From: Joseph Lubin [mailto:joseph.lubin@consensys.net] Sent: Monday, November 27, 2017 12:48 AM To: Barnett, Gary; Matt Corva; Patrick Berarducc1; Aaron J Wright Subject:

Gary,

It was a pleasure seeing you in Singapore and exciting that you remain interested in our fledgling ecosystem

As we discussed, we remain very interested in engaging in discussions with regulators around the world and probably the most important body is the SEC

While we remain confident in our prudent approach to token launches, we are eager to educate regarding the benefits of tokenization, and eager for our ecosystem to be able to operate in the United States with greatly reduced uncertainty

We have begun to gather interested parties to helpjointly define best practices for token launches -- including what we at ConsenSys have defined. These include legal, academic and commercial interests. We expect to publish results from this effort soon and over the next couple of months. You might be aware of the recently released "NOT SO FAST RISKS RELATED TO THE USE OF A 'SAFT' FOR TOKEN SALES" driven by

the Cardozo Blockchain Project and several individuals from ConsenSys "acting solely in their personal capacity."

Separately, we would be very interested in speaking with relevant parties at the SEC so that we can offer ourselves as an educational resource as the SEC increases its understanding of the benefits of blockchain and tokenization, and so that we can talk through how certain plans that we have regarding novel security structures, might be perceived by your colleagues. If you could help us navigate and make appropriate introductions, we would be greatly appreciative.

Best, Joe



×

Joseph Lubin # @ethereumJoseph 49 Bogart St, Suite 22, Brooklyn NY 11206 Web Twitter Facebook Linkedin Newsletter From: Barnett, Gary Sent: Monday, November 27, 2017 11:32 AM To: Hinman, William Subject: Consensys/Cardozo reach out

Bill:

Joe Lubin is the founder of Consensys, a software production shop (plus a lot more) that is currently involved and assisting in a lot of blockchain development in the market today. As you can see from the below Joe is reaching out to the regulatory world to provide help and pursue constructive discussion and in connection with that effort is asking for appropriate introductions. Joe has also included Aaron Wright, a law professor and academic at Cardozo who is being very effective in his role and helping to facilitate thought and debate about the securities and commodities law issues raised in connection with ICOs offerings.

I am going to introduce them to Valerie Szczepanik and would like to include you as well. Unless you have other thoughts on process, I will just include you on my email back to Joe and in the meeting invite that will follow after that.

Thanks,

Gary

From: Hinman, William Sent: Monday, December 04, 2017 11:09 AM To: Barnett, Gary

Thanks for this. I tried to reply when I was flying on the plane to texas last week, but think it did not go through. Happy to participate in a meeting on this topic. Thanks for reaching out. Best Bill

From:	Barnett, Gary
Sent:	Monday, December 4, 2017 12:06 PM
То:	Hinman, William
Subject:	RE: Consensys/Cardozo reach out

Subject: RE: Consensys/Cardozo reach out

Great, thanks Bill. I'll try to set something up. Gary

Gary,

Subject: Location:	Blockchain and Tokenization TM Workroom 7630
Start: End: Show Time As:	Wed 12/13/2017 11:00 AM Wed 12/13/2017 11:30 AM Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer: Required Attendees:	McLeod, Marnetta (Contractor) Hinman, William; Barnett, Gary; Starr, Amy; Szczepanik, Valerie; Fredrickson, David R.; joseph.lubin@consensys.net; matt.corva@consensys.net; patrick.berarducci@consensys.net; Aaron.wright@yu.edu

FYI: Bill, all conference rooms on the fourth floor are reserved for the above meeting. If you have another suggestion, I will be happy to move the meeting location.

Thank you,

Marnetta

From:	Starr, Amy
Sent:	Tuesday, December 12, 2017 8:33 AM
То:	Hinman, William; Barnett, Gary; Szczepanik, Valerie; Fredrickson, David R.; Ingram, Jonathan; Oh, Cindy; Schoeffler, Andrew; Vilardo, Mark; Sanow, Nancy J.; Coe, Michael E.; Greiner, Natasha (Vij); Crovitz, Sara P.; Haghshenas, Parisa
Cc:	McLeod, Marnetta (Contractor)
Subject:	RE: Blockchain and Tokenization

I am attaching information that Consensys provided for the meeting tomorrow.



They also provided the following information.

#### <u>Attendees</u>

- Joseph Lubin is the Founder of ConsenSys and a Co-Founder of the Ethereum Project. Prior to Ethereum, Joseph spent time in technology, finance, and the music industry.
- Patrick Berarducci is a lawyer for ConsenSys working on software in his spare time. Prior to coming to ConsenSys, he practiced law at Sullivan & Cromwell and founded his own HealthTech startup.
- Aaron Wright is an Associate Professor of Law at Cardozo Law School, Author, Chair of the Enterprise Ethereum Alliance Legal Working Group, and Co-Founder of OpenLaw, a ConsenSys Spoke Company.
- Agnes Budzyn, works directly with Joseph Lubin on the growth strategy of ConsenSys, ensuring business alignment across the globe. Previously Agnes was a member of the Financial Markets Advisory special situations team at BlackRock, where she advised institutions, central banks and regulators during the financial crisis.
- Matt Corva is a lawyer for ConsenSys also focused on go-to-market strategies for our various businesses. Prior to coming to ConsenSys, Matt was a Vice President and General Manager for GLG.

