

Article Information

Authors: Steven Pettigrove, Jake Huang, Kelly Kim, Luke Higgins, Luke Misthos, Michael Bacina

Service: Blockchain

Sector: Financial Services, FinTech, IT & Telecommunications

Blockchain Bites: SEC Shoots for Binance, SEC doubles down on Coinbase and gets dealt a Court order back, Australia's strategic plan for a future-ready payments system, New AUSTRAC guidance discourages de-banking, New crypto bill circulating on Capitol Hill, Bank of Japan Reports on CBDC Experiments

Michael Bacina, Steven Pettigrove, Jake Huang, Luke Misthos, Luke Higgins and Kelly Kim of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

SEC Shoots for Binance

The US Securities and Exchanges Commission (**SEC**) has [filed charges against Binance](#) Holdings Ltd., its US-based affiliates (BAM Trading Services Inc. and BAM Management US Holdings Inc.), and founder Changpeng Zhao (**CZ**) for purported breaches of US securities laws.

The SEC has brought forward a litany of charges revolving around the operation of Binance in the US and the provision of services to US customers. The most pertinent allegations are:

1. That Binance and BAM Trading, under CZ's leadership, knowingly offered unregistered exchange, broker-dealer, and clearing agency services to US consumers.
2. That Binance engaged in unregistered offers and sales of crypto asset securities, including Binance's BNB and BUSD, as well as "investment scheme" services BNB Vault and Simple Earn.
3. That BAM Trading and BAM Management engaged in misrepresentation with US investors while raising capital concerning the controls that BAM Trading says was implemented.
4. That Binance and CZ publicly claimed BAM Trading and BAM Management independently controlled US operations, but that behind the scenes CZ and Binance were involved in directing BAM Trading's operations insofar as employees were unable to freely conduct the business of the US platform and an employee of BAM Trading allegedly told Binance's CFO that her "entire team feels like [it had] been duped into being a puppet".
5. While saying the US platform did not serve US consumers, and announcing controls to block US customers, the SEC claims CZ and Binance concealed efforts to offer trading services to "high-value" US customers and assist those customers to circumnavigating any controls. Importantly, the SEC alleges the Binance COO said: "[o]n the surface we cannot be seen to have US users but in reality, we should get them through other creative means."
6. To evade regulatory oversight and provide securities-related services, CZ is alleged to have, at times, moved billions of dollars worth of assets into a US-based entity controlled by CZ, called Merit Peak Limited, which was then transferred to a third party in connection with the purchase and sale of assets. Merit Peak is seen as a market making business serving Binance.
7. That the US platform did not implement appropriate controls to protect against wash trading or self-dealing, which was allegedly occurring. The SEC claims the most notable wash trading was done by trading firm Sigma Chain AG, which was another market making firm which is owned and controlled by CZ. The SEC is alleging directly that CZ engaged in wash trading that artificially inflated the trading volume of crypto assets on the US platform.

The SEC has charged Binance, CZ and BAM Trading with the above (and other) violations and is seeking to block them from engaging in crypto-related operations while also setting a precedent with a severe penalty. Binance has already been

in the cross-hairs recently having [had a lawsuit filed](#) by the Commodities and Futures Trading Commission.

Interestingly, the SEC claims also sets out a theory that Binance's BUSD stablecoin, which was approved by the New York State Department of Financial Services, is a security under US Federal law. The SEC alleges that BUSD purchasers invested in a common enterprise with each other and Binance, and that the ecosystem through which BUSD holders earn returns from pooled investments gave BUSD its profit potential, despite the token being a stablecoin which by definition was not designed to change.

It remains to be seen whether there will be a referral to the Department of Justice and what kind of defence will be brought. As the SEC continues its "regulation by enforcement" campaign it has fired the first shot against one of the world's largest exchange.

CZ shot back on [Twitter](#):



CZ  **Binance**  
@cz_binance



Wonder if he ever reads the comments under his post, from the consumers he is suppose to protect.



Gary Gensler @GaryGensler · 6 Jun

Through thirteen charges, we allege that Zhao and Binance entities engaged in an extensive web of deception, conflicts of interest, lack of disclosure, and calculated evasion of the law. twitter.com/SECGov/status/...

