

SIDLEY UPDATE

# SEC FinHub's Digital Asset Framework: A Guide for Issuers and Secondary Trading Markets

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April 26, 2019

On April 3, the U.S. Securities and Exchange Commission (SEC)'s Strategic Hub for Innovation and Financial Technology (FinHub or Staff) released its much-anticipated guidance, the [Framework for "Investment Contract" Analysis of Digital Assets](#) (Framework), regarding its views on factors to consider in applying the *Howey* test to digital assets.<sup>1</sup> In conjunction with the Framework, the SEC's Division of Corporation Finance published its first [no-action letter](#) in connection with the sale of digital assets, providing relief to TurnKey Jet, Inc., for its proposed token sale (No-Action Letter).

## The Framework

The Framework is based on an amalgamation of sources, including these:

- (i) *Federal Court Decisions*. The U.S. Supreme Court established the longstanding test for determining whether a particular arrangement is an investment contract — where there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others — in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (*Howey*). Subsequent decisions at the U.S. Supreme Court and U.S. Circuit Court level have applied the *Howey* test and further refined the law.<sup>2</sup>
- (ii) *SEC Enforcement Reports and Orders*. In July 2017, the SEC issued the *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO* (Exchange Act Rel. No. 81207) (July 25, 2017) (DAO Report). Based on the SEC Division of Enforcement's investigation into the DAO, the Commission determined that the digital assets at issue were securities under the federal securities laws and, accordingly, must comply with those laws.<sup>3</sup> Subsequently, the SEC instituted proceedings

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<sup>1</sup> In an effort to provide clarity regarding the definition of digital assets under the Securities Act, Rep. Warren Davidson reintroduced on April 9, 2019 a bill first introduced during the previous congressional session that would define and exempt certain digital assets from the definition of security under the federal securities laws, HR 2144 ([Token Taxonomy Act](#)).

<sup>2</sup> In the Framework, the Staff specifically relies on *Howey*, *United Housing Found., Inc. v. Forman*, 421 U.S. 837 (1975) (*Forman*); *Tcherepnin v. Knight*, 389 U.S. 332 (1967) (*Tcherepnin*); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) (*Joiner*), *SEC v. Int'l Loan Network, Inc.*, 968 F.2d 1304, 1307 (D.C. Cir. 1992), *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 (9th Cir.), *cert. denied*, 414 U.S. 821, 94 S. Ct. 117, 38 L. Ed. 2d 53 (1973) (*Turner*), *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 483 n.15 (5th Cir. 1974) (*Koscot*) and *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce Fenner & Smith*, 756 F.2d 230 (2d Cir. 1985) (*Gary Plastic*).

<sup>3</sup> Section 21(a)(1) of the Exchange Act provides, in relevant part, that the Commission may "investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of [the Exchange

based on settled actions against a number of issuers for offering and selling digital assets in violation of the Securities Act.<sup>4</sup>

- (iii) *SEC Public Statements.* In November 2018, the Divisions of Corporation Finance, Investment Management and Trading and Markets released a [joint statement](#) emphasizing that activities related to digital assets may be subject to the federal securities laws.<sup>5</sup> Previously, Chairman Jay Clayton issued a public statement on [cryptocurrencies and initial coin offerings](#).<sup>6</sup>
- (iv) *SEC Speeches.* In June 2018, Director of the Division of Corporation Finance William Hinman delivered a [speech](#) (Hinman Speech) expressing his views on when digital assets are offered and sold as securities and whether a digital asset that was originally offered in a securities offering can be later sold in a manner that does not constitute an offering of a security.<sup>7</sup>

In light of the various sources that set forth the basis for the Framework, the following provides a guide to navigate it. Blockchain companies distributing digital assets and secondary markets trading such assets should carefully evaluate these factors, including the underlying source of the guidance.<sup>8</sup>

The foundation of the Framework's analysis is the Supreme Court's *Howey* case and its progeny. Under *Howey*, an "investment contract" exists when there is the (i) investment of money (ii) in a common enterprise (iii) with a reasonable expectation of profits to be derived from the efforts of others.

