Article Information

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Blockchain Bites: UK Treasury clarifies that staking is not a collective investment scheme, SEC makes waves with Ripple appeal, Coinbase wins appeal in key SEC rule-making decision but rugged on remedy

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

No slashing or burning at the stake: UK Treasury clarifies that staking is not a collective investment scheme

On 8 January, 2025, the UK Treasury moved to provide greater regulatory clarity on the offer of staking services to UK customers, by clarifying that "qualifying cryptoasset staking" does not constitute a collective investment scheme (**CIS**). The change was implemented by statutory instrument amending the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 and provides a clear example of how governments can support innovation by addressing ambiguity in financial laws and recognise how crypto-assets are different to traditional financial products.

The Change: Staking Excluded from CIS Definition

The statutory instrument explicitly states that "qualifying crypto asset staking" does not amount to a CIS in the UK, meaning those offering staking will not have to try to comply with regulatory requirements which typically apply to funds products and are impractical or uncommercial to comply with in the context of blockchain staking services. The law defines staking as validating transactions on a blockchain, distributed ledger technology network, or similar systems. The change does not affect Earn type products or other staking services which are not linked to validating transactions.

The change will take effect on 31 January 2025, and is a welcome relief for exchanges, blockchain users and developers who rely on proof-of-stake mechanisms.

Why It Matters: Reducing Regulatory Burden

In the UK, collective investment schemes are heavily regulated. They require registration, authorisation, and ongoing compliance commitments, overseen by the Financial Conduct Authority (**FCA**). As noted above, it is practically impossible for most staking offers to comply as staking services do not operate like typical managed funds. By removing staking from the CIS category, the Treasury ensures that this blockchain process is not subjected to disproportionate regulation and that popular staking services can be offered within the UK.

Having recently announced a pilot using distributed ledger technology to moderinse debt issuance, and clarifying its crypto regulatory roadmap, the UK continues its push to remain a global finance leader in digital finance and set a standard that other Western countries might follow.

The clarification is part of the UK Treasury's broader effort to regulate crypto assets. Economic Secretary to the Treasury Tulip Siddiq previously announced that a draft regulatory framework for cryptocurrencies, including staking services and stablecoins, is expected by early 2025. This proactive approach could position the UK as a leader in fostering blockchain innovation while maintaining consumer protection.

In Australia, where regulation of crypto-assets mostly has proceeded by enforcement (i.e. see ASIC's lawsuit against BlockEarner), there has been no attempt to use statutory powers to clarify the legal treatment of crypto products, aside from non-binding guidance in ASIC's draft INFO 225 update, which only seeks to express the regulator's views of existing laws. In the US under Gary Gensler, a slew of regulation-by-enforcement has been underway, but a recent Court of Appeal judgment slammed that approach, with Judge Bibas saying:-

> *New inventions create new fraud risks, and [regulators] need to guard against them. But sporadically enforcing ill-fitting rules against crypto companies that are trying to follow the law goes way beyond fighting fraud. It targets a whole industry and risks de facto banning it.*

Key Takeaways for Regulators

The UK Treasury's handling of staking offers a blueprint for other jurisdictions:

1. **Engaging with Stakeholders:** Regulators should consult industry participants and consumers to understand the nuances of emerging technologies and decide what outcome is desired.
2. **Avoid Over-Regulation:** Ensure regulations are proportionate to the risks without stifling innovation, and meet the outcomes sought in policy.
3. **Provide Clear Definitions:** Address ambiguities in laws to reduce legal uncertainties for businesses and users, and give a clear path for good actors to offer products, keeping users from being forced to deal with offshore bad actors.

The UK's move to exclude crypto staking from the definition of a collective investment scheme is a win for rule of law and innovation. By understanding the unique characteristics of blockchain technologies, policymakers and regulators can create frameworks that balance innovation and consumer protection. As the UK Treasury's broader crypto regulatory framework unfolds, it looks set to blaze a trial for other jurisdictions seeking to navigate the complex intersection of law and technology.