#### **Background**

- <u>Coinbase Securities Law Framework for Tokens</u>
- Not So Fast Risks Related to the SAFT for Token Sales
- Announcing the Brooklyn Project

#### Amy

-----Original Appointment----- **From:** McLeod, Marnetta (Contractor) **Sent:** Tuesday, December 05, 2017 3:48 PM **To:** McLeod, Marnetta (Contractor); Hinman, William; Barnett, Gary; Starr, Amy; Szczepanik, Valerie; Fredrickson, David R.; joseph.lubin@consensys.net; matt.corva@consensys.net; patrick.berarducci@consensys.net; Aaron.wright@yu.edu; Ingram, Jonathan; Oh, Cindy; Schoeffler, Andrew; Vilardo, Mark **Subject:** Blockchain and Tokenization ConsenSys and the Cardozo Blockchain Project Selling Consumer Tokens in a Consumer-Protective Manner

December 13, 2017

Premise: It should be possible to sell "consumer tokens" --i.e., digital consumer goods--in a way that (1) does not implicate the securities laws, and (2) protects consumers.

## AGENDA

- Overview of Ethereum
- Overview of ConsenSys and Cardozo Blockchain Project
- Update on Token Sales
- Concerns about Market Confusion and Consumer
   Protection
- The Brooklyn Project and Industry Wide Initiatives
- On-Going Collaboration

### Attendees



**Patrick Berarducci** is a lawyer for ConsenSys and a computer scientist. Prior to coming to ConsenSys, he practiced law at Sullivan & Cromwell and was a co-founder and software architect of a HealthTech startup.



**Agnes Budzyn,** works directly with Joseph Lubin on the growth strategy of ConsenSys, ensuring business alignment across the globe. Previously Agnes was a member of the Financial Markets Advisory special situations team at BlackRock, where she advised institutions, central banks and regulators during the financial crisis.



**Matt Corva** is a lawyer for ConsenSys also focused on go-to-market strategies for our various businesses. Prior to coming to ConsenSys, Matt was a Vice President and General Manager for GLG.



**Joseph Lubin** is the Founder of ConsenSys and a Co-Founder of the Ethereum Project. Prior to Ethereum, Joseph spent time in technology, finance, and the music industry.



**Aaron Wright** is an Associate Clinical Professor of Law at Cardozo Law School; Co-Author of forthcoming book *Blockchain and the Law: The Rule of Code* (Harvard University Press, Spring 2018); Chair of the Enterprise Ethereum Alliance Legal Industry Working Group; Academic Fellow, CoinCenter; Editor, Ledger; and Co-Founder of the Cryptocurrency Research Group.

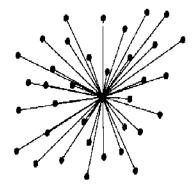
## Ethereum

## The Ethereum Blockchain.

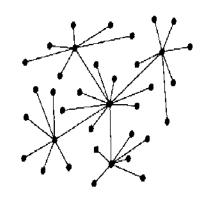
- A next-generation, globally-shared database and compute infrastructure.
- Facilitates trustworthy, fair, and low friction commercial and social activity.
- Allows all actors on the system to be certain that the rules are being fairly applied and followed by all.
- Lower risk of manipulated data or or manipulated business processes, because everyone can directly inspect both data and business logic.
- The Bitcoin blockchain focuses on currency (the Bitcoin application), the Ethereum blockchain focuses on being a platform for applications (many use-cases).

