

## **Securities Regulation Daily Wrap Up, BLOCKCHAIN—S.D.N.Y.: SEC moves for interlocutory appeal of adverse Ripple ruling on crypto, (Aug 18, 2023)**

By [Lene Powell, J.D.](#)

Whether or not crypto tokens are securities under *Howey* is critical to the SEC's enforcement authority.

In a key tactical move, the SEC filed a motion for interlocutory appeal of a recent SDNY ruling in *SEC v. Ripple Labs* that sales of the XRP token in certain settings did not involve the “offer and sale of securities” requiring registration. The SEC said there is “substantial ground for differences of opinion” as reflected by a split in the SDNY district arising from a contrary ruling in *SEC v. Terraform Labs* ([SEC v. Ripple Labs, Inc.](#), August 18, 2023).



An interlocutory ruling by the Second Circuit on the XRP token issue could provide clarity on the broader issue of whether most crypto tokens are securities under *Howey*.

The court set a briefing schedule for response by Ripple and reply by SEC.

**Ripple ruling.** The SEC [sued](#) Ripple Labs in 2020, alleging that its offer and sale of the XRP token, a crypto asset based on the XRP ledger, constituted an unregistered securities offering.

In July, the court issued a [split ruling](#) that the offer and sale of XRP to institutional investors was an unregistered securities offering but not the offer and sale of XRP to retail investors on crypto trading platforms or in other distributions.

The SEC [requested leave](#) to file an interlocutory appeal. The court [granted](#) the SEC's request.

**SEC motion for interlocutory appeal.** The SEC made the following points:

First, the court's ruling on offers and sales on trading platforms and those for services involve controlling questions of law, the SEC said. They involve “pure legal questions” that significantly affect the conduct of the action.

According to the SEC, the rulings dismissed the SEC's claims related to more than half of the XRP offers and sales at issue and entirely disposed of the primary Section 5 liability claims against the individuals. Both rulings could have a substantial impact on a large number of pending litigations—including *SEC v. Coinbase*.

Next, the SEC argued there is a “substantial ground for difference of opinion” on whether issuer offers and sales over crypto asset trading platforms can give rise to an investment contract under *Howey*. The SEC noted that in the recent ruling by Judge Rakoff in [SEC v. Terraform Labs](#), another court in the district explicitly disagreed with the order's ruling on programmatic sales.

There is also substantial ground for difference of opinion as to whether distributing an asset in exchange for services constitutes an investment of money, the SEC said. Courts—including at least one in the crypto space—have held that issuers sold investment contracts in exchange for non-cash consideration such as labor, services, or other assets. Here, the SEC pointed to [SEC v. LBRY](#).

Certifying the appeal would materially advance the ultimate termination of the litigation. The SEC said that determining remedies would be resource-intensive, and Ripple has indicated it is considering its own appeal.

The SEC asked the court to stay any remedies litigation and pretrial proceedings while the interlocutory certification request and any appeal are pending.

**Ripple reaction.** On the X social media platform, Stuart Alderoty, chief legal officer at Ripple, [tweeted](#) opposition the SEC's request for an interlocutory appeal.

"There is no extraordinary circumstance here that would justify departing from the rule requiring all issues as to all parties to be resolved before an appeal," said Alderoty.

Ripple CEO Brad Garlinghouse [tweeted](#) that an appeal would not change the central holding.

"Reminder - the request for appeal (even if granted) doesn't change the fact that XRP is not a security. That's not up for debate/trial," said Garlinghouse.

**Next steps.** The court set a deadline of September 1 for Ripple to file any opposition to the motion and September 8 for the SEC to reply.

The case is [No. 20 Civ. 10832 \(AT\) \(SN\)](#).

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Companies: Ripple Labs, Inc.

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