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Act], in the prescribing of rules and regulations under [the Exchange Act], or in securing information to serve as a basis for recommending further legislation concerning the matters to which [the Exchange Act] relates.”

<sup>4</sup> See *In re Munchee Inc.*, Securities Act Release No. 10,445 (Dec. 11, 2017) (Munchee), *In re Tomahawk Exploration LLC*, Securities Act Rel. 10,530 (Aug. 14, 2018) (Tomahawk), *In re CarrierEQ, Inc., d/b/a Airfox*, Securities Act Release No. 10,575 (Nov. 16, 2018) (Airfox), *In re Paragon Coin, Inc.*, Securities Act Release No. 10,574 (Nov. 16, 2018) (Paragon), *In re Gladius Network LLC*, Securities Act Release No. 10,608 (Feb. 20, 2019) (Gladius). While a respondent may appeal an adverse final order of the Commission in federal circuit court, courts apply a deferential standard to review of the Commission's findings.

<sup>5</sup> The statement represents the views of the Divisions of Corporation Finance, Investment Management and Trading and Markets and is not a rule, regulation or statement of the SEC, meaning that the Commission neither approved nor disapproved its content.

<sup>6</sup> Similarly, the Chairman's statement does not necessarily reflect the views of any other Commissioner or the Commission. As noted by the Chairman, "the statement is not, and should not be taken as, a definitive discussion of applicable law, all the relevant risks with respect to these products, or a statement of my position on any particular product." In September 2018, Chairman Clayton issued a [public statement](#) noting that staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties, that staff statements may be modified, rescinded or supplemented in light of market or other developments and that Enforcement and Office of Compliance Inspections and Examinations staff should keep the distinction between staff views and rules and regulations of the Commission in mind. Commissioner Hester Peirce recently delivered a [speech](#) on the same subject.

<sup>7</sup> As with other staff statements, Director Hinman noted that the speech expresses the author's views and does not necessarily reflect those of the Commission, the Commissioners or other members of the staff and that the SEC disclaims responsibility for any private publication or statement of any SEC employee or Commissioner.

<sup>8</sup> Like all Staff guidance, the Framework represents the views of the Staff and is not a rule, regulation or statement of the SEC, nor is it binding on the SEC and does not modify or replace any existing laws, regulations or rules

## I. Investment of Money

The first prong of the *Howey* test requires an “investment of money.”

|    | Factor  | Source   |
|----|---|--|
| 1. | The first prong of the <i>Howey</i> test is typically satisfied in an offer and sale of digital assets because the digital asset is purchased or otherwise acquired in exchange for value, whether in the form of real (or fiat) currency, another digital asset or other type of consideration | Framework, p. 2.   |
| 2. | <i>Form of Consideration.</i> The lack of monetary consideration does not mean that the investment of money prong is not satisfied.   | See Framework at fn 9. See also DAO Report, citing <i>Useton v. Comm. Lovelace Motor Freight, Inc.</i> , 940 F.2d 564, 574 (10th Cir. 1991). |
| 3. | <i>Bounty Programs.</i> Tokens issued under a so-called bounty program or otherwise provided to investors in exchange for services designed to advance the issuer’s economic interests and foster a trading market for its securities may satisfy the investment of money.                      | Framework at fn. 9; <i>Tomahawk.</i>   |
| 4. | <i>Air Drops.</i> Tokens distributed through a so-called air drop, or otherwise distributed to holders of another digital asset, typically to promote its circulation, may satisfy the investment of money.   | Framework at fn. 9.  |

## II. Common Enterprise

The second prong of the *Howey* test requires that the investment of money be in a “common enterprise.”

