

SEC Responds to Coinbase Petition for Regulation of Digital Assets

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On May 15, 2023, the Securities and Exchange Commission (the SEC) responded to Coinbase, Inc.'s (Coinbase) request for writ of mandamus instructing the SEC to act on Coinbase's previously filed rulemaking petition. In its response, the SEC argued that its regulatory regime is not egregiously delayed and that the SEC is not withholding any decisions already made.

Background

In July 2022, Coinbase filed a petition requesting the SEC "propose and adopt rules to govern the regulation of securities that are offered and traded via digitally native methods, including potential rules to identify which digital assets are securities." In its original petition, Coinbase highlighted "three primary challenges when applying existing rules to digital asset securities": (1) lack of clarity when determining whether a digital asset is a security, (2) requirements incompatible with the operation of digital asset securities, and (3) requirements that are technically possible but overly burdensome.

In return, the SEC's Office of the Secretary opened a file to respond to Coinbase's petition, which received 1,683 form-letter comments, including three from Coinbase. On April 24, 2023, Coinbase filed a Petition for Writ of Mandamus in the United States Court of Appeals for the Third Circuit.

Delay

The SEC first argued that it has not egregiously delayed answering Coinbase's petition and that Coinbase had not suffered economic harm in the 10 months since it filed its petition. The SEC then explained the factors behind its decision-making timeline, including the complexity of Coinbase's proposals, the SEC's resource constraints, and the SEC's concurrent exploration of actions that concern crypto assets that are securities.

Withheld Decisions

The SEC then denied Coinbase's claim that the SEC is withholding formal decisions already made internally, addressing its ability to pursue both enforcement actions and rulemaking. First, the SEC argued that rulemaking does not represent a concession of current rules because there can be "reasonable policy justifications for

modifying” current rules in the future. The SEC then argued that enforcing rules while Coinbase’s rulemaking petition is pending does not violate due process and fair notice otherwise provided through rulemaking because the SEC is entitled to proceed case by case and not required to focus on any particular area all at once. The SEC then stressed “the extent to which case-by-case litigation and rulemaking can beneficially inform one another.”

Implications

The SEC’s response to Coinbase illustrates the SEC’s willingness to maintain control of “ongoing regulatory efforts regarding crypto assets that are securities or offered and sold as such,” including “taking regulatory measures beyond enforcement actions.” Digital assets will likely be subject to greater scrutiny and regulatory enforcement in the near future as the SEC continues its effort to regulate in the [digital age](#). We will continue to monitor developments in the digital assets and blockchain technology industry and provide friends of the firm with updates as they become available.

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