

“PIERCING” the Crypto Veil

FEBRUARY 27, 2023

On February 17, 2023, the Securities and Exchange Commission (SEC) charged former NBA star Paul Pierce—nicknamed “the Truth”—with violations of Section 17(b) of the Securities Act of 1933, as amended (the Securities Act), which makes it unlawful for any person to promote a “security” without fully disclosing the receipt and amount of compensation received for such a promotion. Section 17(b) is known as the SEC’s “anti-touting rule.”

On May 26, 2021, Paul Pierce [tweeted](#), “ESPN I don’t need you. I got @ethereum_max I made more money with this crypto in the past month then I did with y’all in a year. TRUTH shall set u Free ... my own Boss Etereummax.org check it out for yourself.”

The NBA Hall of Famer’s post included a link to the EthereumMax website, through which potential investors could purchase EMAX tokens.

The facts here are nearly identical to the cease-and-desist order issued by the SEC against Kim Kardashian, which we discussed in a [previous post](#).

As was the case with Kim Kardashian’s endorsement, the SEC once again found EMAX to be an “investment contract,” which is a “security” for purposes of the Securities Act. Had the token not been deemed a “security,” the SEC would have no basis for charging Paul Pierce for violations of its anti-touting rule.

In determining that EMAX is an “investment contract,” the SEC applied the *Howey* test, as detailed in the 1946 U.S. Supreme Court case *SEC v. Howey Co.*, and concluded that investors had a reasonable expectation of receiving a profit based on the efforts of others.

The SEC’s chairman, Gary Gensler, posted a [tweet](#) at 11:36 a.m. on February 17, 2023, stating:

“We @SECGov charged NBA HOFer Paul Pierce for unlawfully touting & making misleading statements about a security. The law requires you to disclose by whom/how much you’re paid to promote investment in securities, & you can’t lie when you tout them.”

The [tweet](#) even featured a short video, where Gary Gensler explained the precautions investors should take with when it comes to celebrity endorsements.

This increased publicity by the SEC is in line with the SEC’s recent statements regarding increased scrutiny of and enforcement efforts relating to digital assets the SEC regards as securities. By charging Kim Kardashian—and now Paul Pierce, another celebrity with millions of social media followers—the SEC has generated a significant amount of press for a regulatory action and has reached a significantly broader audience, this time within the world of sports.

Without admitting or denying the SEC’s findings, Pierce agreed to pay more than \$1.1 million and approximately \$240,000 in penalties, disgorgement, and interest. Pierce also agreed not to promote any crypto asset securities for three years.

This enforcement action serves to remind celebrities and others of the importance of being prudent when endorsing any type of digital asset, which might be deemed a security and thereby trigger SEC jurisdiction.

Winston’s cross-practice Digital Assets and Blockchain Technology Group is closely monitoring these developments. We will provide our clients and friends of the firm with more information on this topic as it comes available.

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