|    | Factor  | Source   |
|----|---|--|
| 1. | <i>Horizontal or Vertical Commonality.</i> Federal circuit courts are split on the appropriate test to establish a common enterprise and require either “horizontal” or “vertical” commonality. The “horizontal” approach establishes a common enterprise where each individual investor’s fortunes are tied to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits. “Vertical commonality” looks to the relationship between an investor and the promoter. <sup>9</sup> | See Framework at fn 10. See also <i>Revak v. SEC Realty Corp.</i> , 18 F.3d. 81, 87-88 (2d Cir. 1994).                             |
| 2. | The SEC does not require either horizontal or vertical commonality per se, and Staff have typically found that a common enterprise exists when evaluating digital assets because the fortunes of digital asset purchasers have been linked to each other or to the success of the promoter’s efforts.   | Framework at pg. 2; Framework at fn. 10, 11, citing <i>SEC v. Int’l Loan Network, Inc.</i> , 968 F.2d 1304, 1307 (D.C. Cir. 1992). |
| 3. | The SEC does not view common enterprise as a distinct element of an investment contract.  | Framework at fn. 10, citing <i>In re Barkate</i> , 57 S.E.C. 488,  |

<sup>9</sup> Courts have used two variants of the vertical commonality test in determining whether a common enterprise exists. For courts applying a strict vertical commonality standard, the fortunes of the promoter and investor must be linked. See *Turner* at 482 (finding a common enterprise despite the absence of pooling). The broad vertical approach requires only that the investor’s realization of profits be tied to the promoter’s skill or effectiveness. See *Koscot* at 478.

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|  | 496 n.13 (Apr. 8, 2004) and the Commission’s Supplemental Brief at 14 in <i>SEC v. Edwards</i> , 540 U.S. 389 (2004) (on remand to the 11th Circuit). |
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### III. Reasonable Expectation of Profits Derived From Efforts of Others

The third prong of the *Howey* test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others. The Framework notes that this is usually the main issue in analyzing a digital asset under *Howey*. When a promoter, sponsor or other third party (or affiliated group of third parties) (each an Active Participant or AP) provides essential managerial efforts that affect the success of the enterprise, and investors reasonably expect to derive profit from those efforts, the Staff view this prong of the test to be met.

The Staff further asserts that the inquiry is an objective one, focused on the transaction itself and the manner in which the digital asset is offered and sold.<sup>10</sup> The Framework considers whether there is a reasonable expectation of profits and whether a purchaser is relying on the efforts of others as separate factors.<sup>11</sup> According to the Framework, the following characteristics are especially relevant in an analysis of whether the third prong of the *Howey* test is satisfied.<sup>12</sup>

#### III.A. Expectation of Profits

According to the Framework, a purchaser may expect to realize a return through, among other things, capital appreciation resulting from the development of the initial investment or business enterprise or a participation in earnings resulting from the use of purchasers’ funds.<sup>13</sup> Price appreciation resulting **solely** from external market forces (such as general inflationary trends or the economy) impacting the supply and demand for an underlying asset generally is not considered “profit” under the *Howey* test.<sup>14</sup>

|    | Factor  | Source                  |
|----|---|-------------------------|
|    | The Framework notes that the more the following characteristics are present, the more likely it is that there is a reasonable expectation of profits. However, the Framework does not assign a weight to each factor.   |                         |
| 1. | <i>Methods of Realizing Profits.</i> The digital asset gives the holder rights to share in the enterprise’s income or profits or to realize gain from capital appreciation of the digital asset.<br>(a) The opportunity may result from appreciation in the value of the digital asset that comes, at least in part, from the operation, promotion, improvement or other positive developments in the network, particularly if there is a | The Framework at pg. 6. |

<sup>10</sup> The *Howey* test is an “objective inquiry into the character of the instrument or transaction offered based on what the purchasers were ‘led to expect.’” *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009).

<sup>11</sup> Other courts have considered the “expectation of profits” and “derived from the efforts of others” as a single element of the *Howey* test. *See Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009) (citing *SEC v. Rubera*, 350 F.3d 1084 (9th Cir. 2003)) (“We distilled *Howey*’s definition into a three-part test ....”).

<sup>12</sup> The Framework at pg. 2-3.

