions: When Howey Met Gary (Plastic),” William Hinman ([Jun 4, 2018](#)).

<sup>5</sup> “Crypto Market Rallies on SEC’s Official’s Ether Stance,” *Wall Street Journal* ([Jun 14, 2018](#)).

<sup>6</sup> “Former SEC Division of Corporation Finance Director Bill Hinman Returns to Simpson Thacher,” Simpson Thacher & Bartlett LLP ([Jan 12, 2021](#)).

<sup>7</sup> “SEC Charges Ripple and Two Executives with Conducting \$1.3 Billion Unregistered Securities Offering,” SEC ([Dec 22, 2020](#)).

<sup>8</sup> “XRP Plummeted 25% after SEC’s \$1.3 Billion Lawsuit against Ripple,” *Finance Magnates* ([Dec 23, 2020](#)).

<sup>9</sup> “Marc P. Berger, Former Acting Director of the SEC’s Enforcement Division, to Join Simpson Thacher,” Simpson Thacher & Bartlett LLP ([Apr 15, 201](#)).

<sup>10</sup> “SEC chairman: Cryptocurrencies like bitcoin are not securities,” *CNBC* ([Jun 6, 2018](#)).

<sup>11</sup> “Cryptocurrency Rally Builds Steam as Bitcoin Surpasses \$7,500,” *Bloomberg* ([Jul 17, 2018](#)).

<sup>12</sup> “Former SEC chair Jay Clayton will advise digital asset hedge fund One River on crypto,” *Markets Insider* ([Mar 29, 2021](#)).

entries, notes, or emails between Mr. Hinman and any email address from the domain “@stblaw.com”;

2. All records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain “@entethalliance.org”;
3. All records relating to communications, including calendar entries, notes or emails between Mr. Hinman and any personnel in the SEC’s Office of the Ethics Counsel regarding Mr. Hinman’s continued payments from Simpson Thacher while employed at SEC, his potential recusals or conflicts related to his prior or future employment at Simpson Thacher, as well as his discussions and negotiations with Simpson Thacher regarding rejoining the firm;
4. All records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from Simpson Thacher, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@stblaw.com”;
5. All records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain “@entethalliance.org”;
6. All records relating to communications, including calendar entries, notes, or emails between Mr. Berger and any personnel in the SEC’s Office of the Ethics Counsel, regarding Mr. Berger’s discussions and negotiations with Simpson Thacher, including all communications regarding potential recusals or conflicts related to his potential employment with Simpson Thacher;
7. All records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain “@oneriveram.com”;
8. All records of communications, including calendar entries, notes or emails between Mr. Clayton and personnel in the SEC’s Office of the Ethics Counsel regarding Mr. Clayton’s discussions and negotiations with One River Asset Management, including all communications regarding potential recusals or conflicts related to his potential employment with One River Asset Management.

## **Definitions**

“COMMUNICATION(S)” means every manner or method of disclosure, exchange of information, statement, or discussion between or among two or more persons, including but not limited to, face-to-face and telephone conversations, correspondence, memoranda, telegrams, telexes, email messages, voice-mail messages, text messages, meeting minutes, discussions, releases, statements, reports, publications, and any recordings or reproductions thereof.

“DOCUMENT(S)” or “RECORD(S)” mean any kind of written, graphic, or recorded matter, however produced or reproduced, of any kind or description, whether sent, received, or neither, including drafts, originals, non-identical copies, and information stored magnetically, electronically, photographically or otherwise. As used herein, the terms “DOCUMENT(S)” or “RECORD(S)” include, but are not limited to, studies, papers, books, accounts, letters, diagrams, pictures, drawings, photographs, correspondence, telegrams, cables, text messages, emails, memoranda, notes, notations, work papers, intra-office and inter-office communications, communications to, between and among employees, contracts, financial agreements, grants, proposals, transcripts, minutes, orders, reports, recordings, or other documentation of telephone or other conversations, interviews, affidavits, slides, statement summaries, opinions, indices, analyses, publications, questionnaires, answers to questionnaires, statistical records, ledgers, journals, lists, logs, tabulations, charts, graphs, maps, surveys, sound recordings, data sheets, computer printouts, tapes, discs, microfilm, and all other records kept, regardless of the title, author, or origin.

“PERSON” means individuals, entities, firms, organizations, groups, committees, regulatory agencies, governmental entities, business entities, corporations, partnerships, trusts, and estates.

“REFERS,” “REFERRING TO,” “REGARDS,” “REGARDING,” “RELATES,” “RELATING TO,” or “PERTAINS TO” mean containing, alluding to, responding to, commenting upon, discussing, showing, disclosing, explaining, mentioning, analyzing, constituting, comprising, evidencing, setting forth, summarizing, or characterizing, either directly or indirectly, in whole or in part.

