

SEC-ond Try: SEC Amends Proceedings Against Binance

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On September 12, 2024, the US Securities and Exchange Commission (the SEC) filed a [motion to amend the original complaint](#) in its ongoing case against Binance Holdings Limited (Binance), which operates the largest crypto-trading platform (CTP) in the world, Binance.com, and its US-based affiliate, BAM Trading Services (BAM Trading).¹ Together with Binance, BAM Trading operates the crypto-trading platform Binance.US. The amended filing includes both procedural amendments and legal clarifications, highlighting another shift in strategy by the SEC in its ongoing enforcement pursuits within the digital asset ecosystem.

The latest amendment sparked further discussion, particularly regarding the SEC's regulatory clarity and control over the digital assets space. Most significantly to how this amendment may impact the Canadian landscape, is the SEC's statement that its previous use of the term "crypto asset securities" does not in fact mean that the SEC is referring to a particular crypto asset itself as a security.

History of the SEC Charges Against Binance

In its original charge against Binance from June 2023, the SEC alleged that the CTP operated an unregistered securities exchange and engaged in deceptive practices towards its investors.² Among other things, the SEC also alleged that although US customers were restricted from making transactions on Binance.com, Binance allowed for "high-value" US customers to trade on the platform. Further, despite claims that Binance.US operated as an independent trading platform, Binance's founder Changpeng Zhao controlled the operation of Binance.US behind the scenes.³ The SEC alleged that Binance and Zhao misled investors about "risk controls and corrupted trading volumes".⁴

In June 2024, a federal judge in the US District Court for the District of Columbia ruled that the majority of the SEC lawsuit against Binance could proceed; however, this ruling was still a partial win for the digital asset industry as the judge held that the SEC had not established that crypto tokens were outright to be considered securities subject to SEC oversight.⁵ More specifically, the Court found that the SEC had not made a plausible assertion that purchasers on secondary markets expected Binance to use their investment to generate profits. According to the SEC, some of Binance's sales, including of its token BNB, should have been considered unregistered securities offerings as they were "investment contracts" under the meaning of *Howey*.⁶

The Amended Complaint Against Binance

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The SEC responded to this ruling by filing a proposed amended complaint in its proceedings with Binance. In its proposed amendment, the SEC aimed to address some of the issues that the federal judge had with the SEC's earlier arguments.

A substantial position taken by the SEC was regarding Binance's promotion of tokens, including its own native token, BNB. The SEC advanced that Binance's unique position as a market leader in CTPs allowed it to push information to investors in a promotional manner. In addition to BNB, the SEC argued that ten other digital assets were promoted and traded as unregistered securities, namely SOL, ADA, MATIC, FIL, ATOM, SAND, MANA, ALGO, AXS, and COTI.

The SEC amendment that created the most controversy in the digital asset community is found in footnote 6 of the [memorandum of law in support of the motion to amend the complaint](#). There, the SEC states that their prior blanket use of the phrase "crypto asset securities" when referring to digital assets, does not necessarily mean that the SEC is referring to the "crypto asset itself as the security," and the SEC "regrets any confusion it may have invited" through the use of this phrase.⁷ The explanation provided by the SEC was that the crypto assets were sold in a scheme that involved unregistered investment contracts caught by the test provided in the seminal *Howey* decision (therefore falling under the SEC's jurisdiction), and not that the crypto assets themselves were necessarily securities.

The proposed amendment was met with apprehension and confusion by members of the digital asset community as the SEC's prior position in its regulation of crypto assets appeared to be that the assets themselves were securities, and not that the crypto assets were traded in conjunction with unregistered investment contracts. Members of the community felt that this was a marked departure from the SEC's position on crypto asset regulation that had been established over the past few years and is another example of what they claim is the SEC's problematic approach, where the agency appears to be preferring piecemealing court actions against CTPs together in lieu of developing a comprehensive regulatory framework.⁸

The SEC's Regulation by Enforcement

As a regulatory agency, the SEC has two primary tools to regulate markets within its mandate. The first is through formal notice or the publication of comments and interpretive guidelines to set expectations on a forward-looking basis. The second is by enforcement, which is the use of case-by-case legal action to build agency precedent as a method of lawmaking.⁹ The SEC has chosen to use the latter in the digital asset space; however, this has been criticized due to its inherent limitation of *ex post* sanctions based on existing regulatory expectations in an industry with rapidly evolving technology.