<sup>13</sup> The Framework at 2-3 and pg. 6, citing *United Housing Found., Inc. v. Forman*, 421 U.S. 837 (1975).

<sup>14</sup> The Framework at pg. 6 (emphasis in original).

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|     | <p>secondary trading market that enables digital asset holders to resell their digital assets and realize gains.</p> <p>(b) This also can be the case where the digital asset gives the holder rights to dividends or distributions.</p>  |                           |
| 2.  | <p><i>Methods of Realizing Profits.</i> The digital asset is transferable or traded on or through a secondary market or platform or is expected to be in the future.</p>  | The Framework at pg. 6.   |
| 3.  | <p><i>Methods of Realizing Profits.</i> Purchasers reasonably would expect that an Active Participant's efforts will result in capital appreciation of the digital asset and therefore be able to earn a return on their purchase.</p>  | The Framework at pg. 6.   |
| 4.  | <p><i>Methods of Realizing Profits.</i> There are limited or no restrictions on reselling those digital assets, particularly where an Active Participant is continuing in its efforts to increase the value of the digital assets or has facilitated a secondary market.</p>  | The Framework at pg. 11.  |
| 5.  | <p><i>Tokens Offered Broadly.</i> The digital asset is offered broadly to potential purchasers as compared to being targeted to expected users of the goods or services or those who have a need for the functionality of the network.</p>  | The Framework at pg. 6.   |
| 6.  | <p><i>Price.</i> There is little apparent correlation between the purchase/offering price of the digital asset and the market price of the particular goods or services that can be acquired in exchange for the digital asset.</p>   | The Framework at pg. 7.   |
| 7.  | <p><i>Price.</i> The digital asset is offered or sold to purchasers at a discount to the value of the goods or services.</p>  | The Framework at pg. 11.  |
| 8.  | <p><i>Quantities.</i> There is little apparent correlation between quantities the digital asset typically trades in (or the amounts that purchasers typically purchase) and the amount of the underlying goods or services a typical consumer would purchase for use or consumption.</p>  | The Framework at pg. 7.   |
| 9.  | <p><i>Quantities.</i> The digital asset is offered or sold to purchasers in quantities that exceed reasonable use.</p>  | The Framework at pg. 11.  |
| 10. | <p><i>Marketing.</i> The digital asset is marketed, directly or indirectly, using any of the following:</p> <ul style="list-style-type: none"> <li>(a) the expertise of an Active Participant or its ability to build or grow the value of the network or digital asset;</li> <li>(b) terms that indicate the digital asset is an investment or that the solicited holders are investors;</li> <li>(c) that the intended use of the proceeds from the sale of the digital asset is to develop the network or digital asset;</li> <li>(d) the future (and not present) functionality of the network or digital asset, and the prospect that an Active Participant will deliver that functionality;</li> <li>(e) the promise (implied or explicit) to build a business or operation as opposed to delivering currently available goods or services for use on an existing network;</li> <li>(f) the ready transferability of the digital asset as a key selling feature;</li> <li>(g) the potential profitability of the operations of the network or the potential appreciation in the value of the digital asset;</li> <li>(h) the availability of a market for the trading of the digital asset, particularly where the Active Participant implicitly</li> </ul> | The Framework at pg. 7-8. |

