

SEC's Coinschedule Settlement Offers Mere "Clue-By-Enforcement" Into Whether Cryptocurrencies are Securities

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On July 14, 2021 the SEC issued a consented-to Cease and Desist Order against U.K.-based cryptocurrency review website owner Blotix Ltd. (formerly doing business as Coinschedule Ltd.) for violating Section 17(a) of the Securities Act. According to two SEC Commissioners, the decision should have but didn't clarify the Commission's position as to whether and when cryptocurrencies qualify as securities.

Per the Order, Coinschedule's website told visitors that it was profiling the "best" digital token offerings with the mission of "'mak[ing] it easy and safe for people around the world to join [initial coin offerings].'" But, unbeknownst to website users, Coinschedule was charging token issuers for marketing packages that gave those issuers varying levels of premium publicity on the website and access to inside information about how to improve their Coinschedule "trust score," which meant they had an undisclosed, paid-for advantage in the competition to make Coinschedule's "top 10 trusted ICOs" list.

The failure to disclose this compensation arrangement, the Commission found, violated [Section 17\(b\)](#) of the Securities Act, better known as the "anti-touting" provision, which makes it unlawful to promote a security in exchange for payment without disclosing that you've been paid and how much.

Concurring with the decision, Commissioners Hester M. Pierce and Elad Roisman issued a [public statement](#) admonishing their colleagues for failing to provide more clarity about when digital currency is considered a security, calling the Commission's approach "clue-by-enforcement."

Commissioners Pierce and Roisman noted, for example, that the Coinschedule decision did not explain which tokens the SEC found to be securities or why; it simply concluded that "the digital tokens publicized by Coinschedule included those that were offered and sold as investment contracts, which are securities" Without knowing which digital tokens were sold as investment contracts and why the Commission sees them that way, they explained, digital token issuers and their lawyers lack clear guidance. And, without such guidance, they are forced to cobble together piecemeal enforcement actions when deciding how to comply with applicable laws, leaving them to analogize or distinguish facts that may be completely different from their own. Commissioners Pierce and Roisman also made the interesting point that the lack of guidance is making it difficult for companies to find lawyers willing to opine one way or the other.

For now, the crypto industry will have to continue collecting clues.

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