

SEC Continues to Regulate Cryptocurrency Through Record-High Enforcement Efforts

WRITTEN BY

Jay A. Dubow | Joanna J. Cline | Milica Krnjaja

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The U.S. Securities and Exchange Commission's (SEC) cryptocurrency-related actions reached a new high in 2023, jumping more than 50% when compared to 2022. Although the SEC continues to view cryptocurrency enforcement as a top priority, the question of what role the SEC should play in regulating cryptocurrencies has been an ongoing debate. Nevertheless, we expect the SEC's enforcement efforts in this area to continue at a high pace in 2024, even though whether or not cryptocurrency should be classified as a security or something else remains uncertain.

The Uncertain State of the Law

SEC Chair Gary Gensler has made clear that he believes the existing securities regime appropriately governs cryptocurrencies. In his view, most cryptocurrencies are securities based on the *Howey* test. Under the *Howey* test, a transaction is considered a security if it meets four criteria:

- money is invested;
- there is an expectation that the investor will earn a profit;
- the investment is a common enterprise; and
- profits are generated through the efforts of others.

Yet recent cases have shown that determining whether a cryptocurrency is a security is a complex task that may not always have a clear answer. This uncertainty has increasingly prompted some judges to question why there is no specific regulation addressing cryptocurrency. For instance, U.S. District Court Judge Amy Berman Jackson of the District of Columbia, who is presiding over the SEC's case against Binance, made her views known on this issue during a hearing when she asked:

"Where's the SEC been? Does that matter ... why is it that if they're trying to achieve legislation, is that some suggestion there's something missing in the statute to cover this? Why are we doing this on a coin-by-coin, case-

by-case, judge-by-judge litigation which depends on the ... vagaries of the individual districts ... as opposed to issuing a reg that tells everybody 'this is it?'"

Similarly, U.S. District Court Judge Katherine Polk Failla of the Southern District of New York, who is overseeing the SEC's case against Coinbase, made similar remarks last fall, noting that neither Congress nor the federal courts have made any definitive determinations on whether certain crypto qualifies as a security.

These judges are not alone in questioning whether cryptocurrency requires tailored regulation. Seeking a uniform system of regulation has been a priority of many cryptocurrency lobbyists. Although the legislative efforts in Congress have made some progress, the SEC has been pushing back on the need for new rules on the securities side. The SEC has similarly rejected Coinbase's petition last year asking the SEC to make a clear set of rules to determine if a token is a security and to specify how issuers can legally register with the SEC. Following the rejection, Coinbase's chief legal officer Paul Grewal stated that no one looking fairly at the industry thinks the law is clear. He called for a further dialogue stating that he would rather work together with the SEC to create laws that will benefit consumers than defend "lawsuits based on legal positions that change month after month."

SEC's Cryptocurrency Enforcement Efforts

While the SEC concluded that new cryptocurrency regulation is currently unwarranted, the agency appears set on bringing enforcement actions using existing securities laws. In 2023, the SEC brought 46 enforcement actions related to cryptocurrency against 124 defendants, which represents the highest number since 2013 when such actions were first brought. Of 124 defendants, 54% were individuals and 46% were firms.

Most of the SEC's cryptocurrency-related enforcement efforts are brought in federal courts. From July 2023 through the end of December 2023, the SEC brought 108 actions in U.S. district courts and resolved 65 as administrative proceedings. In 2023, the SEC litigated 26 of the enforcement actions in district courts and resolved 20 as administrative proceedings.

Similar to prior years, the most frequent allegations in these enforcement actions involved fraud and unregistered securities offerings. Around 37% of the enforcement actions in 2023 were related to initial coin offerings, 82% of which included allegations of fraud. The SEC also brought for the first time two proceedings related to nonfungible tokens, alleging defendants conducted unregistered securities offerings in the form of nonfungible tokens (NFTs). In bringing these NFT actions, the SEC has relied on the *Howey* test to allege that the tokens issued in unregistered securities offerings were investment contracts. The SEC settled both NFT enforcement actions.

Compared to the 2013-2022 period, the SEC increasingly recognized remedial, self-reporting, or cooperation efforts undertaken by 52% of the respondents charged in administrative proceedings that involved settlements. Due to this cooperation, the SEC imposed no monetary penalties in two administrative proceedings.

For settlements reached in 2023, the SEC imposed \$281 million in monetary penalties. This amounts to \$2.89 billion in total monetary penalties as of the end of 2023.

Conclusion

The SEC ramped up its cryptocurrency enforcement efforts in 2023 to a record high. While the question of whether the SEC's view on securities law's application to cryptocurrency is valid in the eyes of federal judiciary remains uncertain, the SEC will continue to bring enforcement cases in this area in an effort to create favorable law.

Much of the concern in the cryptocurrency industry is lack of regulatory clarity. The SEC has been criticized for regulating by enforcement with regard to cryptocurrency. Consequently, litigants should pay close attention to federal courts' decisions addressing these matters, especially as the litigation works their way to federal courts of appeals.

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