Articles + Publications | July 14, 2023

SEC v. Ripple Labs, Inc.: XRP Considered an Unregistered Security in Institutional Sales but Not in Programmatic Sales or Other Distributions

WRITTEN BY

Robert A. Friedel | Jay A. Dubow | Mary Weeks | Ethan G. Ostroff | Isabela P. Herlihy

In a long-awaited decision in *SEC v. Ripple Labs, Inc.*, U.S. District Judge Analisa Torres of the Southern District of New York held that Ripple Labs, Inc.'s (Ripple) XRP token is not, in and of itself, a security requiring registration. Although the decision is being regarded by many as a victory for both Ripple and the crypto industry, the nuances in the decision may result in an appeal from both sides.

In December 2020, the Securities and Exchange Commission (SEC) filed a complaint against Ripple and two of its executives, alleging that they raised more than $1.3 billion through an unregistered digital asset securities offering of XRP cryptocurrency. Ripple argued that XRP is not an "investment contract" — and, therefore, not a security — under the *Howey* test. More than 50 years ago, the U.S. Supreme Court in *SEC v. Howey* established that an investment contract exists if there is (1) the investment of money (2) in a common enterprise (3) with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.

In its ruling, the court held that XRP, as a digital token, is not a "contract, transaction or scheme" that by itself satisfies *Howey*'s definition of an investment contract. The court examined the sale of XRP in three different contexts: (1) institutional sales under written contracts, (2) programmatic sales on digital asset exchanges, and (3) other distributions under written contracts in consideration other than cash.

In the context of institutional sales, the court determined that Ripple's sale of $729 million of XRP to institutional buyers constituted investment contracts that fit squarely into the *Howey* test. The institutional sales were directly negotiated between Ripple and each institutional purchaser. Specifically, the court found that, based on Ripple's "communications, marketing campaign, and the nature of the sales, reasonable investors would understand that Ripple would use the capital received from said sales to improve the market for XRP and develop uses for the XRP Ledger, thereby increasing the value of the token."

On the other hand, regarding the other two contexts, the court determined that more than $1 billion of other sales of XRP by Ripple to the public in anonymous market transactions on token exchanges and issuances of XRP to employees and others for services or consideration other than cash, did not involve the sale of investment contracts. In contrast to the institutional buyers, programmatic buyers did not know to whom they were paying money or whether the money was invested in Ripple. As for other contributions, the court held that the transactions failed the first *Howey* prong because their recipients did not pay money or other tangible and definable consideration.

©2026 Troutman Pepper Locke

The most significant takeaway from the court's decision is that XRP tokens themselves are not securities. Rather, the existence of a security in connection with the sale of XRP tokens turned on whether the transaction involved an investment contract under the *Howey* Test. As interpreted through this court's reasoning, this stands for the proposition that only direct issuer sales to purchasers, where the purchasers expect the issuer to provide managerial efforts to generate an increase in the token value — in contrast to anonymous sales as a fraction of total trading volume on a token exchange — are susceptible to characterization as the sale of securities. The decision also suggests that token issuances to employees and other service providers likely do not involve the sale of securities.

The court's opinion also strengthens the hand of token issuers in a later stage of maturity, where the issuer (and its affiliates or founders) are no longer selling cryptocurrency tokens for cash or digital currency directly to identifiable buyers, but are instead selling tokens as part of the overall daily volume on a token exchange. On the other hand, the court's decision does not necessarily address the legality of an issuance of tokens by an issuer early in the life of the token issuer (before the tokens are listed on an exchange), either through an initial coin offering or other token generation event. For such earlier-stage sales and/or issuances, customary factors would presumably continue to apply, including but not limited to ensuring that:

- The network is already fully functional and offers the ability to use the tokens for a consumptive purpose on the network (*i.e.*, that the proceeds are not used to build the network to initial full functionality);
- The "manner of sale" of the tokens does not involve promises to generate increases in token value through future issuer promotional or development activity, or structural price-based incentives intended to generate buying interest (such as through escalating tiered pricing); and
- Tokens are sold only to persons who are expected to use them for consumptive purposes on the network, and only in amounts that they would be expected to use for such consumptive purposes.

The court's decision will likely be appealed by the SEC, and perhaps also by Ripple as it has been found liable for illegal sales of $729 million of securities.

RELATED INDUSTRIES + PRACTICES

- Corporate
- Payments + Financial Technology
- Securities Investigations + Enforcement
- Securities Litigation
- White Collar Litigation + Investigations