Ethereum: A tool to lessen the need for centralized intermediaries

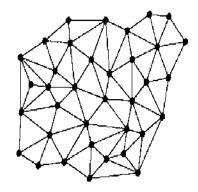
**Platform Economy** 



### Sharing Economy









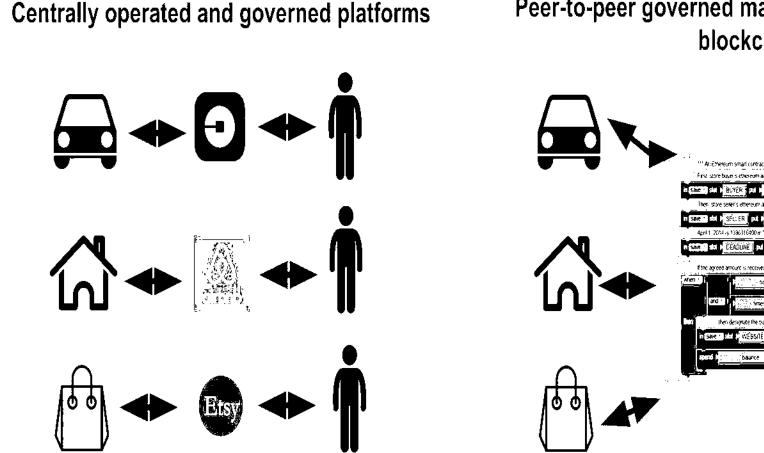




2010

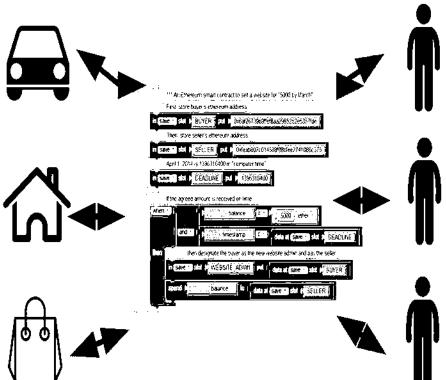
2015

## **Ethereum: Powering Multi-Sided Markets**



Intermediaries own identities, pricing, openness of platform, etc.

Peer-to-peer governed marketplaces through a a blockchain



Blockchains lessen the need for intermediaries. Introduces efficiencies and allows market participants to have greater control over commercial activity

## Tokens: Scarce digital assets that can be securely transferred

### Range of assets can be tokenized



**Consumer Goods** 



Title/Deed to Real Estate







Human Attention



Securities and other Financial Products

- Frictionless creation, verification, and exchange of assets
- Near instantaneous clearing and settlement
- Clear and tamper-resistant records of ownership
- Fractional ownership models
- Cryptographically secured and validated

## About ConsenSys

## ConsenSys

A venture production studio exploring the use of blockchain technology

#### VISION

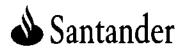
Our vision is a world in which **distributed applications** and the Ethereum world computer enables **more efficient and inclusive** global commerce and social activity.



## Global

460+ blockchain experts, entrepreneurs, computer scientists, designers, engineers, consultants, and business leaders with delivery experience across six continents





**bhp**billiton

**TOP 5 ENERGY COMPANIES** 

دبـــي الذكيـة SMART DUBAI





- Project delivery locations
- Office locations
- ConsenSys Personnel

# About Cardozo Blockchain Project

### About

- Academic initiative launched by Cardozo Law School.
- Purpose is to explore the regulatory challenges raised by blockchain technology.
- Leverages Cardozo's long emphasis on information and commercial law.

# ConsenSys and Cardozo Blockchain Project Industry Leadership

## Industry Leadership: The Enterprise Ethereum Alliance



- Helped launch the Enterprise Ethereum Alliance, a consortium of over 200 large enterprises.
- Aims to develop open standards for enterprise grade Ethereum-based applications.
- Members include J.P. Morgan, UBS, Santander, Microsoft, Intel, and Oracle.

## Industry Leadership: Securities Law Framework for Blockchain Tokens

#### A Securities Law Framework for Blockchain Tokens

A blockchain token is a digital token created on a blockchain as part of a decentralized software piblocol

There are many different types of blockchain tokens leach with varying characteristics and uses. Some blockchain takens like Bitcoin function as a digital currency. Others can represent a right to lang be assets like gold or reariestate.

Blockchain tokens can also be used in new protocols and networks to create distributed applications. These lokens are sometimes also referred to as App Couns or Protocol. Tokens These types of lokens represent the next phase of innovation in blockchain technology and the polential for new types of business models that are decertialized. For example, cloud computing without Amazon, social networks without Rabebook or online marketplaces without eBay

However, there are a number of difficult legal questions surrounding blockchain tokens. For example, some tokens, depending on their features, may be subject to US federal or state securities taws. This would mean, among other things, that it is iflegal to offer them for sale to US residents except by registration or exemption. Similar rules apply in many other op "lines.

The Framework focuses on US federal securities iaw because these laws pose the biggest risk for crowdsales of blockthan tokens in many jurisolations, there may also be issues under anti-money laundering laws and general consumer protection laws las well as specific laws depending on what the loken actually does.

This document is a general guide for developers and users of tokens

Part 1 is designed to estimate how likely a carticular token is to be a security under US federal securities law

Part 2 sets out some best practices for crowdsales

Part 3 is a detailed securities law analysis by Debevolse & Plimpton LLP

As more fully set forth in the component parts of this document, the document does not constitute legal advice and should not be relied on by any person. Developers and users should consult their own counset in connection with their initiatives in this area.

### • Published in 2016.

- First comprehensive analysis into securities law issues related to blockchain-based tokens from the private sector.
- Collaboration between Coinbase, CoinCenter, ConsenSys, Debevoise and Plimpton, and Union Square Ventures.

