

Securities Regulation Daily Wrap Up, BLOCKCHAIN—S.D.N.Y.: Coinbase responds to SEC's complaint, requests court dismiss the charges with prejudice, (Jun 30, 2023)

By Suzanne Cosgrove

The crypto exchange holds the SEC's actions go beyond the bounds of the regulator's authority and the Commission's charges "lack all merit."

In a filing in the U.S. District Court of the Southern District of New York, the digital asset exchange Coinbase Inc. weighed in with a point-by-point response to the SEC complaint filed June 6 and asked the court to dismiss the SEC's charges with prejudice. A [hearing](#) in the case has been set for July 13 ([SEC v. Coinbase](#), June 28, 2023).

The Commission [had charged](#) that Coinbase operates three functions that are typically separated in traditional securities markets—that of a broker, exchange and clearing agency -- but never registered any of those functions with the SEC, "thus evading the disclosure regime that Congress has established for our securities markets." Further, the SEC maintained Coinbase engages in unregistered securities offerings through its staking-as-a-service program.

Differing definitions. However, [in its filing](#), Coinbase countered that the SEC's "still-evolving legal position rests on a novel, atextual, and acontextual construction of the word 'investment contract' in the federal securities statutes" that is at odds with SEC officials' public statements about the limits of their agency's statutory authority.

Loosely referencing the *Howey* test (which defines a security as an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others), Coinbase contended in its court filing that its transactions are not securities transactions, in part because digital assets' value to their purchasers is inherent in the things bought and traded rather than in the businesses that generate them.

Arguments previewed. In [a letter](#) sent Wednesday to U.S. District Judge Katherine Polk Failla, who is scheduled to oversee the next hearing in the case, attorneys for Coinbase outlined their complaints and let her know of their intent to file a motion for judgment. The letter also served to reinforce their contention that the entire matter "falls outside the SEC's authority" and should be dismissed.

"Congress has consistently recognized that regulatory authority over digital assets remains unassigned," the attorneys wrote. "It has considered at least 15 legislative proposals concerning the regulation of digital assets ... None reflect the view that the SEC presently has the authority it claims through this action."

Publicly traded. Also central to Coinbase's argument against the SEC's charges is that the regulator cleared Coinbase to list its shares on Nasdaq in April 2021. The SEC allowed the public offering "without once suggesting that Coinbase must register its operations," Coinbase said.

The Commission grounds its suit in allegations that 12 of the more than 240 tokens traded on Coinbase's spot exchange are "securities," the exchange added. "Six of these 12 assets were already on Coinbase when the SEC declared the company's registration statement effective. The SEC called none of them securities in 2021."

The only change that occurred in the last two years, Coinbase charged, "is in the SEC's position regarding its powers."

Continuous filings. Coinbase filed a rulemaking petition with the SEC in July 2022, saying regulatory clarity was overdue for the crypto industry. In a Third Circuit petition for writ of mandamus filed in April 2023 designed to force the SEC to respond, Coinbase contended, among other things, that the SEC had already decided to deny the petition but had not stated it publicly.

The exchange argued that the Commission has given little guidance on how the federal securities laws apply to digital assets, leaving Coinbase in an “untenable position.”

On June 20, [the Third Circuit ordered](#) the SEC to update the court by October 11, letting it know how the Commission is handling Coinbase’s petition for rulemaking on crypto assets, but the court held back from a ruling on Coinbase’s petition for writ of mandamus.

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Companies: Coinbase, Inc.

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