Despite these limitations and industry criticism of this approach, the SEC has not slowed down in its enforcement actions – in the fiscal year 2023 alone, the SEC filed 784 total enforcement actions, and has

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continued to view crypto asset enforcement as one of its top priorities. These actions included its [case against Coinbase in March 2024](#), where a federal judge in the Western District Court of Washington found that the case was in fact under SEC jurisdiction as the crypto assets in question were transacted as securities.¹⁰ However, in other notable cases, *SEC v Ripple Labs*¹¹ and *SEC v Terraform Labs*¹², both 2023 cases heard in the Southern District of New York, judges had conflicting decisions on whether crypto assets should be considered securities. More recently, crypto trading platform eToro agreed to stop offering nearly all crypto assets to its customers and to pay a penalty of \$1.5 million in a settlement with the SEC for charges that it operated as an unregistered broker and clearing agency.¹³ Given the volume of actions taken by the SEC against CTPs in recent years, it appears that regulation by enforcement will continue to be their dominant tool in digital asset regulation unless and until comprehensive legislation is enacted through Congress.

What Does this Amendment Mean for Crypto?

With the uncertainty regarding whether the SEC has jurisdiction over crypto assets becoming even more clouded following the SEC's amended complaint against Binance, this shift in language and approach to regulation by enforcement could have further consequences for future crypto asset prosecution. The ambiguity regarding crypto asset regulation in the US remains a challenge for Canadian CTPs, or CTPs that conduct business or trade in Canada. It is currently unclear which crypto assets are likely to be categorized as a security by the SEC, and which will be flagged by the SEC for involving unregistered investment contracts.

In contrast to the Canadian regime, which has sought to regulate CTPs through a registration scheme, the SEC has attempted to police individual token offerings and punish CTPs for their role in facilitating these transactions. Ultimately, this creates confusion in the market due to asymmetries between provincial securities regulators in Canada and the SEC in the United States. As such, it is important for CTPs to be vigilant regarding their crypto asset offerings and ensure that they are compliant with the evolving regulation and jurisprudence in the jurisdictions that they operate within.

Next Steps

Crypto and blockchain related technologies are an emerging field of regulation, which leads to volatility in business operations for companies engaging in crypto assets. With Binance and its co-defendants being required to respond to the SEC's motion to amend its complaint by October 11, 2024, it remains to be seen how this case will affect crypto asset regulation both in the US and in Canada.

For more information on how evolving digital asset regulation may impact you or your company, please contact members of our [Blockchain & Digital Assets Group](#) and our [Securities Group](#).

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¹ *Securities and Exchange Commission v Binance Holdings Limited et al*, [Proposed] Amended Complaint, (DC Cir 2024).

² US Securities and Exchange Commission, "SEC Files 13 Charges Against Binance Entities and Founder Changpeng Zhao" (5 June 2023), online: sec.gov/newsroom/press-releases/2023-101.

³ *Ibid.*

⁴ *Ibid.*

⁵ Gnaneshwar Rajan & Hannah Lang, "Binance must face bulk of US SEC crypto lawsuit, judge rules" (1 July 2024), online: reuters.com/legal/binance-must-face-bulk-us-sec-crypto-lawsuit-judge-rules-2024-06-29/.

⁶ See *SEC v Howey Co.*, 328 U.S. 293 (1946) (*Howey*). *Howey* provides that a "contract, transaction, or scheme" is an investment contract where there is: (1) an investment of money (2) in a common enterprise, (3) with an expectation of profits from the efforts of others.

⁷ *Securities and Exchange Commission v Binance Holdings Limited et al*, Plaintiff SEC's Memorandum of Law in Support of Motion for Leave to Amend the Complaint, (DC Cir 2024).

⁸ Paul Grewal, "'The SEC regrets any confusion it may have invited' by falsely and repeatedly stating that tokens themselves are securities" (13 September 2024), online: x.com/iampaulgrewal/status/1834447203680825809.

⁹ Sarah Hay, "Regulating Blockchain and Crypto Technology via Enforcement" (18 June 2024), online: regulatorystudies.columbian.gwu.edu/regulating-blockchain-and-crypto-technology-enforcement#:~:text=The%20SEC%27s%20actions%20in%20the.subject%2C%20in%20lieu%20of%20rulemaking.

¹⁰ *Securities and Exchange Commission v Wahi*, 2:22-cv-01009, (WD Wash Mar 01, 2024) ECF No. 119.

¹¹ *SEC v Ripple Labs, Inc, Bradley Garlinghouse and Christian A. Larsen*, 20 Civ. 10832 (AT).

¹² *SEC v. Terraform Labs Pte. Ltd.*, 2023 WL 8944860.

¹³ US Securities and Exchange Commission, "eToro Reaches Settlement with SEC and Will Cease Trading Activity in Nearly All Crypto Assets" (12 September 2024), online: sec.gov/newsroom/press-releases/2024-125.

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