

[Securities Regulation Daily Wrap Up, BLOCKCHAIN—3d Cir.: Coinbase asks Third Circuit to require SEC to respond to rulemaking petition on crypto, \(Apr. 26, 2023\)](#)

Securities Regulation Daily Wrap Up

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

Coinbase said it needs a response from the SEC on its rulemaking petition so it can challenge the SEC in court if the answer is no.

Coinbase, Inc., a major cryptocurrency trading platform, has brought an action asking the Third Circuit to require the SEC to act on Coinbase's petition for rulemaking on digital assets. Coinbase argues that Coinbase's "painstaking compliance" efforts have been met with enforcement threats and muddled, unclear guidance on whether and how the securities laws apply to digital assets (*In re: Coinbase Inc.*, April 26, 2023).

In a [blog post](#), Coinbase said it seems likely the SEC has decided to deny the rulemaking petition but has not told the public yet.

Coinbase seeks a writ of mandamus instructing the SEC to respond to Coinbase's rulemaking petition within 7 days.

Coinbase rulemaking petition. Last July, Coinbase filed a [rulemaking petition](#) asking the SEC to develop a "new regulatory framework" governing digital asset securities. According to Coinbase, the U.S. does not currently have a functioning market in digital asset securities due to the lack of a clear and workable regulatory regime.

In Coinbase's view, the SEC has not provided adequate guidance on how existing rules apply to digital assets. Instead, the SEC appears to be following an "enforcement-first" approach to crypto regulation, Coinbase said.

Coinbase petitioned the SEC to propose new rules for the offer, sale, registration, and trading of digital asset securities. Coinbase also urged the SEC to seek input from the public and market participants.

The SEC has not publicly responded to Coinbase's rulemaking petition.

Petition for writ of mandamus. In its petition to the Third Circuit, Coinbase argues that the SEC has provided sparse guidance on how the federal securities laws apply to digital assets, leaving Coinbase in an "untenable position."

Coinbase cited the following SEC positions on digital assets:

- In 2018, a senior SEC official stated that a digital asset "all by itself" is not a security that requires registration with the SEC.
- In 2019, an SEC division published a "Framework" that proposed a 60-factor analysis for determining whether a digital asset may be a security.
- In April 2021, the SEC cleared the way for Coinbase to become a public company without any indication that Coinbase needed to register with the Commission.
- In May 2021, the SEC Chair testified before Congress that "the exchanges trading in these crypto assets do not have a regulatory framework either at the SEC, or our sister agency, the Commodity Futures Trading Commission... Right now, there is not a market regulator around these crypto exchanges."
- More recently, the SEC has signaled a tougher stance. For example, in December 2022, the Chair said, "I feel that we have enough authority, I really do, in this space" to require crypto companies "to come into compliance" with the Commission's registration requirements.

According to Coinbase, “the Commission’s new understanding of the securities laws distorts the statutory text, and its regulate-by-enforcement approach transgresses due process and fair notice and violates the APA [Administrative Procedure Act].”

Coinbase further argues that the SEC “has demonstrated by its words and actions—including a campaign of backward-looking enforcement actions, a recent threatened action against Coinbase, and the SEC Chair’s recent testimony to Congress—that it has no intention of conducting rulemaking, as Coinbase has requested.”

By withholding a formal response to Coinbase’s rulemaking petition, the SEC has insulated its refusal from the ordinary avenues of judicial review—and deprived the industry of the path to registration that the SEC insists industry must follow, Coinbase said.

“The writ of mandamus should be granted to break the unlawful logjam,” Coinbase wrote.

Enforcement actions involving Coinbase. The crypto platform has been involved in a few run-ins with the SEC and other authorities.

Most recently, Coinbase [said](#) in March it had received a Wells Notice outlining the SEC’s intent to bring charges relating to Coinbase’s staking services, wallets, and operation of its trading platform.

Going further back, on July 21, 2022—the same day Coinbase filed its rulemaking petition—the SEC [charged](#) a former Coinbase product manager and others with insider trading. According to the SEC, Ishan Wahi tipped his brother and another individual about upcoming token announcements on the Coinbase platform, which they used to make profitable trades. The Wahi brothers are [seeking dismissal](#) of the SEC complaint, arguing the tokens at issue are not “investment contracts” under the federal securities laws.

In parallel criminal proceedings in January, Ishan’s brother Nikhil Wahi was [sentenced](#) to 10 months in prison and ordered to pay \$892,500 in forfeiture. Ishan [pleaded guilty](#) to insider trading in February.

Also in January, Coinbase entered into a [\\$100 million consent order](#) with the New York Department of Financial Services relating to anti-money-laundering [compliance failures](#).

Next steps. If the Third Circuit rules in Coinbase’s favor, it is unlikely to tell the SEC how to act on Coinbase’s rulemaking petition, only require that the SEC must respond. But such a ruling could nevertheless provide fuel for the crypto industry’s complaints that the SEC is not providing “clear rules of the road.” If so, pressure may build on the SEC to undertake formal rulemaking or additional guidance on how the federal securities laws apply to crypto assets.

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

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Companies: Coinbase, Inc.

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