Written by Steven Pettigrove, Luke Misthos and Michael Bacina

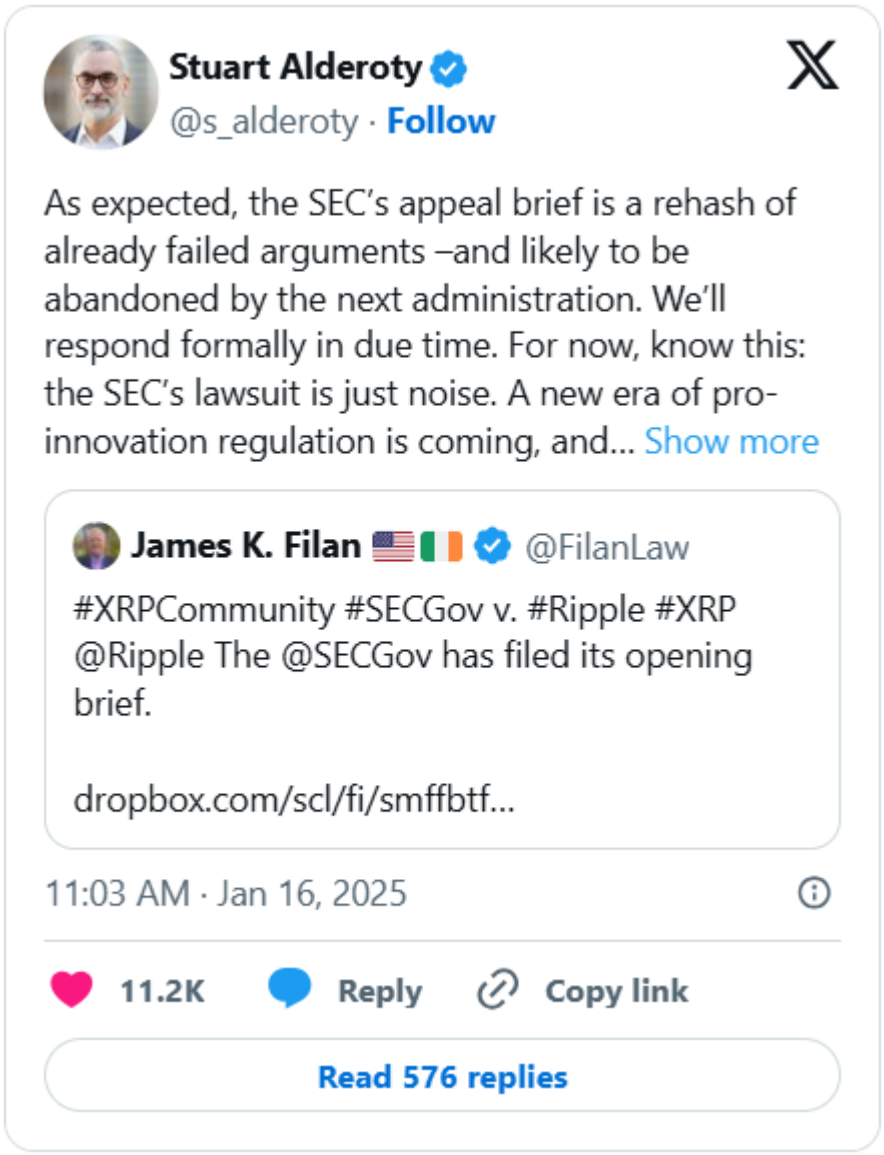
Riptide: SEC makes waves with Ripple appeal

The US Securities and Exchange Commission (**SEC**) has appealed a US federal judge's ruling rejecting part of its case against Ripple Labs. In its latest filing to the Second Circuit Appeals Court on 15 January, the SEC argued that Judge Analisa Torres was incorrect to rule in July 2023 that Ripple's sales of XRP to retail investors were not unregistered securities offerings. The appeal follows Judge Torres' initial ruling blocking an interlocutory appeal back in October 2023.

