



Is the SEC Violating the First Amendment Rights of ICO Operators?

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The Washington, D.C.-based Cato Institute has teamed up with the Institute for Justice to file a lawsuit against the SEC to have the courts decide if their accusations that the regulator engages in “wildly inappropriate use of government power... directly contrary to the spirit of accountability and transparency that permeates our founding documents” are correct.

Almost all defendants against SEC enforcement actions—as well as those facing notices from the CFTC and the CFPB—plead guilty or settle the case for a financial penalty. In those cases, the agreement includes the provision forbidding the defendant from:

“...mak[ing] any public statement denying, directly or indirectly, any allegation in the [SEC’s] complaint or creating the impression that the complaint is without factual basis.”

The Facts Never Come to Light, Man

The Cato Institute lodged proceedings against the U.S. Securities and Exchange Commission on January 9th alleging the watchdog’s “perpetual, lifetime gag orders” violate the First Amendment rights of settling defendants in civil enforcement actions. Per the filing:

“The government uses its extraordinary leverage in civil litigation to extract from settling defendants a promise to never tell their side of the story, no matter how outrageous the government’s conduct may have been and no matter how strong the public’s interest may be in knowing how the government conducts itself in high-stakes civil litigation.”

If facts are rarely presented to a court or publicized in SEC enforcement actions, the public never learn the merits of the SEC’s case or the position of the defendant.

If Uncertainty Is the Enemy of ICOs, the Cato Institute May Have a Fix

Given the number of actions the SEC has quietly taken against ICO operators over the past two years, it is in the public’s interest to know what violations the ICOs were accused of committing. Hester Peirce, often a dissenting voter at the SEC in ETF hearings, appears to agree with the sentiment that settlement procedures should not form part of a regulatory strategy. The commissioner said in May last year:

“Quite simply, a settlement negotiated by someone to end an investigation that is disrupting or destroying her life should not form the basis on which the law applicable to others is based.”

It also interests potential ICOs, as knowing how to be compliant with regulators is very much the domain of educated guesswork and luck. This is despite the regulator's promise of plain English guidance for ICOs. The lack of transparency surrounding the industry in the U.S. has likely dissuaded many startups from setting up camp in the country.

If the Cato Institute can force a ruling on the perpetual gag order in its favor, at the very least it will bring clarity to the legality or otherwise of certain behavior among ICO operators.