6:27 am · 6 Jun 2023 · 3.4M Views

3,083 Retweets 242 Quotes 18.6K Likes 127 Bookmarks



and [pointed out](#) that they had not seen the complaint before the SEC had send it to media:



CZ  Binance  
@cz_binance



4.

Our team is all standing by, ensuring systems are stable, including withdrawals, and deposits.

We will issue a response once we see the complaint. Haven't seen it yet. Media gets the info before we do.



 Last edited 1:27 am · 6 Jun 2023 · 5M Views

5,857 Retweets 1,078 Quotes 33.3K Likes 213 Bookmarks



SEC doubles down on Coinbase, gets dealt a Court order back

The SEC doubled down on its regulation by enforcement efforts by [suing Coinbase](#), the only publicly-listed US crypto-exchange, following the SEC's decision to [charge Binance](#) and its founder for allegedly breaching US securities laws this week.

In a massive [101-page-long complaint](#), the SEC charged Coinbase with operating its crypto asset trading platform as an unregistered national securities exchange, broker, and clearing agency. The SEC also charged Coinbase for failing to register the offer and sale of its crypto asset staking-as-a-service program.

According to the SEC, since 2019 Coinbase has made billions of dollars unlawfully facilitating the buying and selling of crypto asset securities. The SEC alleges that,

Coinbase intertwines the traditional services of an exchange, broker, and clearing agency without having registered any of those functions with the Commission as required by law

Further, the SEC alleged that since 2019, Coinbase has been engaging in an unregistered securities offering through its staking program, which allows customers to earn profits from the "proof of stake" mechanisms of certain blockchains and Coinbase's efforts.

The SEC explained that through this program, Coinbase allegedly pools each type of customers' stakeable crypto assets, stakes the pool to perform blockchain transaction validation services, and provides a portion of the rewards generated from this work to its customers whose assets were part of the pool. The SEC claimed that Coinbase should have registered its offers and sales of this staking program as required by law.

The SEC's chair Gary Gensler, who in April [was grilled by the US Congress](#) for failing to comment on whether Ether is a security, said Coinbase failed to comply with securities laws and

deprive investors of critical protections, including rulebooks that prevent fraud and manipulation, proper disclosure, safeguards against conflicts of interest, and routine inspection by the SEC

The complaint seeks injunctive relief, disgorgement of ill-gotten gains plus interest, penalties, and other equitable relief from Coinbase. Following the SEC's announcement, Coinbase share price plummeted around 19% but soon recovered half the loss.

Coinbase CEO Brian Armstrong has publicly responded to the SEC's complaint, saying the Coinbase team is

confident in our facts and the law

and that it welcomes the chance

to finally get some clarity around crypto rules

Armstrong also made the other tweets restating Coinbase's position:



Coinbase has long been seeking regulatory clarity from the SEC but to no avail, with the SEC recently shifting to a position that "the rules have always been clear", which stands in stark contrast to the jurisdictions around the world working on tailored regulation for crypto-assets.

In July 2022, Coinbase filed a [petition](#) to the SEC in want of a clear and workable regulatory regime, but the latter denied to respond. Rather, the SEC [issued a Wells Notice](#) to Coinbase in March 2023, indicating that it was considering the enforcement action which has now occurred. In April 2023, Coinbase [sued the SEC](#) for its failure to respond to the petition, which led to the SEC [being ordered](#) by court to explain its failure to respond. In a curious twist, the Court in that case responded to the SEC lawsuit against Coinbase by ordering the SEC to urgently respond, which pushes back against the SEC's previous position which was that the SEC could take as long as it wished to respond to the petition. The order is below:

Present: KRAUSE, PORTER and CHUNG, Circuit JudgesRespectfully,
Clerk/pdb

ORDER

In view of Coinbase's request in its Reply in Support of the Petition for Writ of Mandamus for the alternative relief of ordering the SEC to submit periodic reports to the Court regarding the Commission's progress on Coinbase's petition for rulemaking, the Chair's statements to both Congress and the public that current regulations are sufficient for digital assets, and the enforcement actions the SEC has recently filed against Coinbase and others without having ruled on Coinbase's petition, the SEC is hereby ORDERED to submit a letter within seven days of this Order addressing the following issues:

- (1) whether the SEC has now decided to deny Coinbase's petition for rulemaking;
- (2) if not, how much additional time the SEC requires to decide whether to grant or deny that petition; and
- (3) why this Court should not retain jurisdiction and (a) order periodic reports as Coinbase has proposed, and/or (b) establish a deadline by which the Court will rule on Coinbase's Petition for Writ of Mandamus if the SEC has not yet granted or denied the petition for rulemaking.