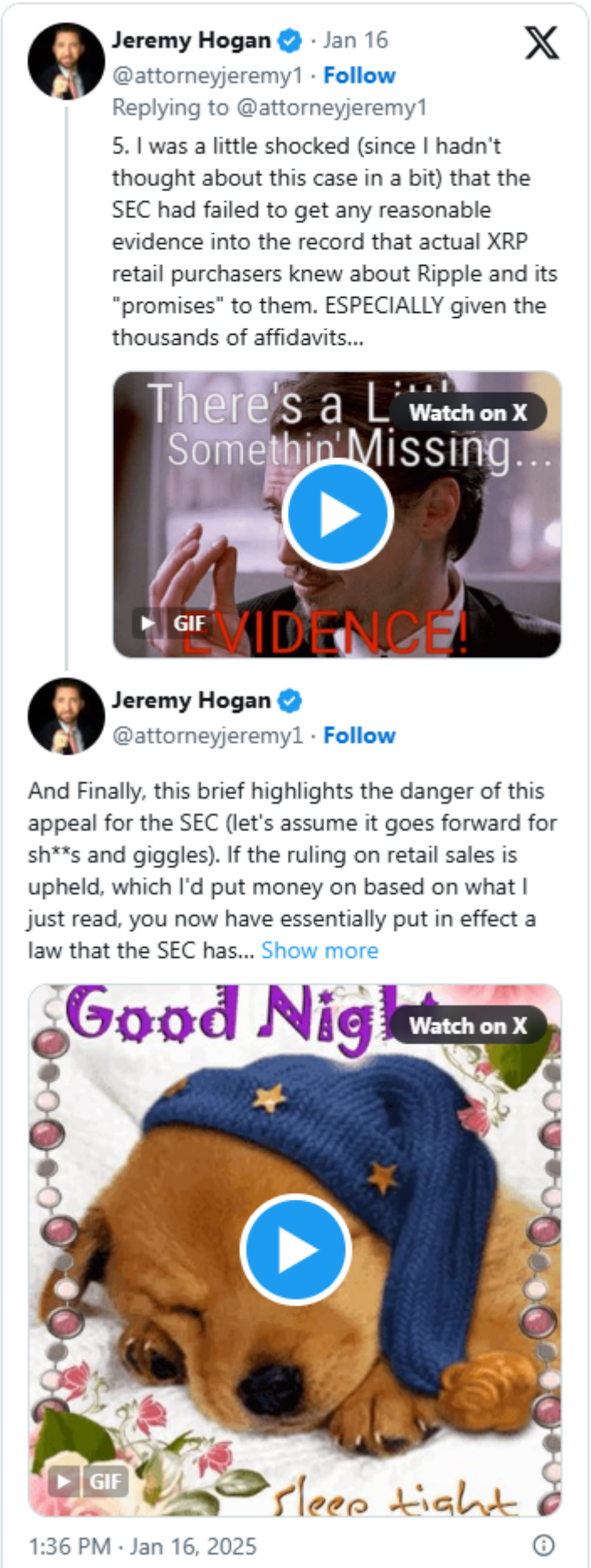
The SEC's filing maintains its stance that Ripple Labs promoted XRP in a manner that would lead buyers, including retail investors, to expect profits based on Ripple's efforts. The SEC argues that this satisfies the criteria for an investment contract under the Howey Test, a long-standing legal standard for determining whether an asset or investment is a security under US laws.

Judge Torres previously distinguished between institutional sales of XRP (deemed securities) and retail sales through exchanges, where buyers were unaware of the seller's identity. The SEC contends that the distinction is flawed and petitions the appeals court to reconsider that finding.

Ripple, meanwhile, is holding its ground – and possibly rolling its eyes. Stuart Alderoty, Ripple's chief legal officer, did not mince words on social media platform X, calling the SEC's brief a "rehash of already failed arguments", while CEO Brad Garlinghouse labelled it as another attempt to apply inconsistent regulatory standards to digital assets.



Attorney Jeremy Hogan described the SEC's brief as underwhelming, noting a lack of evidence connecting retail XRP buyers with Ripple's supposed "promises."



While the SEC carries on its appeal, Ripple has launched [a cross-appeal targeting the $125 million civil penalty imposed by

Judge Torres in respect of institutional sales.

The case continues to attract significant attention due to its potential impact on the classification of cryptocurrencies under US securities laws. If the SEC's appeal succeeds, it could set a precedent, granting securities regulators broader authority over crypto transactions involving retail investors. Conversely, if Ripple prevails, it may narrow the SEC's reach and clarify the regulatory landscape for digital assets.

Some legal professionals (like Jeremy Hogan) speculate that the SEC's pursuit of Ripple may lose momentum under the incoming Trump administration. Past leadership, such as the Trump-era SEC, deprioritised cases that lacked fraud allegations, focusing instead on clearer instances of misconduct.

Despite the ongoing legal battle, XRP remains resilient. Following the SEC's January 15 filing, the token's price rose 10%, mirroring wider gains in the cryptocurrency market. This suggests that investor confidence in Ripple – or at least market sentiment toward the token – remains relatively robust following Trump's victory in November 2024.