## **Instructions**

The words “and” and “or” shall be construed in the conjunctive or disjunctive, whichever is most inclusive.

The singular form shall include the plural form and vice versa.

The present tense shall include the past tense and vice versa.



In producing the records described above, you shall segregate them by reference to each of the numbered items of this Freedom of Information Act request.

### **Fee Waiver Request**

Empower Oversight agrees to pay up to \$25.00 in applicable fees, but requests a waiver of any fees that may be associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii).

Empower Oversight is a non-profit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in making this request. Accordingly, pursuant to 5 U.S.C. § 552 (a)(4)(A)(ii)(II), it is subject only to “reasonable standard charges for document duplication.”

Moreover, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government.

The public has a significant interest in understanding (1) the facts and circumstances surrounding senior SEC officials past and future private sector employment, (2) whether any such relationships presented potential conflicts or public integrity concerns related to their official actions at the SEC, and (3) whether, how, and to what extent the SEC and its ethics officials properly mitigated any such issues.

Empower Oversight is committed to government accountability and public integrity and is committed to public disclosure of documents via its website, and by providing these documents to the media for public dissemination. Hence, information it receives that either confirms or dispels the public integrity concerns described above will be published to empower Americans to accurately assess the proper level of public confidence they should have in the integrity of the SEC—making this request undeniably eligible for a waiver or reduction of fees under 5 U.S.C. § 552 (a)(4)(A)(iii)

Thank you for your prompt attention to this matter.

Cordially,

[/Jason Foster/](#)

Jason Foster  
Founder & President

# EXHIBIT B



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2465

Office of FOIA Services

August 13, 2021

Mr. Jason Foster Founder & President  
Empower Oversight  
Whistleblowers & Research 2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. **21-02531-FOIA (1 of 8)**

Dear Mr. Foster:

This letter is an acknowledgment of your FOIA request dated August 12, 2021, and received in this office on August 13, 2021, for records regarding **all records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain "@stblaw.com.**

Your request has been assigned tracking number 21-02531-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible. If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS). A list of SEC FOIA Public Liaisons can be found on our agency website at <https://www.sec.gov/oso/contact/foia-contact.html>. OGIS can be reached at 1-877-684-6448 or [Archives.gov](https://www.archives.gov) or via email at [ogis@nara.gov](mailto:ogis@nara.gov).

In the interim, if you have any questions about your request, you may contact this office by calling (202) 551-7900, or sending an e-mail to [foiapa@sec.gov](mailto:foiapa@sec.gov). Please refer to your tracking number when contacting us.

For additional information, please visit our website at [www.sec.gov](https://www.sec.gov) and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2465

Office of FOIA Services

August 13, 2021

Mr. Jason Foster Founder & President  
Empower Oversight  
Whistleblowers & Research  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. **21-02532-FOIA (2 of 8)**

Dear Mr. Foster:

This letter is an acknowledgment of your FOIA request dated August 12, 2021, and received in this office on August 13, 2021, for records regarding **all records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain "@entethalliance.org".**

Your request has been assigned tracking number 21-02532-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible. If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS). A list of SEC FOIA Public Liaisons can be found on our agency website at <https://www.sec.gov/oso/contact/foia-contact.html>. OGIS can be reached at 1-877-684-6448 or [Archives.gov](https://www.archives.gov) or via email at [ogis@nara.gov](mailto:ogis@nara.gov).

In the interim, if you have any questions about your request, you may contact this office by calling (202) 551-7900, or sending an e-mail to [foiapa@sec.gov](mailto:foiapa@sec.gov). Please refer to your tracking number when contacting us.

For additional information, please visit our website at [www.sec.gov](https://www.sec.gov) and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2465

Office of FOIA Services

August 13, 2021

Mr. Jason Foster Founder & President  
Empower Oversight  
Whistleblowers & Research  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. **21-02533-FOIA (3 of 8)**

Dear Mr. Foster:

This letter is an acknowledgment of your FOIA request dated August 12, 2021, and received in this office on August 13, 2021, for records regarding **all records relating to communications, including calendar entries, notes or emails between Mr. Hinman and any personnel in the SEC's Office of the Ethics Counsel regarding Mr. Hinman's continued payments from Simpson Thacher while employed at SEC, his potential recusals or conflicts related to his prior or future employment at Simpson Thacher, as well as his discussions and negotiations with Simpson Thacher regarding rejoining the firm.**

Your request has been assigned tracking number 21-02533-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible. If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS). A list of SEC FOIA Public Liaisons can be found on our agency website at <https://www.sec.gov/oso/contact/foia-contact.html>. OGIS can be reached at 1-877-684-6448 or [Archives.gov](https://www.archives.gov) or via email at [ogis@nara.gov](mailto:ogis@nara.gov).