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|  | or explicitly promises to create or otherwise support a trading market for the digital asset.   |  |
| 11.  | <i>Use of Proceeds.</i> An Active Participant has raised an amount of funds in excess of what may be needed to establish a functional network or digital asset.                                   | The Framework at pg. 7. See also Hinman Speech at pg. 4. |
| 12.  | <i>Use of Proceeds.</i> The Active Participant continues to expend funds from proceeds or operations to enhance the functionality or value of the network or digital asset.                       | The Framework at pg. 7.                                  |
| 13.  | <i>Active Participant May Profit.</i> An Active Participant is able to benefit from its efforts as a result of holding the same class of digital assets as those being distributed to the public. | The Framework at pg. 7. See also Hinman Speech at pg. 2. |
| <b>“Reasonable Expectations of Profits” Re-evaluation Considerations</b>   |   |  |
| When evaluating whether a digital asset previously sold as a security should be re-evaluated at the time of latter offer or sale, the Staff provides the following additional considerations. As they relate to “reasonable expectation of profits,” the presence of, including, but not limited to, one or more of these factors makes it less likely that future sales of the digital asset are securities transactions. |   |  |
| 14.  | Purchasers of the digital asset no longer reasonably expect that continued development efforts of an Active Participant will be a key factor for determining the value of the digital asset.      | The Framework at pg. 8.                                  |
| 15.  | The value of the digital asset has shown a direct and stable correlation to the value of the good or service for which it may be exchanged or redeemed.   | The Framework at pg. 8.                                  |
| 16.  | The trading volume for the digital asset corresponds to the level of demand for the good or service for which it may be exchanged or redeemed.  | The Framework at pg. 8.                                  |
| 17.  | Whether holders are then able to use the digital asset for its intended functionality, such as to acquire goods and services on or through the network or platform.                               | The Framework at pg. 8.                                  |
| 18.  | Whether any economic benefit that may be derived from appreciation in the value of the digital asset is incidental to obtaining the right to use it for its intended functionality.               | The Framework at pg. 8.                                  |
| 19.  | No Active Participant has access to material, nonpublic information or could otherwise be deemed to hold material inside information about the digital asset.                                     | The Framework at pg. 8. See also Hinman Speech at pg. 3. |

### III.B. Reliance on the Efforts of Others

The U.S. Supreme Court in *Howey* determined there was an investment contract where investors were “led to expect profits solely from the efforts of a promoter or third party.”<sup>15</sup> Subsequent decisions have relaxed the view that the expectation of profits be derived “solely” from the efforts of others.<sup>16</sup> The Staff recognizes that “holders of digital assets may put forth some effort in the operations of the network, but those efforts do not negate the fact that the holders of digital assets are relying on the efforts of the Active Participant. That a scheme assigns ‘nominal or limited responsibilities to the [investor] does not negate the existence of an investment contract.’”<sup>17</sup> Managerial and entrepreneurial efforts typically are

<sup>15</sup> *Howey* at 299.

<sup>16</sup> See *Turner* at 775. “In applying the Supreme Court’s definition of an investment contract, therefore, the efforts of others which are relevant for purposes of the definition are those essential managerial efforts which affect the failure or success of the enterprise.” See also *Forman* at 852. “The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.”

<sup>17</sup> The Framework at fn. 16, quoting *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 483 n.15 (5th Cir. 1974).

characterized as involving expertise and decision-making that impacts the success of the business or enterprise through the application of skill and judgment.<sup>18</sup>

