

Crypto.com's Novel and Proactive Attempt To Force Regulatory Clarity

OCTOBER 9, 2024

Regulatory uncertainty has haunted the digital asset space since its inception. The U.S. Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) have been engaged in a multi-year turf war over which agency has the power to regulate various aspects of digital assets. While Congress has been actively considering multiple pieces of legislation that would have a dramatic impact on the regulatory environment for digital assets, both agencies have brought enforcement actions against many of the leading digital asset businesses. Perhaps most controversially, the SEC's actions have been largely predicated on the notion that virtually all digital assets are "securities" or sold as "investment contracts" under U.S. securities laws.

As agencies and industry participants grapple with the proper classification of digital assets and the appropriate regulatory structure for those assets, businesses in the space have been left to operate in a twilight zone of uncertainty. On Tuesday, Crypto.com, a digital assets exchange with a significant presence in the United States, filed two novel actions designed to force either courts or regulatory agencies to take a definite stance on whether certain digital assets should be classified as securities or commodities under U.S. law and regulation.

CRYPTO.COM'S NOVEL APPROACHES

On October 8, 2024, Crypto.com filed a lawsuit against the SEC, alleging that the SEC is acting beyond its authority in attempting to regulate certain digital assets through a de facto rule instead of following the formal rulemaking process to properly designate digital assets of various types to be securities. Crypto.com stated that the filing of its lawsuit against the SEC is an "unprecedented move" for the company.^[1]

Additionally, Crypto.com filed a unique petition for the CFTC and SEC to issue a joint interpretation confirming that specific cryptocurrency derivative products should be regulated either as swaps, securities-based swaps or mixed swaps, which in turn requires the SEC and CFTC to determine which agency has jurisdiction over those transactions and the assets underlying those transactions. Both actions seek to limit or clarify the reach of the SEC's enforcement authority.

THE DE FACTO RULEMAKING THEORY

Crypto.com's lawsuit comes after the SEC served the company with a Wells notice, which is a formal indication that the SEC intends to recommend enforcement action for alleged violations of securities laws against the recipient.

Although the Wells notice is not public, other digital asset exchanges like Crypto.com have been sued on the basis that they facilitated transactions in digital assets that the SEC regards as securities,^[2] and thus that the exchange has violated various obligations arising under the securities laws, likely including the obligation to register as a broker-dealer, and to register as a clearing agency.^[3] The lynchpin of the SEC's enforcement authority is that certain specified digital assets sold on Crypto.com are securities. Crypto.com's lawsuit alleges that the SEC (i) has wrongfully expanded its authority beyond statutory bounds and (ii) failed to follow proper formal notice and comment rulemaking procedures in designating most crypto assets as securities by improperly adopting a de facto rule. The lawsuit seeks a declaration that (i) secondary-market transactions of identified digital assets on Crypto.com's platform are not securities transactions, (ii) that Crypto.com is not a securities broker-dealer or securities clearing agency, (iii) that the SEC does not have regulatory authority to pursue any enforcement action against Crypto.com that is premised on the notion that secondary-market transactions of the identified digital assets are securities transactions or that Crypto.com is an unregistered securities broker-dealer or securities clearing agency, (iv) grants an injunction and (v) sets aside the de facto rule.

While other digital asset companies have pursued legal action against the SEC, Crypto.com's de facto rulemaking theory is novel. Crypto.com asserts that instead of conducting formal notice and comment rulemaking, as required by the Administrative Procedure Act (APA),^[4] the SEC has created an arbitrary and capricious de facto rule. The alleged de facto rule is the SEC's determination that, besides transactions in bitcoin and ether, other secondary market transactions of specified digital assets should be regulated as securities transactions. Crypto.com alleges that the SEC is now impermissibly attempting to enforce the de facto rule through litigation, instead of waiting for statutory authority from Congress or conducting a formal rulemaking. This focus on de facto rulemaking may allow Crypto.com to continue at least beyond the motion to dismiss phase and force courts to rule on whether the SEC has the authority for this type of enforcement.^[5]

AN UNPRECEDENTED PETITION FOR JOINT INTERPRETATION

In addition to bringing an action against the SEC, Crypto.com also petitioned the SEC and CFTC to issue a joint interpretation under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which allows market participants to petition for a joint interpretation on whether a product is a "swap," "security swap," or "mixed swap." Specifically, Crypto.com's petition asks the agencies to jointly resolve which agency is the proper regulator of certain types of swaps involving specified digital assets. The SEC has authority to regulate securities-based swaps, while the CFTC has authority to regulate commodities-based swaps, and the Commissions shall jointly prescribe such regulations regarding "mixed swaps" as may be necessary to carry out the purposes of Title VII of the Dodd-Frank Act ("Title VII").^[6] Crypto.com asserts that its crypto-based derivative products are commodity-based and should be regulated by solely the CFTC, not the SEC.^[7] This type of petition for a joint interpretation is virtually unprecedented. By proactively seeking a joint interpretation from the SEC and CFTC, Crypto.com is attempting to force the agencies to agree on which agency is the proper regulator of certain specified digital assets. The agencies have 120 days from receipt of the petition to either issue a joint interpretation or deny an interpretation. If the agencies deny an interpretation, they must provide their written rationale. Additionally, even if the agencies refuse to take a position, Crypto.com would then be able to bring an action in court against the agencies and force them to consider the petition. Thus, Crypto.com, in filing what appears to be the first petition for a joint interpretation as to its digital asset-based swaps, seeks to finally compel the agencies to establish the proper classification and regulator for certain digital assets.

THE QUEST FOR REGULATORY CLARITY

Both Crypto.com's lawsuit against the SEC based on its novel de facto rulemaking theory and its petition to the SEC and CFTC for a joint interpretation are unique approaches to resolving longstanding conflict over the regulation of digital assets. The industry is hopeful that this is one mechanism that will finally grant the digital asset space what it has always been missing—clarity.

[Crypto.com's complaint is available here.](#) Its petition for rulemaking is filed under seal. Winston & Strawn LLP will continue to monitor evolving developments in regulatory enforcement in the digital asset space.

Julia Lagnese also contributed to this blog post.

[1] Crypto.com’s notice of filing its suit and petition is available at <https://crypto.com/company-news/complaint>.

[2] Notably, the SEC’s theory as to how digital assets may be securities appears to have changed over time; although the SEC initially argued that digital assets were themselves securities or “embodied” a security, the SEC has recently conceded that digital assets themselves are not securities but may be distributed in transactions that are the offer and sale of investment contracts.

[3] See Complaint, *Foris DAX, Inc. v. SEC et al.*, No. 6:24-cv-00373, ¶¶ 17, 89 (E.D. Tex. Oct. 8, 2024).

[4] Administrative Procedure Act § 1, 5 U.S.C. § 553 (2024)

[5] Outside of the digital asset space, courts have previously reviewed allegations of an agency conducting an improper de facto rulemaking. See, e.g., *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 192–93 (5th Cir. 2023) (reviewing a de facto rule regarding e-cigarettes); *W & T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 239 (5th Cir. 2019) (stating that agency’s adjudicative orders “evinced the creation of a new substantive rule” subject to the APA).

[6] 17 C.F.R. Part 240 Subpart A §240.3a68-2

[7] *Crypto.com Has Filed Suit Against the SEC to Protect the Future of Crypto in the U.S.*, Crypto.com (Oct. 8, 2024) <https://crypto.com/company-news/complaint>.

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