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DOJ and SEC Press Novel Insider Trading Claims

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The [Department of Justice \(DOJ\)](#) and [Securities and Exchange Commission \(SEC\)](#) recently brought first-of-their-kind actions against three individuals for insider trading of crypto assets.

The facts are straightforward. Ishan Wahi was on the Coinbase asset listing team. That position gave him access to confidential details about which tokens Coinbase planned to list in the future. Ishan allegedly passed this sensitive information to his brother and friend. They traded in the tokens, reaping significant profits when Coinbase announced the listings and the token prices spiked.

Not a good idea. Coinbase [apparently got wind](#) of this and reported it to the government.

The [four-count indictment](#) in the Southern District of New York against Ishan Wahi, Nikhil Wahi, and Sameer Ramani is a novel one in the crypto space. While DOJ recently brought wire fraud and money laundering charges [against a former OpenSea employee](#) arising from alleged insider trading of NFTs, it has never brought charges against a "tippee" -- a person who receives and trades on information obtained by someone else (the "tipper") in violation of the tipper's duty to a third party.

That changed today. DOJ brought charges against (1) Ishan for misappropriating confidential Coinbase listing information and providing it to Nikhil and Ramani, the brother and friend, in violation of Ishan's duty of trust and confidence to Coinbase; and (2) Nikhil and Ramani as tippees who profited from trading in the tokens using this confidential information.

While these facts have all the trimmings of a classic securities insider trading case, the DOJ's indictment makes no mention of "securities." DOJ charged the defendants with conspiracy to commit wire fraud and wire fraud, *not* traditional securities insider trading. As with the insider trading indictment against the OpenSea employee, the DOJ is not guaranteed to prevail on a wire fraud theory in the wake of the Supreme Court's recent decision in *Kelly*, which provided that "the wire fraud statute ... prohibits only deceptive schemes to deprive the victim of money or property." *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). The decision has already led the DOJ to concede that one wire fraud conviction for insider trading cannot stand because the information was not an "object of the fraud." Brief on Remand for the United States of America at 8, *United States v. Blaszcak, et al.*, No. 18-2811 (L), ECF No. 453 (Apr. 2, 2021).

Even still, the SEC does not have the luxury of falling back on wire fraud. The scope of its jurisdiction begins and ends with securities. So for the first time in history, the SEC brought a follow-on civil enforcement action alleging insider trading *in violation of the securities laws* in the crypto context. The [SEC's Complaint](#) alleges that the scheme violated Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, based on the theory that nine of the tokens that Nikhil and Ramani traded based on the tip from Ishan were "crypto asset securities."

Interestingly, those nine "crypto asset securities" (AMP, RLY, DDX, XYO, RGT, LCX, POWR, DFX, and KROM) all traded on Coinbase. While Coinbase is not named in the SEC's complaint as an unregistered

securities exchange, the implication is now plain as day. It is unclear what consequences will result from this shot across the bow, but the SEC reportedly has [declined to rule out](#) enforcement efforts against Coinbase.

These two cases present myriad interesting issues for the crypto space and will be closely watched. The SEC's action also presents yet another opportunity for [the fundamental question](#) facing crypto securities cases to get a definitive answer: whether the security/investment contract is the token itself or the offering – i.e., the "contract, transaction, or scheme" in the parlance of *SEC v. Howey* -- that references or includes the token. The distinction has major implications for exchanges that have opened their books to crypto assets that have now been deemed "crypto asset securities" in an SEC enforcement case years later.

Time will tell how these issues shake out in courts across the country as judges grapple with novel theories in criminal and enforcement actions like the ones brought today.

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