

VitalLaw Legislation and Rules News, BLOCKCHAIN—3d Cir.: Coinbase plans to take SEC back to court over crypto rulemaking petition, (Dec 15, 2023)

By [Mark S. Nelson, J.D.](#)

The SEC denied Coinbase's request for the agency to engage in notice and comment rulemaking or to otherwise issue guidance further clarifying the rules of the road for crypto asset securities.

A majority of the Commission declined to further entertain a rulemaking petition submitted in July 2022 by Coinbase Global, Inc. that asked the Commission to engage in rulemaking establishing rules of the road for blockchain and crypto activities in the securities sphere. Commissioners Hester Peirce and Mark Uyeda disagreed with the decision to turn away the Coinbase petition. A [letter](#) from the SEC's Office of the Secretary to Coinbase explained that the petition failed to adhere to SEC rules for such petitions and suggested that other in-progress rulemakings could answer some of Coinbase's concerns about clarity on crypto regulations. Coinbase late today said it plans to take the SEC back to court via a petition for review of the Commission's denial of its rulemaking petition ([In re Coinbase, Inc.](#), December 15, 2023).

SEC denial. The SEC rarely takes explicit action on the numerous petitions for rulemaking that it receives, despite in some cases receiving many thousands of public comments. The SEC also is sometimes barred by Congress from using funds to pursue certain rulemakings, some of which are suggested by the public via rulemaking petitions, as remains the case regarding public company political donations.

In the case of Coinbase's [petition](#) for clearer securities regulations on crypto activities, the Commission told the firm that its petition did not follow SEC rules and provide the "text or the substance of any proposed rule," but instead offered only generalized concerns about the application of existing securities rules to crypto activities.

The Commission's letter indicated that the Coinbase petition had been referred to staff at the agency's Divisions of Trading and Markets and Corporation Finance (CorpFin), who together made an unspecified recommendation to the Commission that prompted the denial of the Coinbase rulemaking petition.

The Commission's letter also directly addressed Coinbase's concerns about the lack of clarity in existing federal securities laws for crypto activities. Here, the Commission majority stated that they disagreed with Coinbase that existing federal securities laws are insufficient to address many of the legal and regulatory issues that may arise from a firm's crypto activities. The majority response to Coinbase also noted that the Commission has pursued multiple crypto-related rulemakings and that those rulemakings may address some of Coinbase's concerns about lack of legal clarity around crypto activities.

SEC Chair Gary Gensler issued a [statement](#) echoing the contents of the letter sent to Coinbase. Gensler specifically said that existing federal securities laws can adequately address crypto issues, that the SEC is pursuing various rulemakings that have crypto components, and that the SEC seeks to maintain discretion over its regulatory agenda.

"While the crypto market experiences outside fraud, abuse, and noncompliance relative to its size, it nevertheless is a small portion of the bigger-than-\$110 trillion capital markets," said Gensler. "It is important that the Commission maintain discretion to direct focus to whichever parts of the capital markets need updated regulation."

Peirce, Uyeda statement. Commissioners Peirce and Uyeda issued a [statement](#) disagreeing with the Commission majority's decision to deny Coinbase's rulemaking petition. Both commissioners acknowledged that the Commission has discretion over much of its rulemaking agenda, but said they prefer an approach that would have the SEC host public roundtables, issue concept releases, and seek additional public comment around what regulatory actions may be needed to clarify federal securities regulations for crypto activities.

“We hope that interested persons continue to posit specific rule changes, guidance, and exemptions that would form a useful basis for the crypto industry to continue its development within the United States,” said Peirce and Uyeda. “While we are disappointed that the Commission is not hosting these important conversations, we will have an open ear for conversations that others host and the ideas that emerge from those conversations.”

Public [records](#) available on the SEC’s website indicate that Peirce and a combination of advisors to Peirce and Uyeda met with Coinbase representatives on three occasions regarding the rulemaking petition. On one of those occasions, the discussion also included a proposed rule on custody of digital assets.

Overall, the SEC received 1,683 form letters from persons supporting the Coinbase rulemaking petition and arguing that new rules for crypto are needed to ensure U.S. financial innovation and to prevent the loss of crypto business to offshore exchanges. Four substantive public comment were received, three of them from Coinbase ([December 6, 2022](#); [March 20, 2023](#); [May 3, 2023](#)), and one from the U.S. Chamber of Commerce ([January 19, 2023](#)).

Coinbase headed back to court. Coinbase’s Chief Legal Officer, Paul Grewal, [posted](#) on X (formerly Twitter), that the firm would now take its demand for rules of the road on crypto back to court. “With appreciation for the Third Circuit, later today we’ll again seek its help by challenging the SEC’s abdication of its duty,” said Grewal. Grewal’s mention of the U.S. Court of Appeals for the Third Circuit was a reference to Coinbase’s earlier court effort to force the SEC to respond to its rulemaking petition.

The SEC filed a [document](#) in the Third Circuit today noting that it had taken the action desired by Coinbase and indicating that the agency, if necessary, was prepared to move to dismiss the action. For its part, Coinbase responded in court by indicating that it will file a petition for review of the Commission’s denial of its rulemaking petition. At this point, almost the only thing the SEC and Coinbase agree on is that Coinbase’s request for a writ of mandamus is now moot.

Said Coinbase in its court filing: “The Commission’s formal denial of that request makes explicit what its words and actions had long shown was the Commission’s position. By doing so, the SEC has cleared the path for judicial review that its unexplained inaction had long obstructed.”

In April 2023, Coinbase sought a [writ of mandamus](#) from the Third Circuit asking the court to order the SEC to reply to the firm’s rulemaking petition, albeit without telling the SEC how to reply. As of June 2023, the Third Circuit, having heard from the SEC that agency staff would submit a recommendation to the Commission within a 120 day period, [held off issuing the writ of mandamus](#), but the court did retain jurisdiction over the matter. The SEC later informed the court that the Commission would make a decision about how to respond to the rulemaking petition by December 15, 2023.

The case is [No. 23-1779](#).

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Companies: Coinbase Global, Inc.

MainStory: Securities