## Industry Leadership: First Academic Exploration of Legal Issues Related to Blockchain Technology

## BLOCKCHAIN and the LAW Primavera De Filippi Aaron Wright The RULE of CODE 0

- Harvard University Press, Spring 2018.
- Explores ways to regulate blockchain technology.

## Industry Leadership: Other Academic Publications

ananan an	
jados en de contrate de presentation. A substitute de contrate de la sec	
:	

- Academic and industry collaboration to flag emerging risks in blockchain-based token sales.
- Collaboration between Cardozo Blockchain Project, ConsenSys, University of Tennessee Law, and lawyers from Hogan Lovells, McDermott, and Morrison & Foerster.

## Industry Leadership: First Legal Academic Conference to Explore Blockchain Technology

an ta Musi afa Tinta a sa R
Contact

- Academic researchers beginning to explore regulatory challenges of blockchain technology.
- Co-sponsored by Duke Center on Law and Technology and the Legal Studies Department at University of Pennsylvania, Wharton School.

## Industry Leadership: The Brooklyn Project



joseph Lubin
is the second of the second sector is sector
is the second se

### Announcing "The Brooklyn Project" for Token Launches



Dear Community,

I'm reaching out to let you know that ConsenSys is launching "The Brooklyn Project," a company and industry-wide initiative to help fulfill the promise of tokenization by addressing head-on and—we hope—solving the issues that some regulators and others have raised over the last year regarding token

- Academic and industry collaboration to promote best practices and solutions for selling tokens in a way that protects consumers.
- Collaboration between Cardozo Blockchain Project, ConsenSys, University of Tennessee Law, and lawyers from Hogan Lovells, McDermott, Morrison & Foerster.

# Types of Tokens

## **Growing Agreement around Types of Tokens**

# Agreement from both US and EU academics. Broad categories of tokens:

- Protocol tokens/virtual currencies.
- Investment tokens (e.g., tokenized securities).
- Consumer or "utility" tokens (digital consumer goods, e.g., a tokenized software license).

Sources: Rohr, Jonathan and Wright, Aaron, Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets (October 4, 2017). Cardozo Legal Studies Research Paper No. 527; University of Tennessee Legal Studies Research Paper No. 338. Available at SSRN: <u>abgaugest compression of exactable (November 22, 2017)</u>. Available at SSRN: <u>abgaugest compression</u> (November 22, 2017). Available at SSRN: <u>abgaugest compression</u> (November 22, 2017). Available at SSRN: <u>abgaugest compression</u> (November 22, 2017).

### **Tokens are Not Homogenous : Consumptive Rights Predominate**

Table 3. Rights attached to ICO tokens. Sample: 253 ICOs occurred from 2014 to August 2017

Right	Yes	No	N/A
Currency	53 (20.9%)	180 (71.1%)	20 (7.9%)
Access to platform services	172 (68.0%)	61 (24.1%)	20 (7.9%)
Governance decisions	63 (24.9%)	170 (67.2%)	20 (7.9%)
Profit rights	66 (26.1%)	167 (66.0%)	20 (7.9%)
Contribution rights	40 (15.8%)	193 (76.3%)	20 (7.9%)

Source: Adhami, Saman and Giudici, Giancarlo and Martinazzi, Stefano, Why Do Businesses Go Crypto? An Empirical Analysis of Initial Coin Offerings (October 20, 2017). Available at SSRN: <u>https://securear.com/apat/apat/20269</u>.

### Majority of Token Sales Occurring in Other Jurisdictions

Table 1. Initial Coin Offerings' characteristics. Sam	ple: 253 ICOs occurred from 2014 to August 2017
---	---

Country of origin	Number	%
USA	47	18.6%
Decentralized/mixed	31	12.2%
Russian Federation	17	6.7%
UK	14	5.5%
Canada	11	4.3%
China	10	4.0%
Switzerland	10	4.0%
Singapore	9	3.6%
Others/NA	104	41.1%

Source: Adhami, Saman and Giudici, Giancarlo and Martinazzi, Stefano, Why Do Businesses Go Crypto? An Empirical Analysis of Initial Coin Offerings (October 20, 2017). Available at SSRN: <u>https://secureagetracrestille/ces</u>.

# Market Confusion & Consumer Protection

## Entrepreneurs and Others Lack Guidance on How to Sell Tokens That Should Not Be Securities

- Law firms are engaging in aggressive advertising/marketing and suggesting that there are ways to structure compliant token sales to "navigate" around existing laws and regulations. The focus is on escaping regulation, not protecting consumers.
- Investors in existing startups are pressuring founders to "go ICO" and engage in a token sale to provide investors with liquidity without suffering dilution.

## Entrepreneurs and Investors May Lack an Appreciation for Regulatory Risks

- Entrepreneurs are not being provided with an accurate picture of the penalties they may face when engaging in a token sale.
- Purchasers may not recognize the risk that they may be acquiring securities subject to transfer restrictions.

