

SEC Obtains \$750K Settlement From 'World's First NFT Restaurant'

“The line between innovation and a potential securities violation remains murky,” said Helen Gugel, a partner at Am Law 10 firm Ropes & Gray who is not involved in the matter.

What You Need to Know

- Flyfish Club LLC sold NFTs at two price points and generated gross proceeds of approximately \$14.8 million.
- The U.S. Securities and Exchange Commission obtained a \$750,000 settlement from the company.
- An expert advised an alternative method for similar businesses to avoid SEC scrutiny.

The U.S. Securities and Exchange Commission obtained a \$750,000 settlement from Flyfish Club LLC over its offer and sale of securities through the form of non-fungible tokens, a unique digital identifier on the blockchain used to certify ownership.

Still, SEC Commissioners Hester M. Peirce and Mark T. Uyeda said in their dissent in the [administrative order](#) that securities laws are not necessary in this context and their application is harmful, both in the present case involving the respondent, Flyfish Club, which billed itself as the “world’s first NFT restaurant,” and as a future precedent.

“The Flyfish NFTs were simply a different way to sell memberships,” Peirce and Uyeda said. “NFTs offer a promising way to allow creative people—such as chefs, musicians, or visual artists—to monetize their talent and a potentially efficient way for selling access to experiences and communities. Experiments like Flyfish Club are not a threat to the American investor.”

Nicolle Lafosse, of counsel at [Diaz Reus](#) in Miami, specializes in technology law, including blockchain matters, and is not involved in the case. She said there are different reasons and implications for someone not wanting to register digital assets as a security, such as a business becoming synonymous with the traditional market and causing the “hype to die down.”

“You become not that novel and not that trendy, which are some of the things consumers are looking at,” Lafosse said. “But if you can register as a security, you could use your NFT and have those royalties. But if you don’t want to be a security, from a legal standpoint, use your NFT as a token of participation but have all the commercial aspects through a different vehicle.”

Flyfish Club has agreed to multiple undertakings, including destroying all of the NFTs in its possession, custody or control within 10 days and notifying secondary market trading platforms that it will not accept further royalties from the sale of its NFTS.

This order is based on its violation of Section 5(a) and 5(c) of the Securities Act of 1933, which requires all offers and sales of securities to be registered with the SEC unless there is an available registration exemption, such as when a registration statement is the subject of a refusal or stop order or when a public proceeding or examination is underway.

‘Exclusive Membership’

Between August 2021 and May 2022, Flyfish Club conducted an unregistered offering of crypto assets in the form of securities by offering and selling them to the public in the form of about 1,600 NFTs at two price points, according to the order. The first price point was at 2.5 ETH, or \$8,400, for the Flyfish NFT, while the second was 4.25 ETH, or \$14,300, for the Omakase NFT.

The SEC wrote in the order that the purpose of these sales was to fund

the construction and operation of a members-only club, restaurant and bar in New York City, which is scheduled to open in the fall. Possession of a Flyfish or Omakase NFT was to be the exclusive means of obtaining membership in the club. The offering generated gross proceeds of \$14.8 million.

The SEC claimed in the order that Flyfish Club told investors they could profit from reselling their NFTs at appreciated prices in the secondary market, and in doing so, Flyfish would receive a 10% royalty payment each time one of the NFTs was sold on certain NFT-trading platforms. Proceeds totaled over \$2.7 million by early 2023, court records show.

However, the SEC argued in the order that Flyfish Club offered and sold the NFTs as investment contracts and, therefore, securities pursuant to the test laid out by the U.S. Supreme Court in *SEC v. W.J. Howey Co.* And while the NFTs initially doubled their offering price at one point, as of July, the floor prices dropped nearly 74% for the Flyfish NFT and 32% for the Omakase NFT.

“The settlement reflects the SEC’s continued focus on NFTs but, as the dissenting commissioners powerfully underscore, it does little to provide actionable guidance to the industry,” said Helen Gugel, a partner in [Ropes & Gray's](#) litigation and enforcement practice at its New York office who is not involved in the matter. “The line between innovation and a potential securities violation remains murky.”

Read the Order: