

Securities Regulation Daily Wrap Up, BLOCKCHAIN—S.D.N.Y.: SEC's motion to appeal Ripple decision denied, (Oct 4, 2023)

By [Rodney F. Tonkovic, J.D.](#)

There was no substantial ground for difference of opinion, and an appeal would not materially advance the litigation.

The SEC's motion for interlocutory appeal in the *Ripple* case has been denied. The Commission sought an appeal so that the Second Circuit could provide clarity on the application of *Howey* to crypto assets and because of an express intra-district split on the matter. The court said that the Commission did not present a pure question of law and disagreed that her conclusions conflicted with *Terraform*. The court denied the motion for certification of interlocutory appeal, and a request for a stay was denied as moot. Trial is set to begin on April 23, 2024 ([SEC v. Ripple Labs, Inc.](#), October 3, 2023, Torres, A.).



In 2020, the SEC [sued](#) Ripple Labs, alleging that its offer and sale of the XRP token was an unregistered securities offering. The XRP token is a crypto asset based on the XRP ledger. The SEC claimed that the XRP token was an investment contract and thus a security.

In July 2023, the court issued a split ruling on the matter. The judge applied the *Howey* test and concluded that sales made to institutional investors were "investment contracts" and thus securities under the federal securities laws, but "programmatically" sales of tokens to retail investors on crypto trading platforms or in other distributions were not.

Motion to appeal. The SEC [requested](#) leave to file an interlocutory appeal on the two holdings, and the court [granted](#) the request. The [motion](#) for interlocutory appeal, plus a request for a stay, was filed on August 28, 2023. The motion made two arguments, the first of which concerned the controlling question of law. The Commission said that the court's order has precedential value for other digital asset cases and that the court improperly applied *Howey*. This could have a substantial impact on a large number of pending cases, the SEC contended.

The Commission also argued that there was a substantial ground for difference of opinion, in part, because of an intra-district split of authority over whether certain types of sales of crypto assets are sales of investment contracts. Here, the Commission pointed to Judge Rakoff's ruling in the [Terraform](#) case. In finding that Terraform's crypto assets were securities, Judge Rakoff declined to draw a distinction between the various coins based on their manner of sale. In doing so, he explicitly rejected the approach used by the judge in *Ripple*, reasoning that *Howey* makes no distinction between purchasers.

Appeal denied. The court denied the SEC's motion for certification of its interlocutory appeal. The court first said that the SEC did not present a "pure question of law" that could be decided "quickly and cleanly." The core of the Commission's argument was that the court improperly applied *Howey*—not that it used the wrong standard—and that test depends on the facts and circumstances of a transaction. This question, then, was not an issue of pure law and was not appropriate for interlocutory appeal.

Regarding the precedential value of this case, the court said that its findings came from the application of *Howey* to the unique facts and circumstances of *this* case: the pending actions cited by the SEC involve different factual circumstances and economic realities, the judge said.

Building on the above, the court found no substantial ground for difference of opinion and rejected the argument that her decision was in conflict with *Terraform*. The court said that Judge Rakoff was not required to engage with her

reasoning in the earlier order due to the different procedural postures of the two cases. Since *Terraform* was at the motion to dismiss stage, the judge was required to accept all reasonable inferences in the SECs favor. The court said that the SEC failed to point to any digital-asset cases conflicting with her decision because it could not contend that courts substantially differ as to the proper legal standard to be applied.

Finally, the court said that certification would not materially advance the ultimate termination of the litigation. If this order were reversed and remanded, the court said, the complicated legal and factual issues would have to be considered in the first instance, and any party that disagreed could again move for an interlocutory appeal. Plus, much resource-intensive litigation remains in this matter before final judgment.

The case is [No. 1:20-cv-10832](#).

Attorneys: Jorge Gerardo Tenreiro for the SEC. Andrew J. Ceresney (Debevoise & Plimpton LLP) and Andrew Edward Goldsmith (Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.) for Ripple Labs Inc.

Companies: Ripple Labs Inc.

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