### **Consumer Protection Concerns**

- Projects may entice consumers with a promise of profits through both direct and indirect formats.
- Sales are structured to give advantages to wealthy purchasers through discount, SAFT, or pre-sale schemes. As a result, retail consumers may be disadvantaged and risks for market manipulation and speculation are heightened.
- If consumer tokens represent pre-paid access to an online platform or a digital good, and there is market manipulation, there is a risk that consumers may pay inflated prices.
- Bad actors are abusing the mechanism to perpetrate outright frauds.

# The Brooklyn Project & Other Industry-Wide Initiatives

### Emerging Private Sector Attempts to Provide Standards on Token Sales Process with Consumer Protection in Mind

- ConsenSys Announced the "Brooklyn Project" on November 30: Academics, top law firms, industry participants, and over 200 other interested parties.
- EEA Legal Industry Working Group's Token Subcommittee: Members from over 20 top AMLaw 100 firms, aiming to tackle token related questions.
- Wall Street Blockchain Alliance: Deep bench of seasoned financial lawyers, working on guidance for securities lawyers and other practitioners.

## ConsenSys and Cardozo Blockchain Project Working to Bring these Initiatives Together

- Promote standards in non-securities token sales with goal of protecting consumers.
- Develop FAQs providing potential guidance on ways to identify investment and utility/consumer tokens.
- Collect and report data related to ongoing or contemplated token sales.
- Develop technical tools and standards to protect consumers and limit possibility for speculation.

## **Exploring the Development of Possible Standards to Protect Consumers**

- Smart contract-based purchase limits and transfer restrictions.
- Conditioning release of tokens to actual use of the platform.
- Standardizing documentation for project's technical aspects.
- Promoting financial transparency so interests and risks can be evaluated by both consumers and regulators.
- Smart contract-based lockups for founders and investors to prevent speculation.
- Consumer-refunds, if project milestones are not met.
- Purchaser education and verification of knowledge, sophistication, and risk profile.
- Elimination or dramatic reshaping of the "pre-sale" process.

# **On-Going Collaboration**

## **On-going Collaboration**

- Improving consumer protection.
- Leveraging Ethereum blockchain and industry expertise to identify areas of concern for consumers and regulators--e.g., inadequate disclosures, fraudulent projects.
- Input from regulators so we can properly account for concerns from a range of market participants. We are pleased to see the latest SEC releases on the subject, including Chairman Clayton's recent statement.
- Establishing an ongoing dialogue between industry and SEC to increase the flow of information and provide updates on developments.

#### From: Matt Corva [mailto:matt.corva@consensys.net] Sent: Tuesday, December 19, 2017 10:34 PM To: Starr, Amy Subject: Re: Meeting with SEC staff

Amy - apologies for getting this over the night before but we've been a little upside down trying to make travel work I'm attaching a PDF and word copy of a document we put together to align some of our thinking. As you'll see, it focuses around hypotheticals because we think that's a useful format for analyzing some of the key attributes that impact both sides of the token analysis. While we think this might be helpful to guide the conversation, we're certainly open to any format your side finds most useful to you.

We'll see you tomorrow at 2 PM

Matt

From:	Starr, Amy
Sent:	Wednesday, December 20, 2017 7:41 AM
To:	Hinman, William
Cc:	Seaman, Michael P.
Subject:	FW: Meeting with SEC staff
Attachments:	Exploring Tokens That May Not Be Securities.docx; Exploring Tokens That May Not Be Securities.pdf

	b)(5)
Bill – I received this last night.	

Amy

(b)(5)

#### **Exploring Tokens That May Not Be Securities**

#### **Introduction**

The purpose of this discussion is to examine whether and when it is permissible to sell blockchain-based digitals tokens without implicating U.S. federal securities laws and in a way that protects consumers. In our view, whether a consumer token implicates the U.S. federal securities laws largely will depend on analyzing both the rights or other functionality a token provides its holder (i.e., its <u>intrinsic properties</u>), as well as other factors such as the manner of sale (i.e., its <u>extrinsic properties</u>).

Below are three hypothetical examples of contemplated token models, including hypothetical intrinsic and extrinsic properties. In each example, there is a fact pattern and proposed variations. Generally speaking, we view these examples as involving intrinsic properties that implicate one or more of the following categories of token types:

- **Consumer Tokens:** Tokens that are essentially consumer goods and services, in digital, tokenized form.
- User Activity Tokens: Tokens that provide holders with rights or obligations related to an individual user's activities on a token-based network. With regard to user activity tokens, we contemplate at least two subcategories:

Reward tokens: Tokens that serve as a form of reward or payment for performed activities.

License tokens: Tokens that serve as a license to perform certain activities related to an online service. Analogies in the analog world may include a software license, taxi medallions for New York City taxis, or occupational licensing and certifications for certain vocations.

