

When is a Token More Than a Token? SEC Settlement over Anti-Touting Provision Raises Familiar Questions

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On July 14, 2021, the Securities and Exchange Commission (“SEC”) [settled](#) an action against the operator of a platform that promoted current and upcoming digital token offerings for violations of the anti-touting provision of the Securities Act of 1933. [In the Matter of Blotics Ltd. f/d/b/a Coinschedule Ltd.](#) (July 14, 2021). The SEC claimed that the primary source of revenue for the platform operator, Coinschedule Ltd., was compensation received from issuers that paid to list, market, and rate their token offerings on the platform. The SEC charged that Coinschedule’s failure to disclose the consideration it received from token issuers for promoting their token offerings was a violation of the anti-touting provisions (Section 17(b)) of the Securities Act. The respondent, Blotics Ltd. (successor to Coinschedule Ltd.), was ordered to pay disgorgement of \$43,000, plus interest, and a civil penalty of \$154,434.

The settlement order does not shed any light on when a digital token is a security. The anti-touting provisions of Section 17(b) apply only if the instrument being touted is a security, and the order states that some portion of the digital tokens offered and sold on the Coinschedule platform were securities in the form of investment contracts. However the settlement order does not address how many or which of the 2,500 individual token offerings profiled on the Coinschedule platform involved securities, providing no analysis and only a conclusory statement that “[t]he digital tokens publicized by Coinschedule included those that were offered and sold as investment contracts, which are securities pursuant to Section 2(a)(1) of the Securities Act.”

The omission of such details from the SEC's settlement order was met with reproach from two of the Commission's five members. Commissioners Peirce and Roisman published a strong [statement](#) that was critical of the general lack of regulatory guidance from the SEC that would address questions about the application of the federal securities laws to digital assets. The statement noted that in the absence of such guidance, SEC enforcement actions have been the primary source for guidance in this area. The two Commissioners urged the SEC to address this regulatory uncertainty, noting that "[p]roviding clear insight outside of the enforcement context into the Commission's investment contract determinations and analysis for digital assets would serve everyone well."

SEC Chair Gary Gensler is well-versed in blockchain and digital assets, and he has provided Congressional [testimony](#) on the need for additional investor protections related to these products. However, the SEC's current [rulemaking agenda](#) does not include any initiatives related to digital asset regulation. It is possible that SEC staff could provide additional guidance, perhaps building on its [framework](#) for investment contract analysis of digital assets, but such staff-level guidance is unlikely to provide the degree of clarity sought by Commissioners Peirce and Roisman, as well as many market participants.

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