

NFT Legal Issues

Article By:

James G. Gatto

Maxwell Earp-Thomas

This year, the SEC has ramped up its enforcement efforts against digital asset marketplaces for selling non-fungible tokens (“NFTs”) (and other digital assets) the agency alleges are securities. In response, some potential targets for SEC enforcement have proactively sued the SEC, challenging its jurisdiction to regulate digital assets and/or seeking a declaration that the digital assets are not securities. Escalating tensions further, several private plaintiffs have also filed civil lawsuits against NFT issuers and/or marketplaces. The SEC continues to decline to issue regulatory guidance or engage in rulemaking on whether NFTs qualify as securities, instead focusing on selective enforcement actions against specific NFT projects and marketplaces. These developments underscore the regulation-by-enforcement approach that has characterized the SEC’s treatment of the crypto industry under the Biden administration. However, as we discuss below, 2025 may mark a turning point in the NFT regulatory landscape.

In a glimmer of hope for the NFT industry, a bill has been introduced in Congress which aims to bring clarity to these issues. Early signals from President-elect Donald Trump also indicate that regulatory scrutiny of NFTs and crypto at large may change under the new administration. In the interim, anyone issuing NFTs or operating NFT marketplaces should take note of the recent flurry of NFT regulatory and litigation activity and assess whether they can mitigate the risk of being the next entity on the receiving end of an enforcement action or lawsuit. Read on for more detail on these recent developments and some key takeaways.

Recent SEC NFT Enforcements

On August 28, 2024, OpenSea (the largest NFT marketplace) [disclosed](#) that it received a Wells Notice from the SEC for selling NFTs on its platform that are allegedly securities. The Wells Notice is not public, but presumably the allegation is that OpenSea’s business activities constitute the operation of an unregistered securities exchange. In a notable response, OpenSea has contributed to an [NFT legal defense fund](#) that has raised \$6 million to help cover legal fees for NFT creators and developers to defend against similar Wells notices they receive.

On September 16, 2024, the SEC [instituted](#) cease-and-desist proceedings (the “Order”) under Section 8A of the Act against Flyfish Club, LLC (“Flyfish”) over restaurant-related NFTs the SEC alleges are securities. Proceeds from sales of the Flyfish NFTs were used to finance the construction

and launch of a private members-only restaurant called Flyfish Club. The NFTs grant owners club membership. The SEC alleged Flyfish engaged in significant marketing efforts to promote the NFTs as investments, and led investors to expect profits from Flyfish's efforts. According to the Order, Flyfish told investors that they could potentially profit if the club became successful, either by reselling their NFTs on the secondary market at appreciated prices, or by leasing their NFTs to others interested in accessing the club as a "passive income strategy." Per the Order, 42% of investors bought more than one NFT in the offering, even though only one Flyfish NFT is required to gain membership. The Order further provided that Flyfish agreed to destroy all Flyfish NFTs in its possession and stop accepting royalty payments from secondary market sales of the NFTs, among other undertakings.

After receiving a Wells Notice from the SEC, Crypto.com also filed a [lawsuit](#) against the agency seeking a declaratory judgement to prevent the SEC from unlawfully expanding its jurisdiction to cover secondary-market sales of certain network tokens sold on Crypto.com's platform.

Civil Class Action Lawsuits Alleging NFTs are Securities

A securities class action lawsuit was brought by users against Nifty Gateway in 2022, alleging that the NFT marketplace violated federal securities laws by selling NFTs on its platform. On March 19, 2024, the court granted Nifty Gateway's motion to compel arbitration and stay the action pending the outcome of arbitration

On September 19, 2024, two OpenSea users [filed](#) a class action lawsuit against OpenSea alleging that the company's NFT listings were "deceptive and misled the Plaintiffs into purchasing worthless and unlawful unregistered securities." The plaintiffs' arguments parallel those made by the SEC in the previously discussed NFT enforcements; namely that, the NFTs sold on the OpenSea platform meet the *Howey* criteria of an investment contract, and therefore, OpenSea is engaging in the illegal sale of unregistered securities. The plaintiffs further assert that OpenSea unjustly enriched itself by collecting fees and accepting payments from transactions linked to sales of unregistered securities (NFTs). Plaintiffs' complaint also points to the Wells notice issued to OpenSea and the SEC's successful NFT enforcements last fall against Stoner Cats and Impact Theory, which we previously covered [here](#) and [here](#), as validation of its claims. OpenSea vigorously denies the plaintiffs' allegations.

