THOMPSON HINE

Blockchain & Cryptocurrencies Alert

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SEC's Recent Lawsuits Signal Heat Wave in Crypto-Winter

The crypto-sphere and regulators are in a pitched battle over the SEC's recent offensive in digital assets regulation, and developments seem to unfold daily. On June 6, the SEC filed suit in the Southern District of New York against Coinbase, one of the largest cryptocurrency exchange platforms in the U.S. The suit is the second offensive in the SEC's most recent challenge against crypto, as the SEC only a day before also filed suit against Binance, the industry's largest international cryptocurrency exchange platform.

Both suits center mostly around the claim that the crypto exchange platforms merge the legally distinct roles of brokers, exchanges, and clearing agencies without registering with the SEC in any of these roles. Layered throughout both complaints, the SEC asserts that numerous crypto assets (many of which have never been the subject of any prior enforcement action) meet the criteria for securities under the well-established *Howey* test and also require registration.

According to the SEC, a consistent industry failure to register has allowed crypto exchange platforms to earn billions of dollars in revenue while ducking traditional disclosure requirements imposed on other securities markets participants and exposing investors to unmitigated risk. The SEC claims such behavior is in direct violation of both the Securities Act of 1933 and the Securities Exchange Act of 1934.

Although the Binance suit also includes allegations of fraud and operating illegally in the U.S. through their "puppet company" BAM Trading Services, Inc., the CFTC has already determined its coin is a commodity, which tees up a longstanding jurisdictional schism between the SEC and CFTC.

These SEC complaints, which amount to "regulation by enforcement" are particularly frustrating for crypto-companies, some of which argue that they have tried to register with the SEC only to be turned away without explanation. Notably, Coinbase, in a June 16, 2023, letter to the U.S. Third Circuit argued that a writ of mandamus is necessary because the SEC's claim that it needed 120 days to respond to the court's order of time to issue recommendations is unreasonable. Despite the fact that Coinbase spent months negotiating with the SEC, only to have the SEC respond that rulemaking was unnecessary, the SEC's current complaint alleges that Coinbase's efforts to comply with federal securities laws (e.g., Coinbase's Crypto Rating Council) is, in fact, evidence of conduct that violates federal securities laws.

While much remains uncertain, it is clear that the crypto-sphere will continue to watch these cases with attention to every detail. Full, detailed, and separate analyses of developments in both the Coinbase and Binance sagas are warranted and are forthcoming. If you would like to stay abreast of this and other crypto and blockchain-related developments, click here to join Thompson Hine's dedicated listserv on the topic.

FOR MORE INFORMATION

For more information, please contact:

Cassandra W. Borchers
513.352.6632
Cassandra.Borchers@ThompsonHine.com

Marc B. Minor
614.469.3232
Marc.Minor@ThompsonHine.com

Brian Lanciault
212.908.3945
Brian.Lanciault@ThompsonHine.com

James Jaworski
216.566.5537
James.Jaworski@ThompsonHine.com

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