In the interim, if you have any questions about your request, you may contact this office by calling (202) 551-7900, or sending an e-mail to [foiapa@sec.gov](mailto:foiapa@sec.gov). Please refer to your tracking number when contacting us.

For additional information, please visit our website at [www.sec.gov](https://www.sec.gov) and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2465

Office of FOIA Services

August 13, 2021

Mr. Jason Foster Founder & President  
Empower Oversight  
Whistleblowers & Research  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. **21-02534-FOIA (4 of 8)**

Dear Mr. Foster:

This letter is an acknowledgment of your FOIA request dated August 12, 2021, and received in this office on August 13, 2021, for records regarding **all records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from Simpson Thacher, including calendar entries, notes or emails between Mr. Berger and any email address from the domain "@stblaw.com"**.

Your request has been assigned tracking number 21-02534-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible. If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS). A list of SEC FOIA Public Liaisons can be found on our agency website at <https://www.sec.gov/oso/contact/foia-contact.html>. OGIS can be reached at 1-877-684-6448 or [Archives.gov](http://Archives.gov) or via email at [ogis@nara.gov](mailto:ogis@nara.gov).

In the interim, if you have any questions about your request, you may contact this office by calling (202) 551-7900, or sending an e-mail to [foiapa@sec.gov](mailto:foiapa@sec.gov). Please refer to your tracking number when contacting us.

For additional information, please visit our website at [www.sec.gov](http://www.sec.gov) and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2465

Office of FOIA Services

August 13, 2021

Mr. Jason Foster Founder & President  
Empower Oversight  
Whistleblowers & Research  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. **21-02535-FOIA (5 of 8)**

Dear Mr. Foster:

This letter is an acknowledgment of your FOIA request dated August 12, 2021, and received in this office on August 13, 2021, for records regarding **all records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain "@entethalliance.org"**.

Your request has been assigned tracking number 21-02535-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible. If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS). A list of SEC FOIA Public Liaisons can be found on our agency website at <https://www.sec.gov/oso/contact/foia-contact.html>. OGIS can be reached at 1-877-684-6448 or [Archives.gov](http://Archives.gov) or via email at [ogis@nara.gov](mailto:ogis@nara.gov).

In the interim, if you have any questions about your request, you may contact this office by calling (202) 551-7900, or sending an e-mail to [foiapa@sec.gov](mailto:foiapa@sec.gov). Please refer to your tracking number when contacting us.

For additional information, please visit our website at [www.sec.gov](http://www.sec.gov) and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services





UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2465

Office of FOIA Services

August 13, 2021

Mr. Jason Foster Founder & President  
Empower Oversight  
Whistleblowers & Research  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. **21-02537-FOIA (7 of 8)**

Dear Mr. Foster:

This letter is an acknowledgment of your FOIA request dated August 12, 2021, and received in this office on August 13, 2021, for records regarding **all records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain "@oneriveram.com"**.

Your request has been assigned tracking number 21-02537-FOIA. Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible. If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS). A list of SEC FOIA Public Liaisons can be found on our agency website at <https://www.sec.gov/oso/contact/foia-contact.html>. OGIS can be reached at 1-877-684-6448 or [Archives.gov](http://Archives.gov) or via email at [ogis@nara.gov](mailto:ogis@nara.gov).

In the interim, if you have any questions about your request, you may contact this office by calling (202) 551-7900, or sending an e-mail to [foiapa@sec.gov](mailto:foiapa@sec.gov). Please refer to your tracking number when contacting us.

For additional information, please visit our website at [www.sec.gov](http://www.sec.gov) and follow the FOIA link at the bottom.

Sincerely,

Office of FOIA Services

# EXHIBIT C



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

OFFICE OF THE  
GENERAL COUNSEL

Stop 9613

September 23, 2020

*Via electronic mail*  
[jf@empowr.us](mailto:jf@empowr.us)

Mr. Jason Foster  
Empower Oversight  
2615 Columbia Pike, #445  
Arlington, VA 22204

Re: Appeal, Freedom of Information Act Request Nos. 21-02531-FOIA through  
21-02538-FOIA, designated on appeal as Nos. 20-00631-APPS & 21-00632-APPS

Mr. Foster:

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's decision concerning your August 13, 2021 FOIA request<sup>1</sup> for eight categories of records.<sup>2</sup> You

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<sup>1</sup> Although your FOIA request is dated August 12, 2021, it was not received by the SEC's FOIA Office until August 13, 2021.