At least one other NFT-related class action has settled.

NFT Artists File Preemptive Lawsuit Against the SEC

Rewind to July 29, 2024, when two artists [filed](#) a preemptive lawsuit against the SEC challenging the agency's authority to regulate NFTs. Musician Jonathan Mann and artist and law professor Brian L. Frye filed a civil complaint against the SEC, seeking a declaratory judgment affirming that NFTs representing ownership of their works do not constitute securities. Similar to the OpenSea lawsuit, this lawsuit also references the SEC's successful enforcements against the Impact Theory and Stoner Cats NFT projects to bolster its claims. The lawsuit is intended to proactively bar the SEC from engaging in enforcement actions against future sales of their NFT digital art. On October 28, the SEC responded to the lawsuit with a motion to dismiss the case, indicating that the agency would like to avoid litigating the NFT issue if it can.

Areas to Watch in 2025

[Despite all of the above, the embattled NFT industry's legal troubles may find a solution through legislation. In September, Congressman William Timmons introduced the New Frontiers in Technology Act](#) (“NFT Act”), which aims to address the legal and regulatory treatment of NFTs. The NFT Act's most notable provisions include:

- A definition for certain covered NFTs, which excludes securities;
- The creation of protections for “covered” NFTs, a term which encompasses NFTs primarily purposed as art and collectibles, among other exempted categories; and
- A call for the Comptroller General, who is notably not a financial regulator, to conduct a study on NFTs, which will presumably inform future NFT-related legislation and regulation.

Should the bill be passed, it would mark a watershed moment for the NFT industry, and flip the script on the SEC's NFT enforcement agenda.

Furthermore, early signs from the incoming Trump administration suggest that the cryptocurrency and NFT industries are poised for significant regulatory shifts. Per data released the crypto advocacy group [Stand With Crypto](#), an unprecedented number of members of Congress are projected to be pro-crypto under the new administration. Several leadership roles in the Trump administration related to crypto oversight have also been filled by individuals with notably pro-crypto views.

In a December 5 [post](#) on his social media platform Truth Social, the President-elect announced the appointment of former PayPal Chief Operating Officer David Sacks—an outspoken critic of regulatory overreach in emerging technologies—as the new “White House A.I. & Crypto Czar.” It remains unclear whether the role will function as a White House staff position or serve as a coordinator for policy among the various federal agencies responsible for overseeing the crypto industry.

In another development deemed positive for the crypto industry, the President-elect [nominated](#) Paul Atkins, a former SEC commissioner who has been vocal in his support for the crypto industry, to lead the SEC. This move is expected to result in a more balanced approach toward crypto-related enforcement actions.

Conclusion

The SEC has consistently refrained from issuing clear regulatory guidance or rules on whether NFTs qualify as securities, opting instead to pursue selective enforcement actions against various NFT projects. This approach reflects the regulation-by-enforcement strategy that has defined the SEC's handling of the crypto industry under the Biden administration. However, the coming year could represent a pivotal moment for the legal framework governing NFTs.

Overall, it remains to be seen how exactly Donald Trump's seemingly pro-crypto stance will translate into policy and regulation for the industry. However, signs indicate that the Trump administration aims to create a more favorable environment for the crypto and NFT industries, emphasizing innovation and growth through regulatory clarity. Some speculate more control will be given to the CFTC to regulate crypto assets, which is viewed by many in the industry as a potential positive.

Companies that have concerns about whether NFTs they have issued or plan to issue implicate securities laws should seek advice from a knowledgeable attorney, based on the specific facts of their offering. In some cases, certain actions can be taken to minimize the risk of an enforcement.

[Listen to this post.](#)

Copyright © 2025, Sheppard Mullin Richter & Hampton LLP.

National Law Review, Volume XIV, Number 366

Source URL: <https://natlawreview.com/article/nft-legal-issues>