Analysis and thoughts by Katherine Wu. This document reflects the personal opinion of the author and does not constitute legal advice.

The below is a broad summary of the July 13, 2023 SDNY Court Decision in the case of SEC v. Ripple Labs, Brad Garlinghouse, and Christian Larsen. (Link) Some details may be omitted and this is written from the biased perspective of the reader. This document does not constitute legal advice.

Things to know before jumping in:

Generally, a summary judgment is granted when the facts can be decided without needing to go to trial (legaspeak for this is "no genuine dispute as to any material fact"), where the opposing party would lose due to a lack of evidence. If it's not clear that there is no more evidence, then summary judgment must be denied. (Source)

In this case, the Court ruled on both party's Motion for Summary Judgement:

- The SEC's motion for summary judgment is GRANTED as to the Institutional Sales, and otherwise DENIED.
- Defendants (XRP)' motion for summary judgment is GRANTED as to the Programmatic Sales, the Other Distributions, and Larsen's and Garlinghouse's sales, and DENIED as to the Institutional Sales.

Overview + Implication(s):

One sentence overview: The question before the Court is whether Ripple et al. offered to sell or sold XRP as a security– specifically, if XRP counts as an 'investment contract'.

The short answer is yes and also no- it depended on who XRP was sold to.

The 'Yes, XRP was a security'":

- Ripple sold approximately $728.9 million of XRP in Institutional Sales.

  TLDR; The court ruled that **Institutional Sales of XRP are considered to be investment contracts under Howey.**

Analysis:

  - Prior to conducting Institutional sales, Ripple received memos that articulated legal risks of selling XRP tokens, especially, "if sold to investors, XRP tokens are likely to be securities".
  - Institutions are defined as *'sophisticated individuals and entities'* that paid money for XRP pursuant to written contracts.

- **Institutional Sales of XRP are considered to be investment contracts under Howey because they satisfy all four prongs of the Howey Test.**
    1) There was payment of money from Institutions in exchange for XRP; thereby fulfilling 'investment of money' prong
    2) Investor's assets were pooled by Ripple into bank accounts that Ripple controlled + used to fund operations. Each institutional buyer's ability to profit was directly tied to the success of Ripple– all these fulfill the 'common enterprise' prong
    3) From Ripple's communications, marketing and the *nature* of institutional buyers, 'reasonable investors' would have the expectation that they would derive profits from Ripple's effort– this fulfills the 'reasonable expectation for profits' prong
    4) Court looks at all of the public materials and statements that Ripple (Labs and also senior leadership like Garlinghouse etc made, especially ones that connected XRP price to their own efforts (such as announcing partnerships, saying things such as 'Ripple's business model is based on the success of XRP", etc)-- . This all fulfills the 'efforts of others' prong– as in, institutional buyers clearly understand that XRP value is directly tied to the Ripple team and business model.

- More on the 'nature of institutional buyers':

  "the nature of the Institutional Sales also supports the conclusion that Ripple sold XRP as an investment rather than for consumptive use."

The court cites examples to prove the above by pointing out the fact that institutions agreed to a lock up when they bought XRP, namely, "rational economic actors would not agree to freeze millions of dollars if the purchaser's intent was to obtain a substitute for fiat currency". Other examples the Court pointed to were provisions within the purchase agreements such as indemnity clauses or other clauses that expressly state that the Institution was purchasing XRP 'solely to resell or otherwise distribute".

Given all the above, the court concludes that Ripple's Institutional Sales of XRP made this specific type of transaction a security.

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The "No, XRP was not a security":

- The SEC alleges that Ripple sold approximately $757.6 million of XRP in Programmatic Sales:

TLDR; **The court ruled that Programmatic Sales of XRP are not considered to be investment contracts under Howey**, because it fails the third prong of Howey ("reasonable expectation for profit").

- The Court points out a huge difference between Institutional Buyers that bought XRP from Ripple directly and 'Programmatic Buyers' (ie retail/ public buyers)--programmatic buyers 1) did not buy XRP pursuant to a contract with Ripple 2) bought XRP from exchanges, which were 'blind bid/ask transactions', meaning they could not know where exactly their money went (as in, institutional buyer's money went directly into Ripple's bank account, but a public buyer's money could gone to a market maker, an exchange, or a seller that was not Ripple).
- Another difference between Institutional Buyers and Programmatic buyers: no purchase contracts!! "Programmatic Sales were not made pursuant to contracts that contained lockup provisions, resale restrictions, indemnification clauses, or statements of purpose."
- Additionally, the marketing materials that Ripple sent to Institutional Buyers were not circulated to the general public.
- The court also points out that just because people were indeed speculating on XRP, a speculative motive instead does not prove that something is a security.
- Even if someone purchased XRP with their own expectation of profit, they were not buying it directly from Ripple.
- Thus, "with respect to Programmatic Sales, Ripple did not make any promises or offers because Ripple did not know who was buying the XRP, and the purchasers did not know who was selling it."

Therefore, having considered the economic reality and totality of circumstances, the Court concludes that Ripple's Programmatic Sales of XRP did not constitute the offer and sale of investment contracts.

Other (slightly unrelated) things to note:

- Court notes that Ripple paying employees or even project within their ecosystem XRP which those parties can then sell or exchange for goods does not make XRP a security, because there was no 'investment of money' and because the secondary market payment money never traced back to Ripple directly
- Larsen and Garlinghouse also sold XRP for USD in their individual capacities – the court said that because they sold their XRP on exchanges, there was no way they knew for sure who they sold to, thereby failing the third prong of the Howey test

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In conclusion: is XRP a security? The answer is both YES and NO- it depended on how and who bought them.

In general, this is a huge win for retail + exchanges – however, whether it was CEX and DEX that won, the court does not address. For now it seems like both types took a huge W today.

The other biggest winners here are of course the two founders of Ripple, both of whom sold more than $150 million USD worth of XRP and are in the clear.

The biggest losers are perhaps the institutional buyers– who, depending on their registration status as investment advisers and managers, may need to calibrate internally with their finance and accounting team.

Now, this is not yet over. As laid out above, the court will issue a separate order for trials for those parts that were denied. My biggest question: if the answer is a YES and NO, what does this mean for registration status for issuers? In other words, does a token issuer have to register with the SEC if they want to sell to institutions but not retail? In this specific case, is there retroactive registration? We are still unclear on the final details, but for now– what a L for the SEC today.