The above terms and labels are merely meant to be illustrative. And the below examples are meant for discussion purposes only. They should not be viewed as a comprehensive list of all existing or contemplated token models, and we note that we believe that some of the variations noted below may implicate U.S. federal securities laws.

#### Hypothetical Examples

#### Example #1

Tokens that Represent A Right to Buy or Sell Computer Processing Capacity<sup>1</sup> Token Category: Consumer Good

Company A plans to build a platform that will enable the sharing and rental of computing power among the users of the platform. Members of the network with excess computing power on their personal computers can sell their computing power to other participants on the network.

To build the network, Company A sells to both U.S. and foreign purchasers blockchain-based tokens ("Token A") to raise sufficient funding to complete the platform. Token A only will

<sup>&</sup>lt;sup>1</sup> We note that this case study is a variation of one of the case studies found in the Monetary Authority of Singapore. A Guide to Digital Token Offerings, p. 8.

give token holders the right to buy or sell computing power on the platform, serving as a unit of account and a means of payment. Token A will not have any other rights or functionality.

Company A sells a limited number of Token A and these tokens will be freely tradable after the sale, creating a free floating market price for the computing resources made available by members the network.

#### Variations:

- Use of proceeds: Company A engages in the token sale described above, but intends to use the proceeds to: (i) continue to support and maintain the platform after the platform is developed; and (ii) pay for ongoing marketing, business development, research, and support services.
- Token Purchaser Assessment: Company A engages in the token sale described above, but before selling Token A. Company A assesses the following characteristics of each potential initial purchaser: (ii) understanding of the consumptive use of Token A: (ii) an intent to use Token A to sell or consume computing power (the token's consumptive use) and not for reselling Token A for profit; (iii) technical sophistication regarding tokens and crypto-assets; and (iv) an understanding and ability to withstanding losing any and all money used to purchase the token. For any potential purchasers who fail one or more of these assessments, Company A either prohibits the sale or limits the amount of the purchase to no more than \$500.
- Marketed as an Investment: Company A engages in the token sale described above, but during the course of the sale emphasizes in marketing materials the potential of Token A to generate a profit. Company A indicates to potential purchasers that the value of the token could go up or provides information in a "white paper" estimating the potential "market cap" of the token.
- Structuring Sale to Accredited Investors: Before engaging in the sale. Company A sells a portion of the tokens to accredited investors (as defined in 17 C.F.R. § 230.50) within the United States. As confirmed in an agreement, investors purchasing tokens seek to acquire Token A to profit off the sale of the token in the secondary market, and have no desire to use or consume the computing power provided by members of the platform.
- **Governance Rights**: Company A engages in the same token sale described above. However, Token A does not just provide holders with the right to buy or sell computing power; it also provide token holders with the right to vote on software upgrades and to participate in other platform-wide governance issues.
- Efforts to List the Token on an Exchange: Company A engages in the same token sale described above, but prior to or during the course of the sale attempts to list the token on a cryptocurrency exchange.
- **Timing of Sale**: Company A engages in the same token sale described above, but only does so once the underlying platform has been launched and is operational.
- **Reservation of Tokens by Company**: Company A engages in the same token sale described above, but reserves 30% of sold tokens for the Company. Profits from the sale of Token A will be used to support the platform. A portion of the profits may also be returned to investors in Company A in the form of a dividend.

#### Example #2

Tokens that Represent Membership Access Rights to an Online Platform Token Categories: User Activity License to Access an Online Service Company B plans to develop an online platform that enables people to buy and sell consumer goods, providing users with a user experience that is similar to eBay today. Company B engages in a sale of digital tokens ("Token B") to purchasers in the U.S. and abroad to raise sufficient funding to develop the platform.

Token B provides token holders with the right to use the platform, functioning as a membership card and a license to sell goods on the platform. Only holders of Token B are able to sell goods on the platform at any given time, and Token B has no other rights or functionality.

As in Case Study #1, Company B only created a limited number of Token B and these tokens will be freely tradable after the sale, creating a free floating market price for the right to sell goods on the platform.

#### Variations:

• Same variations outlined in Case Study #1, as applied to the Case Study #2.

#### Example #3

Tokens for the Incentivization and Creation of Online Content Token Categories: Consumer Good (Coupon for Free Services): User Activity Reward Token

Company C plans to build an online platform that facilitates the creation and dissemination of online media and other interactive content. To incentivize contributions to the platform, Company C creates an internal token ("Token C").

Token C represents a coupon for future access to the service. Users contributing to the platform receive allocations of Token C. Users of the platform who wish to consume posted content must pay a fee, which can be paid for in either Token C or in U.S. dollars (at the user's option).

Company C only intends to create a limited number of Token C. Under Company's C model, early contributors to the platform receive larger allocations of Token C for any contributions as compared to later contributors.

Company C sells Token C to the public, and engages in ongoing efforts to maintain and develop the platform. Token C is freely tradeable, creating a free floating market price for the user generated content.