<sup>2</sup> Specifically, you requested the following records: (1) all records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from Simpson Thacher, including calendar entries, notes, or emails between Mr. Hinman and any email address from the domain "@stblaw.com" (designated as FOIA Request No. 21-02531-FOIA); (2) all records relating to communications from May of 2017 through December of 2020 between William Hinman and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Hinman and any email address from the domain "@entethalliance.org" (FOIA Request 21-02532-FOIA); (3) all records relating to communications, including calendar entries, notes or emails between Mr. Hinman and any personnel in the SEC's Office of the Ethics Counsel regarding Mr. Hinman's continued payments from Simpson Thacher while employed at SEC, his potential recusals or conflicts related to his prior or future employment at Simpson Thacher, as well as his discussions and negotiations with Simpson Thacher regarding rejoining the firm (FOIA Request No. 21-02533-FOIA); (4) all records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from Simpson Thacher, including calendar entries, notes or emails between Mr. Berger and any email address from the domain "@stblaw.com" (FOIA Request No. 21-02534-FOIA); (5) all records relating to communications from May of 2017 through January of 2021 between Marc Berger and any personnel from the Enterprise Ethereum Alliance, including calendar entries, notes or emails between Mr. Berger and any email address from the domain "@entethalliance.org" (FOIA Request No. 21-02535-FOIA); (6) all records relating to communications, including calendar entries, notes, or emails between Mr. Berger and any personnel in the SEC's Office of the Ethics Counsel, regarding Mr. Berger's discussions and negotiations with Simpson Thacher, including all communications regarding potential recusals or conflicts related to his potential employment with Simpson Thacher (FOIA Request No. 21-02536-FOIA); (7) all records relating to communication from May of 2017 through December of 2020 between Jay Clayton and personnel from One River Asset Management, including calendar entries, notes or emails between Mr. Clayton and any email address from the domain "@oneriveram.com" (FOIA Request No. 21-02537-FOIA); and (8) all records of communications, including calendar entries, notes or emails between Mr. Clayton and personnel in the SEC's Office of the Ethics Counsel

requested a fee waiver on the basis that “the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government.” You further state that “Empower Oversight is a non-profit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in making this request ...[and] it is subject only to “reasonable standard charges for document duplication.””

By letter dated July 12, 2021, the FOIA Officer denied your request for a fee waiver and placed you in the “Other Use” fee category. On September 17, 2021, you filed this appeal challenging the FOIA Officer’s decision. I have considered your appeal, and it is granted.

### *Fee Category*

You assert that the FOIA Office “should have classified Empower Oversight as a news media requester.” You state that “Empower Oversight issues ‘press releases’ describing its activities and findings [and] also emails research papers, FOIA updates, and news accounts of its activities to an address list more than 9,400 members of the press, Capitol Hill staff, and key thought leaders.” With respect to the materials sought in the subject FOIA request, you offer that “Empower Oversight intends to evaluate the materials that the SEC produces in response to its FOIA request and to create original work discussing the contents of such materials and the public integrity concerns that arise from this matter.”

Given how you intend to use the materials obtained from this request and your past work, I find that the FOIA Office improperly classified you as an “other use” requester. The FOIA Office will be instructed to classify you as a “news media” requester in processing your FOIA request.

### *Fee Waiver*

As a news media requester, you can only be assessed duplication fees for the processing of your request.<sup>3</sup> The FOIA, however, precludes agencies from assessing duplication fees to news media requesters if the agency fails to meet the 20-day time limit for complying with a request and where no unusual or exceptional circumstances exist.<sup>4</sup> Because the FOIA Office has not complied with the 20-day time period for responding to your request (September 13, 2021) and because it has not informed you that unusual circumstances exist in processing your request, you cannot be assessed duplication fees at this juncture. The question of whether you are entitled to a fee waiver is moot as there are no chargeable fees for processing your FOIA request.<sup>5</sup>

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regarding Mr. Clayton’s discussions and negotiations with One River Asset Management, including all communications regarding potential recusals or conflicts related to his potential employment with One River Asset Management (FOIA Request No. 21-02538-FOIA).

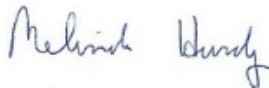
<sup>3</sup> See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>4</sup> See 5 U.S.C. § 552(a)(4)(A)(viii).

<sup>5</sup> See, e.g., *Long v. Dep’t of Justice*, 450 F. Supp. 2d 42, 85 (D.D.C. 2006) (finding moot requester’s challenge to agency’s authority to request certain information in order to make fee category determination where no fee ultimately

If you have any questions regarding this determination, please contact Mark Tallarico, Senior Counsel, at 202-551-5132.

For the Commission  
by delegated authority,

A handwritten signature in blue ink that reads "Melinda Hardy". The signature is written in a cursive, slightly slanted style.

Melinda Hardy  
Assistant General Counsel for  
Litigation and Administrative Practice

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was assessed); *Hall v. CIA*, 437 F.3d 94, 99 (D.C. Cir. 2006) (finding that agency’s release of documents without seeking payment mooted plaintiff’s “arguments that the district court’s denial of a fee waiver was substantively incorrect”).