

## [Securities Regulation Daily Wrap Up, BLOCKCHAIN—S.D. Cal.: SEC seeks to dismiss lawsuit demanding clarity on Ethereum legal status, \(Feb. 8, 2023\)](#)

Securities Regulation Daily Wrap Up

[Click to open document in a browser](#)

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

The SEC argues a law firm has not met jurisdictional requirements for its claim that the SEC is being overly vague about crypto asset oversight.

The SEC is asking a federal district court to dismiss a lawsuit by a small crypto-focused law firm seeking declaratory relief relating to the Ether digital asset and Ethereum network. According to the SEC, the court lacks subject matter jurisdiction because the law firm has not identified a case or controversy and it does not have standing or a ripe dispute ([Hodl Law, PLLC v. SEC](#), February 6, 2023).

**Seeking clarity on crypto.** Hodl Law bills itself as “a law firm dedicated to the unique issues of digital assets and cryptocurrency.” (“Hodl” is crypto slang for “hold on for dear life”).

Hodl Law [argues](#) it is at risk of imminent harm due to the uncertain legal status of the Ethereum Network and Ether DCU under the federal securities laws. The firm says its practice of law relating to digital assets and cryptocurrencies “involves utilizing digital assets and cryptocurrencies.” Specifically, the firm itself “transacts on the Ethereum Network and utilizes the Ether DCU [digital currency unit] for a variety of use cases.”

If the SEC were to determine that Ethereum Network or Ether DCU are securities or investment contracts under the Securities Act, their use could potentially be deemed unlawful securities transactions. The firm is concerned this could expose it to potential legal liability.

The firm contends the SEC has refused to state its official position on the Ethereum Network and Ether DCU despite inquiries by the firm along with thousands of members of the public. The firm says SEC officials have provided ambiguous, conflicting indications on this question, leaving Ethereum users in doubt. The firm notes the SEC has brought lawsuits against individuals and entities in relation to other DCUs.

The firm seeks declaratory relief clarifying the legal status of Ethereum Network and Ether DCU under the federal securities laws.

**SEC motion to dismiss.** The SEC filed an [appearance of counsel](#) and [notice of motion to dismiss](#) on February 6.

The SEC argues the action should be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). In its [memorandum](#) supporting the motion to dismiss, the SEC says Hodl Law has not identified a duty of the SEC to provide a determination as to Ethereum and the Ether DCU under the federal securities laws. The SEC also argues other jurisdictional deficiencies.

**SEC: no case or controversy.** First, the SEC argues Hodl Law has not identified a “case or controversy” between it and the SEC, as required by Article III, section 2 of the United States Constitution. According to the SEC, the complaint does not allege that the SEC has investigated or prosecuted Hodl Law for any reason, nor that it is likely to do so in the future.

The SEC also says Hodl Law has not alleged that the SEC has an obligation to explain Hodl Law’s rights to it under the federal securities laws or to promise not to prosecute it in the future. Nor has it pointed to any statute that would impose such an obligation.

"At its core the Complaint only displays Hodl Law's desire for the SEC to promulgate rules around crypto/digital assets, which does not amount to an actual case or controversy," stated the SEC.

**SEC: no standing.** Next, the SEC argues that Hodl Law lacks standing. The SEC contends the firm has not alleged an "actual or imminent" personal injury traceable to the SEC's conduct that declaratory relief would redress. The SEC again points to the lack of threat of investigation or prosecution.

"Hodl Law presents only a hypothetical concern that it may violate federal securities laws, which amounts more to an abstraction than an actual case because the supposed injury has not materialized and may never materialize," the SEC stated.

**SEC: claim not ripe.** Closely related to the standing issue, the SEC next argues that Hodl Law's claim is not ripe. Citing precedent, the SEC states that an agency's action is appropriate for review if "the regulation at issue is a final agency action." Here, there is no final agency decision. Rather, the impetus of Hodl Law's case is that the SEC has not completed its decision-making process concerning whether transacting on the Ethereum network implicates federal securities laws, says the SEC.