|  | Factor   | Source   |
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| The more the following characteristics are present, the more likely it is that there is reliance on the efforts of others. |  |  |
| 1.   | <i>AP's Role.</i> An Active Participant is responsible for the development, improvement (or enhancement), operation or promotion of the network, particularly if purchasers of the digital asset expect an Active Participant to be performing or overseeing tasks that are necessary for the network or digital asset to achieve or retain its intended purpose or functionality.   | The Framework at pg. 3; Hinman Speech at 4. Also see <i>Turner</i> ; also see <i>Koscot</i> at 483 n.15. |
| 2.   | <i>AP's Role.</i> Where the network or the digital asset is still in development and the network or digital asset is not fully functional at the time of the offer or sale, purchasers would reasonably expect an Active Participant to further develop the functionality of the network or digital asset (directly or indirectly). This particularly would be the case where an Active Participant promises further developmental efforts in order for the digital asset to attain or grow in value.  | The Framework at pg. 3-4; also see <i>Gary Plastic</i> .   |
| 3.   | <i>AP's Role.</i> An Active Participant's efforts are "undeniably significant ones, or essential managerial efforts which affect the failure or success of the enterprise," as opposed to efforts that are more ministerial in nature.   | The Framework at fn. 16, quoting <i>Turner</i> at 482 and citing the DAO Report.                         |
| 4.   | <i>AP's Role.</i> An Active Participant promises further developmental efforts in order for the digital asset to attain or grow in value.  | The Framework at pg. 4; also see <i>Gary Plastic</i> .   |
| 5.   | <i>AP's Role.</i> There are essential tasks or responsibilities performed and expected to be performed by an Active Participant, rather than an unaffiliated, dispersed community of network users (commonly known as a "decentralized" network).  | The Framework at pg. 4.  |
| 6.   | <i>AP's Role.</i> An Active Participant has a lead or central role in the direction of the ongoing development of the network or the digital asset, in particular, if an Active Participant plays a lead or central role in deciding governance issues, code updates or how third parties participate in the validation of transactions that occur with respect to the digital asset.  | The Framework at pg. 4.  |
| 7.   | <i>AP's Role.</i> An Active Participant has a continuing managerial role in making decisions about or exercising judgment concerning the network or the characteristics or rights the digital asset represents, including, for example, <ul style="list-style-type: none"> <li>(a) determining whether and how to compensate persons providing services to the network or to the entity or entities charged with oversight of the network;</li> <li>(b) determining whether and where the digital asset will trade. For example, purchasers may reasonably rely on an AP for liquidity, such as where the AP has arranged, or promised to arrange for, the trading of the digital asset on a secondary market or platform;</li> <li>(c) determining who will receive additional digital assets and under what conditions;</li> </ul> | The Framework at pg. 4-5. Hinman Speech at 4.  |

<sup>18</sup> The Framework at fn. 16.

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|  | <ul style="list-style-type: none"> <li>(d) making or contributing to managerial-level business decisions, such as how to deploy funds raised from sales of the digital asset;</li> <li>(e) playing a leading role in the validation or confirmation of transactions on the network or in some other way having responsibility for the ongoing security of the network;</li> <li>(f) making other managerial judgments or decisions that will directly or indirectly impact the success of the network or the value of the digital asset generally.</li> </ul>   |  |
| 8.   | <p><i>AP's Role.</i> Purchasers would reasonably expect the Active Participant to undertake efforts to promote its own interests and enhance the value of the network or digital asset, such as where:</p> <ul style="list-style-type: none"> <li>(a) <i>AP may profit.</i> An Active Participant has the ability to realize capital appreciation from the value of the digital asset. In these instances, purchasers would reasonably expect the AP to undertake efforts to promote its own interests and enhance the value of the network or digital asset.</li> <li>(b) <i>Digital assets are AP's compensation.</i> An Active Participant distributes the digital asset as compensation to management or the AP's compensation is tied to the price of the digital asset in the secondary market. To the extent these facts are present, the compensated individuals can be expected to take steps to build the value of the digital asset.</li> <li>(c) <i>AP retains intellectual property rights.</i> An Active Participant owns or controls ownership of intellectual property rights of the network or digital asset, directly or indirectly.</li> <li>(d) <i>AP monetizes value.</i> An Active Participant monetizes the value of the digital asset, especially where the digital asset has limited functionality.</li> </ul> | The Framework at pg. 5. Hinman Speech at 4.          |
| 9.   | <p><i>AP Supports the Market.</i> An Active Participant creates or supports a market for, or the price of, the digital asset. This can include, for example, an Active Participant that</p> <ul style="list-style-type: none"> <li>(a) controls the creation and issuance of the digital asset or</li> <li>(b) takes other actions to support a market price of the digital asset, such as by limiting supply or ensuring scarcity, through buybacks, "burning" or other activities.</li> </ul>   | The Framework at pg. 4, citing <i>Gary Plastic</i> . |
| <p><b>"Efforts of Others" Re-evaluation Considerations</b></p> <p>In evaluating whether a digital asset previously sold as a security should be re-evaluated at the time of later offers or sales, there would be additional considerations as they relate to the "efforts of others," including but not limited to the following:</p> |   |  |
| 10.  | <p><i>AP No Longer Important to Value.</i> The efforts of an Active Participant, including any successor promoter, are no longer important to the value of an investment in the digital asset.</p>  | The Framework at pg. 5.                              |
| 11.  | <p><i>AP's Essential Efforts No Longer Expected.</i> The network on which the digital asset is to function operates in such a manner that purchasers would no longer reasonably expect an Active Participant to carry out essential managerial or entrepreneurial efforts.</p>  | The Framework at pg. 5                               |
| 12.  | <p><i>AP No Longer Affects Success.</i> The efforts of an Active Participant are no longer affecting the enterprise's success.</p>  | The Framework at pg. 5.                              |