The SEC's continued pursuit of Ripple underscores the tension between regulators and the cryptocurrency industry, highlighting the urgent need for clear and consistent rules. For now, the case remains a litmus test for how digital assets are treated under US law.

Whether the SEC's latest attempt to redefine XRP sales proves successful or ebbs away under a new administration remains to be seen.

Written by Luke Higgins and Steven Pettigrove

Coinbase wins appeal in key SEC rule-making decision, but is rugged on remedy

Coinbase, one of the largest crypto exchanges, has been embroiled in litigation for some time with the US Securities and Exchange Commission (**SEC**), trying to force the SEC into rule-making as well as more recently making public documents revealing how US banking regulators have made "suggestions" that US banks avoid servicing crypto or getting involved in crypto related product offerings.

In a ruling from their recent appeal, Coinbase has had a significant victory with the SEC's actions being found "arbitrary and capricious", but stopped short (dare we say "rugged Coinbase") in not ordering the SEC to institute rule-making for crypto, but instead to provide more detailed reasons for the rejection.

The Case History

- Coinbase, facing uncertainties around the rules for crypto issuances in the USA, and with the SEC alleging tokens are securities without setting out any basis by which that was determined (other than saying the token offerings had met the *Howey* test), petitioned the SEC asking that they promulgate rules clarifying how and when US federal securities laws would apply to digital assets.
- Following litigation, the SEC was ordered to respond and then denied the rulemaking petition and gave a single paragraph saying it had higher-priority agenda items, and it might prefer to take an incremental approach.

The Court recounted the SEC's approach to digital assets, including:

- The DAO Report, in which the SEC stated the DAO tokens easily satisfied the *Howey* test because "*the DAO raised money by exchanging ether for special-purpose tokens, and those tokens promised future profits resulting from projects undertaken by the DAO*". The Court noted that "*The DAO Report did not provide a precise formula for determining when a digital asset is a security.*"
- In 2019 the SEC issued a *Framework for 'Investment Contract' Analysis of Digital Assets* in which again the SEC said issuers *"will need to analyze the relevant transactions to determine if the federal securities laws apply"*
- Various comments by SEC Commissioners concerning digital assets including:
    - In 2018 William Hinman's statement that a digital asset *"all by itself is not a security"*.
    - In 2021 Gary Gensler's testimony in Congress that *"only Congress … could really address … bring[ing] greater investor protection to the crypto exchanges."*
    - In 2021 Mr Gensler's speech to the Aspen Security Forum that *'"[t]here's actually a lot of clarity" about whether existing securities laws apply to digital assets.'*
    - In 2022 Mr Gensler's comment to a reporter that the SEC *"ha[s] enough authority … in this Case: 23-3202 Document: 60 Page: 10 Date Filed: 01/13/2025 11 space"*
    - In 2023, Mr Gensler saying that *"the vast majority of crypto assets likely meet the investment contract test,*

making them subject to the securities laws"

- The SEC expanded their enforcement agenda to digital assets in 2023 and the Court noted an action against Coinbase, with an allegation that Coinbase was an unregistered broker, exchange and clearinghouse.

Coinbase Petition

In July 2022 Coinbase filed a rulemaking petition with the SEC urging that they adopt new rules for reasons including that:

- the securities-law framework was *"fundamentally incompatible with the operation of digital asset securities"*
- Digital assets possess non-investment uses including for paying transactions/gas fees, voting and being a medium of exchange for native applications.
- Blockchains, as decentralised networks, often have no one who can register or make required disclosures.
- Existing laws do not provide owners of digital assets with useful information because they are designed for issuers of traditional equity and debt securities and "poorly fit the decentralised and open-source nature of blockchain based digital asset securities".
- Custody rules don't include provision for private keys.
- The "Net capital Rule" could require companies holding custody of digital assets to "contribute a dollar of cash as additional equity…for every dollar worth of digital asset security custodied" which would be "non-economic and unsustainable".

Nine months after petitioning the SEC, Coinbase sued seeking a writ of mandamus, that is an order that the government agency do something which it has failed to do.

In June 2023 the Court ordered that the SEC provide an update on the status of the rulemaking petition by October 2023, and the SEC informed the court that its staff had made a recommendation but the Commissioners had not made a final decision. In December 2023 the SEC denied the rule-making petition with only a single paragraph of reasoning.