On the "hardship" prong, the SEC argues that Hodl Law has not shown any hardship to their day-to-day operations from the court's withholding consideration of their claim, only "general anxiety." Dismissal of the action would simply force Plaintiff to wait for SEC determinations, just like the "millions of other users worldwide," the SEC says. Moreover, dismissal is appropriate to permit the SEC to crystallize its decision-making and avoid premature adjudication, the SEC argues.

**SEC: APA requirements not met.** Finally, the SEC contends that the claim does not meet Administrative Procedure Act (APA) requirements.

Here, the SEC first contends that the only possible basis for Hodl Law's claim is the APA because the complaint does not describe any Constitutional right or any other statutory or common law right, and the APA provides a vehicle for claims against federal agencies when no other statutory process exists.

According to the SEC, the APA permits judicial review of two categories of agency conduct: (1) agency action made reviewable by statute; and (2) final agency action for which there is no other adequate remedy in a court. Here, the SEC argues the complaint does not and cannot identify a statute that provides for judicial review of the SEC's purported action (or inaction) concerning the Ethereum network or Ether. Further, there is no final agency action, as detailed above.

To the extent the complaint may be construed to make a claim based on agency inaction under 5 U.S.C. § 706(1), Hodl Law's allegations also fall short, the SEC says. When a plaintiff seeks to challenge agency inaction, the APA authorizes reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed." Here, Hodl Law has not identified any duty the SEC may have to promulgate rulemaking relating to Ethereum or to respond to Plaintiff's individual inquiries about its own use of Ethereum, says the SEC.

**SEC: declaratory relief not appropriate.** Even if the court had jurisdiction over this case, it should decline to exercise it, the SEC writes.

The SEC argues that declaratory judgment by the court would have significant effects beyond addressing Hodl Law's use of the Ethereum network and Ether; it would impact users of many types of digital currency and the larger digital currency market. This action is not the appropriate forum for the court to explore how the Ethereum network and Ether are handled under federal securities laws.

"Hodl Law asks this Court to validate its use of a particular crypto/digital currency (Ether) without going through the processes that would apply to SEC rulemaking on issues relating to that crypto/digital currency ... This is not an appropriate forum for a broad ruling on how the federal securities laws apply to a particular crypto/digital currency," writes the SEC.

The SEC filed a [proposed order](#) that would dismiss the complaint.

**Party comment.** The SEC declined to comment beyond the public filings on this matter.

Hodl Law provided the following comment:

"As expected, rather than adhere to its claimed mission of providing clear market guidance with the aim of protecting ordinary American investors, the SEC has chosen to continue its haphazard approach to digital assets by dissembling with a motion to dismiss based on lack of subject matter jurisdiction. Rather than respond with its actual position on the security status of a software network and digital currency unit with a market capitalization of over two hundred billion dollars, the SEC is again using weaponized ambiguity to turn the entire digital asset space into its fiefdom. The SEC's motion to dismiss should serve as a clarion call to any individual or institution that transacts on the Ethereum Network and uses the Ether DCU that the SEC fully intends to classify both as securities once its current phase of litigation against other digital asset projects wind down.

"As to the motion itself, Hodl Law is hopeful that the court will see through the SEC's obfuscation. Given the relentless attacks the agency has pursued against people and companies to date for using DCUs on the secondary market, Hodl Law's active use of the Ethereum Network and Ether DCU gives rise to a substantial controversy of sufficient immediacy and reality to warrant issuance of declaratory judgment."

The case is [No. 22-cv-1832-L-JLB](#).

Attorneys: Frederick A. Rispoli (Hodl Law Cali, APC) for Hodl Law, PLLC. Alexandra Verdi for the SEC.

Companies: Hodl Law, PLLC

MainStory: TopStory Blockchain ExchangesMarketRegulation GCNNews SecuritiesOfferings CaliforniaNews