## III.C. Characteristics of Use or Consumption

The U.S. Supreme Court in *Howey* stated that the analysis of whether an arrangement is an investment contract focuses on the “economic reality of the transaction.” In *Forman*, the Supreme Court stated that where a purchaser is not “attracted solely by the prospects of a return on his investment ... [but] is motivated by a desire to use or consume the item purchased ... the securities laws do not apply.”

|   | Factor   | Source                                |
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| The Framework provides several characteristics of digital assets that may indicate that the token is offered and sold for use or consumption by purchasers. While the Staff notes that no one of the following characteristics is necessarily determinative, the stronger their presence, the less likely the <i>Howey</i> test is met. |  |                                       |
| 1.  | <i>Fully Operational.</i> The distributed ledger network and digital asset are fully developed and operational.  | The Framework at pg. 9.               |
| 2.  | <i>Immediate Use.</i> Holders of the digital asset are immediately able to use it for its intended functionality on the network, particularly where there are built-in incentives to encourage such use.   | The Framework at pg. 9. Hinman at 5.  |
| 3.  | <i>Design.</i> The digital assets’ creation and structure is designed and implemented to meet the needs of its users rather than to feed speculation as to its value or development of its network. For example, the digital asset can be used only on the network and generally can be held or transferred only in amounts that correspond to a purchaser’s expected use.   | The Framework at pg. 9.               |
| 4.  | <i>Limited Possibility of Appreciation.</i> Prospects for appreciation in the value of the digital asset are limited. For example, the design of the digital asset provides that its value will remain constant or even degrade over time, and therefore a reasonable purchaser would not be expected to hold the digital asset for extended periods as an investment.   | The Framework at pg. 9. Hinman at 4.  |
| 5.  | <i>Use for Payments.</i> With respect to a digital asset referred to as a virtual currency, it can immediately be used to make payments in a wide variety of contexts or acts as a substitute for real (or fiat) currency. <ul style="list-style-type: none"> <li>(a) This means that it is possible to pay for goods or services with the digital asset without first having to convert it to another digital asset or real currency.</li> <li>(b) If it is characterized as a virtual currency, the digital asset actually operates as a store of value that can be saved, retrieved and exchanged for something of value at a later time.</li> </ul>  | The Framework at pg. 9.               |
| 6.  | <i>Redemption for Goods or Services.</i> With respect to a digital asset that represents rights to a good or service, it currently can be redeemed within a developed network or platform to acquire or otherwise use those goods or services. Relevant factors may include these: <ul style="list-style-type: none"> <li>(a) There is a correlation between the purchase price of the digital asset and a market price of the particular good or service for which it may be redeemed or exchanged.</li> <li>(b) The digital asset is available in increments that correlate with a consumptive intent versus an investment or speculative purpose.</li> <li>(c) An intent to consume the digital asset may also be more evident if the good or service underlying the digital asset</li> </ul> | The Framework at pg. 10. Hinman at 5. |