Coinbase may but is not required to file a response within five days of the SEC's filing. Each submission shall not exceed ten pages, double spaced.

By the Court,

s/ Cheryl Ann Krause
Circuit JudgeDated: June 6, 2023
PDB/cc: All Counsel of Record

These orders will apply significant pressure on the SEC and are a rare court initiated order which the SEC appears to have provoked with the lawsuit filed.

While the SEC's allegations against Coinbase are less scathing than those against Binance, the consecutive complaints against two of the world's biggest crypto-exchanges signals the SEC's approach to regulation by enforcements after (or as some might say, in response to) [FTX's collapse](#). This stands in stark contrast with the approach adopted by other jurisdictions, including the EU, Singapore and Hong Kong, which are seeking to better regulate the industry through parliament's legislative frameworks and support the innovation blockchain brings.

Digital shift: Australia's strategic plan for a future-ready payments system

The Australian Government has released a strategic plan for the country's payments system, focusing on modernisation and resilience. The plan, titled "[A Strategic Plan for Australia's Payments System](#)," outlines the government's vision of a modern, efficient and world-class payments system, and emphasises the importance of efficient cross-border transactions, competition and innovation.

A focus of the plan will be to establish a new payments licensing framework that aims to:

1. ensure consistent and appropriate regulation of payment service providers based upon the function they provide;
2. improve regulatory certainty for payment service providers;
3. support a more level playing field for payment service providers seeking access to payment systems;

4. better target regulatory obligations based on the level of risk posed to end-users;
5. streamline the process for businesses that require multiple licenses; and
6. better align Australia's payments regulatory framework with international jurisdictions.

The plan contemplates a new payments licensing framework and coincides with the release of [a consultation paper on the new regime](#). This consultation canvasses potential reforms for stored value facilities, including so-called "payment stablecoins", and payment facilitation services. A second-round consultation will occur in late-2023 on the detailed obligations under the new regime before the introduction of legislation in 2024.

The Treasury has separately [opened a further consultation](#) on reforms to the *Payment Systems Regulation Act 1998* (Cth) which would expand the regulation of emerging payment systems, including digital wallet providers, and could extend to "transfers of value" using digital assets (not just money). The changes would also introduce Ministerial powers that can be exercised in the 'national interest' to respond to issues beyond the remit of regulators. The government will develop exposure draft legislation for these changes by the end of 2023 subject to a consultation.

The Government is also proposing the establishment of a new Inter-Agency Payments Forum (**IAPF**) to strengthen collaboration and communication between payment system regulators.

The Strategic Plan recognises the potentially transformative role of digital currencies, specifically Central Bank Digital Currencies (**CBDCs**), and their potential future impact in the evolving payments landscape. The Reserve Bank of Australia (**RBA**) and the Digital Finance Cooperative Research Centre (**DFCRC**)'s CBDC pilot project [recently completed the first Australian CBDC transaction using eAUD](#).

The RBA and the DRCFC's collaboration [aims to explore the use cases for a Central Bank Digital Currency \(CBDC\)](#) for specific scenarios (like international transactions). Concurrently, the strategic plan indicates that the Treasury is undertaking broader work to explore the policy framework related to CBDCs. The RBA and DRCFC report on the CBDC pilot is due by mid-2023, while Treasury will release a paper in mid-2024 taking stock of the work to date done by Treasury and the RBA relating to CBDCs in Australia.

While the Strategic Plan doesn't explicitly detail a pathway for incorporating digital assets into Australia's payment infrastructure, many of the stated goals - such as transaction transparency, efficient international transactions, and enhanced security - can be realised through the application of blockchain technology and the use of crypto assets.

With two new consultations underway and big reforms promised, payments remains an area of rapid regulatory change and innovation. Consistent with this dynamic, the Treasury has promised to update the Strategic Plan on a 18 month rolling cycle to ensure that it is responsive to advances in technology, competition and changes in consumer demand.