#### Variations:

- Stream of Revenue Tied to User Activity: Company C does not sell Token C, meaning it can only be earned through work, and holders of Token C receive a percentage of the revenue tied to the fees generated by Company C which is directly and solely attributable to the user's uploaded content (payable in Token C).
- Same variations outlined in Case Study #1, as applied to the Case Study #3.

#### Exploring Tokens That May Not Be Securities

#### **Introduction**

The purpose of this discussion is to examine whether and when it is permissible to sell blockchain-based digitals tokens without implicating U.S. federal securities laws and in a way that protects consumers. In our view, whether a consumer token implicates the U.S. federal securities laws largely will depend on analyzing both the rights or other functionality a token provides its holder (i.e., its <u>intrinsic properties</u>), as well as other factors such as the manner of sale (i.e., its <u>extrinsic properties</u>).

Below are three hypothetical examples of contemplated token models, including hypothetical intrinsic and extrinsic properties. In each example, there is a fact pattern and proposed variations. Generally speaking, we view these examples as involving intrinsic properties that implicate one or more of the following categories of token types:

- **Consumer Tokens**: Tokens that are essentially consumer goods and services, in digital, tokenized form.
- User Activity Tokens: Tokens that provide holders with rights or obligations related to an individual user's activities on a token-based network. With regard to user activity tokens, we contemplate at least two subcategories:
  - <u>Reward tokens</u>: Tokens that serve as a form of reward or payment for performed activities.
  - <u>License tokens</u>: Tokens that serve as a license to perform certain activities related to an online service. Analogies in the analog world may include a software license, taxi medallions for New York City taxis, or occupational licensing and certifications for certain vocations.

The above terms and labels are merely meant to be illustrative. And the below examples are meant for discussion purposes only. They should not be viewed as a comprehensive list of all existing or contemplated token models, and we note that we believe that some of the variations noted below may implicate U.S. federal securities laws.

#### Hypothetical Examples

#### Example #1

Tokens that Represent A Right to Buy or Sell Computer Processing Capacity' Token Category: Consumer Good

Company A plans to build a platform that will enable the sharing and rental of computing power among the users of the platform. Members of the network with excess computing power on their personal computers can sell their computing power to other participants on the network.

<sup>&</sup>lt;sup>1</sup> We note that this case study is a variation of one of the case studies found in the Monetary Authority of Singapore. A Guide to Digital Token Offerings, p. 8.

To build the network, Company A sells to both U.S. and foreign purchasers blockchain-based tokens ("Token A") to raise sufficient funding to complete the platform. Token A only will give token holders the right to buy or sell computing power on the platform, serving as a unit of account and a means of payment. Token A will not have any other rights or functionality.

Company A sells a limited number of Token A and these tokens will be freely tradable after the sale, creating a free floating market price for the computing resources made available by members the network.

#### Variations:

- Use of proceeds: Company A engages in the token sale described above, but intends to use the proceeds to: (i) continue to support and maintain the platform after the platform is developed; and (ii) pay for ongoing marketing, business development, research, and support services.
- Token Purchaser Assessment: Company A engages in the token sale described above, but before selling Token A, Company A assesses the following characteristics of each potential initial purchaser: (ii) understanding of the consumptive use of Token A; (ii) an intent to use Token A to sell or consume computing power (the token's consumptive use) and not for reselling Token A for profit; (iii) technical sophistication regarding tokens and crypto-assets; and (iv) an understanding and ability to withstanding losing any and all money used to purchase the token. For any potential purchasers who fail one or more of these assessments, Company A either prohibits the sale or limits the amount of the purchase to no more than \$500.
- Marketed as an Investment: Company A engages in the token sale described above, but during the course of the sale emphasizes in marketing materials the potential of Token A to generate a profit. Company A indicates to potential purchasers that the value of the token could go up or provides information in a "white paper" estimating the potential "market cap" of the token.
- Structuring Sale to Accredited Investors: Before engaging in the sale, Company A sells a portion of the tokens to accredited investors (as defined in 17 C.F.R. § 230.50) within the United States. As confirmed in an agreement, investors purchasing tokens seek to acquire Token A to profit off the sale of the token in the secondary market, and have no desire to use or consume the computing power provided by members of the platform.
- **Governance Rights**: Company A engages in the same token sale described above. However, Token A does not just provide holders with the right to buy or sell computing power; it also provide token holders with the right to vote on software upgrades and to participate in other platform-wide governance issues.
- Efforts to List the Token on an Exchange: Company A engages in the same token sale described above, but prior to or during the course of the sale attempts to list the token on a cryptocurrency exchange.
- **Timing of Sale**: Company A engages in the same token sale described above, but only does so once the underlying platform has been launched and is operational.

• **Reservation of Tokens by Company**: Company A engages in the same token sale described above, but reserves 30% of sold tokens for the Company. Profits from the sale of Token A will be used to support the platform. A portion of the profits may also be returned to investors in Company A in the form of a dividend.