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|     | can only be acquired, or more efficiently acquired, through the use of the digital asset on the network.  |                          |
| 7.  | <i>Incidental Economic Benefit.</i> Any economic benefit that may be derived from appreciation in the value of the digital asset is incidental to obtaining the right to use it for its intended functionality. | The Framework at pg. 10. |
| 8.  | <i>Marketing.</i> The digital asset is marketed in a manner that emphasizes the functionality of the digital asset, and not the potential for the increase in market value of the digital asset.                | The Framework at pg. 10. |
| 9.  | <i>Functional Network and Digital Asset.</i> Potential purchasers have the ability to use the network and use (or have used) the digital asset for its intended functionality.                                  | The Framework at pg. 10. |
| 10. | <i>Restrictions on Transfer.</i> Restrictions on the transferability of the digital asset are consistent with the asset's use and not facilitating a speculative market.  | The Framework at pg. 10. |
| 11. | <i>Secondary Market.</i> If an Active Participant facilitates the creation of a secondary market, transfers of the digital asset may only be made by and among users of the platform.                           | The Framework at pg. 10. |

## **No-Action Letter**

The Division of Corporation Finance's April 3 No-Action Letter indicated that it would not recommend enforcement action against TurnKey Jet, Inc. (TKJ) if TKJ offered and sold its tokens without registration under the Securities Act and the Exchange Act so long as TKJ followed the facts described in its [request letter](#) (Request Letter). In reaching this position, the Staff noted certain conditions that the relief is based on, which draw on several characteristics and factors listed in the Framework above. Particularly, the following sets forth each condition in the No-Action Letter, along with a reference to the applicable section in the Framework Chart above:

|    | <b>Condition</b>  | <b>Reference</b>  |
|----|---|---|
| 1. | The platform and tokens will be fully developed and operational at the time tokens are sold, and no proceeds from token sales will be used to develop the TKJ platform.   | See III.B. Reliance on the Efforts of Others, Factor 2; <i>also see</i> III.C. Characteristics of Use or Consumption, Factors 1 and 9.        |
| 2. | The tokens will be immediately usable for their intended functionality at the time they are sold.   | See III.C. Characteristics of Use or Consumption, Factors 1 and 2; <i>also see</i> III.B. Reliance on the Efforts of Others, Factors 1 and 2. |
| 3. | TKJ will restrict transfers of tokens to TKJ wallets only, and not to wallets external to the platform.   | See III.C. Characteristics of Use or Consumption, Factors 4, 10, and 11.  |
| 4. | TKJ will sell tokens at a price of one U.S. dollar per token throughout the life of the program, and each token will represent a TKJ obligation to supply air charter services at a value of one U.S. dollar per token. | See III.C. Characteristics of Use or Consumption, Factors 4, 5, 6, and 11; <i>also see</i> III.A. Expectation of Profits, Factors 6, 7 and 8. |
| 5. | If TKJ offers to repurchase tokens, it will only do so at a discount to the face value of the tokens that the holder seeks to resell to   | See III.A. Expectation of Profits, Factors 6, 7 and 8; <i>also see</i> III.B. Reliance on   |

|    |  |   |
|----|--|---|
|    | TKJ, unless a court within the United States orders TKJ to liquidate the tokens.   | the Efforts of Others, Factors 6, 7 and 9.  |
| 6. | TKJ will market the tokens in a manner that emphasizes the functionality of the token and not the potential for the increase in the market value of the token. | See III.C. Characteristics of Use or Consumption, Factors 6 and 8; also see III.A. Expectation of Profits, Factor 10. |

## Conclusion

The Framework provides insight into how the Staff will interpret facts and circumstances specific to digital assets when applying the *Howey* test to determine whether the offer and sale of a digital asset is an investment contract and therefore a security. While no one factor addressed in the Framework is necessarily dispositive as to whether or not an investment contract exists, the No-Action Letter (while only applicable to a narrow fact pattern) appears to highlight those factors in the Framework that the Staff views as particularly determinative. The Framework affirms that each particular offer and sale of a digital asset may have unique facts and circumstances that merit a separate analysis of the *Howey* test at various stages of product development. Blockchain companies and/or secondary trading venues are advised to carefully consider, in consultation with counsel, the body of case law that informs the Framework, including *Howey* and its progeny, to determine whether a digital asset in an “investment contract” within the definition of a security.

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