New AUSTRAC guidance discourages de-banking; urges closer collaboration

AUSTRAC has released [new guidance](#) regarding 'debanking', a common problem affecting digital currency exchanges (**DCEs**) and Web3 businesses and one that has received increased attention in recent weeks as [Binance's payments provider moved to severe ties](#) and Commonwealth Bank [applied new restrictions on crypto transactions](#).

The guidance states that 'debanking' or 'derisking' by financial institutions has raised concerns as it limits banking services to customers in certain industries. AUSTRAC believes that this approach, driven by factors such as commercial considerations, reputational risk, and regulatory risk exposure, can have a "devastating impact" on legitimate businesses and be counter productive in tackling financial crime.

The guidance notes that debanking reduces the effectiveness of Australia's anti-money laundering and counter-terrorism financing (**AML/CTF**) framework, as it discourages transparency and may push customers towards unregulated channels.

Without access to the formal financial system, customers may seek out unregulated channels. The risk of debanking may cause some customers to provide financial institutions with less information about the true nature of their business activities, which limits transparency and increases risk.

The guidance reiterates AUSTRAC's risk-based approach to AML/CTF regulation, the role of financial institutions, and the considerations for businesses in need of banking services. It clarifies AUSTRAC's regulatory expectations for financial institutions when assessing and offering services to higher-risk businesses and emphasizes the importance of applying appropriate risk identification, mitigation, and management systems and controls to mitigate potential risks effectively. This ensures that financial institutions can maintain their compliance obligations while providing services to high risk sectors.

For the risk-based approach to be effective, AUSTRAC highlights that open and good-faith communication between financial institutions and their customers is crucial. Customers must be transparent with financial institutions about the nature of their business activities, enabling a comprehensive understanding of the risks involved. By fostering this communication, financial institutions can more effectively assess and mitigate risks, supporting the overarching goal of combating AUSTRAC's paramount concerns of money laundering and terrorism financing.

The guidance specifically addresses remitters, digital currency exchanges (**DCEs**), and fintech companies, such as payment service providers. For financial institutions, the guidance encourages closer engagement and the implementation of systems and controls that are "*objective and proportionate*" to AML/CTF risks for the customer.

Similarly, the guidance encourages openness for higher-risk businesses in sharing information with financial institutions and a preparedness to demonstrate compliance with AML/CTF obligations.

AUSTRAC's guidance is timely, in light of recent announcements by [Westpac](#) and the [Commonwealth Bank](#) limiting customer access to certain DCEs in an effort to tackle AML/CTF risk and scams. AUSTRAC's guidance seemingly addresses mounting concerns over debanking generally, without directly pointing fingers or commenting on any particular case, noting that the question over whether to service a particular client will often be a commercial decision.

AUSTRAC's message is clear: the practice of debanking high risk sectors is counterproductive in the fight against money laundering and terrorism financing. To combat the challenges posed by debanking, the guidance emphasises the importance of engaging with customers rather than disengaging due to perceived risks.

New crypto bill circulating on Capitol Hill

House Republicans in the US Congress have [introduced a draft bill](#) aimed at providing more clarity and flexibility for digital tokens in the US. The bill, released by House Financial Services Committee Chair Patrick McHenry and House Agriculture Committee Chair Glenn Thompson, seeks to address the treatment of digital assets in the US under existing financial laws and to accommodate the unique characteristics of blockchain-based tokens.

One significant provision in the bill is the establishment of a clear definition for determining when a project is decentralised enough to no longer be considered an 'investment contract' under US securities law. This has long been a contentious issue for crypto projects operating in the region.

McHenry and Thompson hope that this draft bill will serve as a starting point for negotiations with House Democrats and Senate counterparts. They intend for it to [advance discussions rather than it being a definitive document](#). The reception from other policymakers and the Biden administration will play a crucial role in determining the bill's prospects for passage. Last year, US financial regulators, led by Treasury Secretary Janet Yellen, called for new legislation regarding digital assets.

In addition to engaging with House members, staff of the Financial Services Committee [have been in contact with several senators who are actively involved in crypto legislation](#) and aim to lay the groundwork for passage in both chambers of Congress. This outreach includes communication with staff from the Senate Agriculture Committee, Senate Banking Committee, and other senators with significant involvement in digital asset regulation.