Reasoning

Coinbase argued the SEC's rejection was arbitrary and capricious on three grounds:

1) the decision to apply securities laws to digital assets is a "significant policy change" that "presumptively" requires rulemaking;

2) the emergence of digital assets changes a fundamental fact underlying the entire existing regulatory framework – specifically that compliance is possible at all.

3) that the SEC's explanation was conclusory and insufficiently reasoned.

In considering the matter, the Court commented on a sensible point made by Coinbase that:

whether a crypto asset implicates the … securities laws depends on the facts and circumstances of its offer and sale"—is a "truism" and thus "no test at all." In Coinbase's view, the relevant question for purposes of fair notice is not "whether the securities laws can apply to certain digital asset transactions, but rather how and to what extent they apply.

The Court stated that if a particular enforcement action violates administrative-law, the proper approach would be to move to dismiss that enforcement action.

The Court also did not accept an argument that compliance with existing laws being impossible, the SEC ought to rule-make instead of conduct enforcement, saying:

law often works by regulating or even prohibiting conduct that some would like to pursue

Finding

The Court considered the SEC's three reasons in the denial of the rule-making petition:

1) That the SEC disagreed with the assertion that existing securities laws were unworkable;

2) That consideration of how to alter the regime could be informed by data and information relating to current enforcement, and be incremental); and

3) That the SEC has many other priorities.

The Court agreed these were inadequate, noting that:

> *A single sentence disagreeing with the main concerns of a rulemaking petition is conclusory and does not provide us with any assurance that the SEC considered Coinbase's workability objections, nor does it explain how it accounted for them.*

The Court criticized what the SEC had said about resource allocation, saying it must do more than claim it has other priorities, and that "at a minimum, it must explain why it is prioritizing other regulatory actions". Similarly the suggestion that the SEC might prefer to move incrementally needed to be explained in much more detail, but the SEC's explanation was "conclusory".

The concurring opinion by Justice Bibas offers an analysis of the tensions between existing securities regulations and the novel aspects of blockchain technology and crypto assets.

Some great quotes from this opinion include:

> *Nearly a century ago, Congress created the SEC to serve as a watchdog for securities markets, including by developing rules. The SEC insists that its old rules apply to the novel crypto market but refuses to spell out how.*
>
> *old regulations fit poorly with this new technology, and its enforcement strategy raises constitutional notice concerns.*
>
> *…some crypto assets could be securities in infancy and something else in adulthood. But…classifying them as securities could strangle them in their cribs.*
>
> *At oral argument in this very case, the SEC's lawyer refused to say whether Bitcoin and Ether are securities… [t]hat evasiveness is puzzling.*
>
> *The SEC repeatedly sues crypto companies for not complying with the law, yet it will not tell them how to comply. That caginess creates a serious constitutional problem; due process guarantees fair notice…*
>
> *No victims are evident, yet the agency keeps seeking penalties. It targets not just fraudsters, but also the infrastructure on which much of the crypto industry relies.*

Finding and Remedy

As such, the Court found for Coinbase, but did not go so far as to order the SEC to engage in rule-making, as that would only occur in "the rarest and most compelling of circumstances" and instead ordered that the SEC provide a sufficiently reasoned rejection of Coinbase's petition, with Justice Bibas saying firmly:

> *We properly remand to the SEC to explain itself; it should not give yet another poor explanation in an already-long line of them*

What does this mean?

Now the SEC must come up with a much lengthier and better reasoned basis for it's rejection of Coinbase's petition for rule-making.

It would seem that all the effort and money spent on this litigation could have funded sensible rule-making by the SEC (possibly several times over) but given the overt hostility the SEC has shown towards the cryptocurrency sector, we would expect the SEC to simply follow the orders of the court and provide more detail for its reason, and Coinbase may again seek to appeal that if they are dissatisfied with the outcome. It remains to be seen whether personnel changes at the SEC following the Trump inauguration will impact the SEC's approach in dealing with the matter.

If all this seems a bit academic, it is worth remembering that administrative law, the body of law that deals with whether government agencies are doing their jobs, is inherently focused on the *process* and is not usually an inquiry into what the *outcome* of an agency's decision should be. Government agencies are granted great discretion in applying their limited resources to different priorities, and Courts have historically given a great deal of deference to that discretion.