While traditional securities like stocks and bonds require disclosure documents, proponents of digital assets argue that these laws should not apply to them. However, the SEC has been extremely active in recent times (see for example the SEC's recent activities regarding [Bittrex](#) and [Coinbase](#)).

The legislation being negotiated in the House of Representatives aims to establish a more stable and investor-friendly market structure for digital assets in the US. It also seeks to address concerns that current securities laws may be [too rigid for promising crypto projects](#).

One notable aspect of the bill is the definition it provides for the concept of a decentralised network. If a token operates within such a network, it could transition under US law from being treated as a security as a commodity, subject to lower disclosure requirements in the US and dividing the regulatory approach between the SEC (for securities) and the CFTC (for commodities).

Under the current language of the bill, a network would be considered decentralised if, for at least a year:

1. no individual had control, no issuer or decentralised organization owned more than 20% of the tokens; and
2. no marketing or issuance occurred in the three months before certification.

Token issuances within 12 months would also need to be directed to end users only.

Private sales of tokens for capital raising would still be allowed, following the same framework as private securities offerings. The determination of whether a project qualifies as decentralised would be made by the federal market regulators (i.e. the SEC and the CFTC). If a project becomes recentralised, the SEC could revoke the determination.

Although the bill is not seen as comprehensive as EU's MiCA regime (nor does it seem to intend to be), industry members are pleased with the Senators' efforts. Delphi Lab's General Counsel Gabriel Shapiro [said](#):

[the draft bill is] a good faith, diligent informed effort to make crypto work on its own terms within the U.S.'s incredibly byzantine & otherwise incompatible financial regulatory environment...it's probably our best hope

If the bill is enacted, most trading platforms for tokens would finally have a path they could follow to become registered in the US as "Alternative Trading Systems" with the SEC. Payment stablecoins would be exempt from securities designation, and additional legislation has been proposed to establish a comprehensive framework for this class of digital assets by McHenry and other senators. This move is a needed positive step forward given recent global industry events and enforcement actions and while it faces a divided US Congress it may, as Mr Shapiro said, be the best hope of the US crypto industry.

Bank of Japan Reports on CBDC Experiments

[The Bank of Japan has released a 31-page report](#) on the results and findings of its Central Bank Digital Currency (CBDC) experiment, entitled "Proof of Concept Phase 2". The report was initially published in Japanese last month, with the English version's recent release sparking renewed interest among commentators. The report provides insights into the Bank of Japan's progress in exploring the idea and logistics of the digital yen, but does not make a final decision regarding its implementation.

The report highlights the Bank of Japan's interest in distributed ledger technology, including blockchain, for integrating a digital yen CBDC. The report references overseas CBDC experiments where collaborations between CBDC systems and blockchain platforms have been observed. The Bank of Japan envisions a similar approach where assets exchanged between the CBDC and blockchain platforms would initially be secured in their respective systems. The report also emphasises the importance of being prepared for upcoming changes and disruptions in the global financial landscape, with additional reference to activities around the world.

The proof of concept for the yen CBDC, which verified the technical feasibility of the CBDC, was originally completed in 2022. The 'pilot' phase of the experiment has commenced as of April 2023 according to the report. This means that Japan joins the [17 other countries around the world](#) currently piloting a CBDC ([including Australia](#)).

Japan's pilot experiment will involve various aspects such as testing end-to-end processing flow, identifying issues and countermeasures for connecting with external systems, and exploring ideas and necessary measures identified during the 2022 proof of concept phase. Japan intends to establish the 'CBDC Forum' body, which is intended to facilitate the Bank of Japan gathering insights from private businesses involved in retail payments. The report highlights the importance of industry discourse, stating that the CBDC Forum will enrich the discussion around the potential introduction of a CBDC and that public discussions will play a crucial role in determining the future introduction of a yen CBDC.

The Bank of Japan's report demonstrates the country's commitment to exploring the potential of a CBDC and conducting a thorough assessment of technical and operational aspects before making conclusive decisions. By remaining at the forefront of innovation, the Bank of Japan aims to join other jurisdictions around the world in being prepared for a future that may include digital sovereign currencies.