#### Example #2

Tokens that Represent Membership/Access Rights to an Online Platform Token Categories: User Activity License to Access an Online Service

Company B plans to develop an online platform that enables people to buy and sell consumer goods, providing users with a user experience that is similar to eBay today. Company B engages in a sale of digital tokens ("Token B") to purchasers in the U.S. and abroad to raise sufficient funding to develop the platform.

Token B provides token holders with the right to use the platform, functioning as a membership card and a license to sell goods on the platform. Only holders of Token B are able to sell goods on the platform at any given time, and Token B has no other rights or functionality.

As in Case Study #1, Company B only created a limited number of Token B and these tokens will be freely tradable after the sale, creating a free floating market price for the right to sell goods on the platform.

#### Variations:

• Same variations outlined in Case Study #1, as applied to the Case Study #2.

#### Example #3

Tokens for the Incentivization and Creation of Online Content Token Categories: Consumer Good (Coupon for Free Services); User Activity Reward Token

Company C plans to build an online platform that facilitates the creation and dissemination of online media and other interactive content. To incentivize contributions to the platform, Company C creates an internal token ("Token C").

Token C represents a coupon for future access to the service. Users contributing to the platform receive allocations of Token C. Users of the platform who wish to consume posted content must pay a fee, which can be paid for in either Token C or in U.S. dollars (at the user's option).

Company C only intends to create a limited number of Token C. Under Company's C model, early contributors to the platform receive larger allocations of Token C for any contributions as compared to later contributors.

Company C sells Token C to the public, and engages in ongoing efforts to maintain and develop the platform. Token C is freely tradeable, creating a free floating market price for the user generated content.

#### Variations:

- Stream of Revenue Tied to User Activity: Company C does not sell Token C, meaning it can only be earned through work, and holders of Token C receive a percentage of the revenue tied to the fees generated by Company C which is directly and solely attributable to the user's uploaded content (payable in Token C).
- Same variations outlined in Case Study #1, as applied to the Case Study #3.

 From:
 Hinman, William

 Location:
 600

 Importance:
 Normal

 Subject:
 FW: Crypto Meeting with Scott Kupor - Andreesssen Horowitz etc.

 Start Date/Time:
 Wed 3/28/2018 11:00:00 AM

 End Date/Time:
 Wed 3/28/2018 12:30:00 PM

Room 6000

----Original Appointment----From: Seaman, Michael P.
Sent: Saturday, March 03, 2018 11:29 AM
To: Seaman, Michael P.; Hinman, William; Szczepanik, Valerie; Fredrickson, David R.; Ingram, Jonathan; Starr, Amy; King, Dietrich
Subject: Crypto Meeting with Scott Kupor - Andreesssen Horowitz etc.
When: Wednesday, March 28, 2018 11:00 AM-12:30 PM (UTC-05:00) Eastern Time (US & Canada).
Where: 6000

This group is coming in for a dialogue about crypto technologies. They will send some materials on Monday.

In-person:

- \* Scott Kupor and Ryan Ward, Andreessen Horowitz
- \* Dax Hansen, Molly Moynihan and Lowell Ness, Perkins Coie
- \* Nick Grossman and John Buttrick, Union Square Ventures
- \* Nancy Wojtas and Karen Ubell, Cooley Godward
- \* Lila Tessler, Lee Schneider, McDermott Will Emery
- \* Brad Burnham, Union Square Ventures
- \* Justin Field, NVCA

By phone:

- Joe Grundfest, Stanford Law School
- Adam Sterling, Boalt School of Law

\*\*\*DO NOT DELETE OR CHANGE ANY OF THE TEXT BELOW THIS LINE\*\*\*

Michael Seaman has scheduled this WebEx meeting.

Crypto Meeting with Scott Kupor - Andreesssen Horowitz etc. Host: Michael Seaman

When it's time, start or join the WebEx meeting from here:

(b)(6)

Subject: Location:	Meeting with VCs re: utility tokens Chairman's Conference Room
Start: End: Show Time As:	Wed 4/18/2018 3:00 PM Wed 4/18/2018 3:30 PM Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer: Required Attendees:	Memon, Sean Hinman, William; Moskowitz, Lucas; Klima, Jaime; Cook, John; Dinwoodie, Jeffrey T.; Fox, Raquel; Littman, Kristina

This group will be meeting with Commissioner Peirce at 2pm and would like to talk to us about utility tokens. Het them know that we have the open meeting scheduled for the 18<sup>th</sup>, so we may have limited attendance from our side. Please attend if you'd like.

- Scott Kupor, Managing Partner, Andreessen Horowitz
- Ryan Ward, GC, Andreessen Horowitz
- Lee Schneider, Partner, Mcdermott Will
- Karen Ubell, Partner, Mcdermott Will
- John Buttrick, MD, Union Square Ventures
- Brad Burnham, MD, Union Square Ventures
- Lowell Ness, Partner, Perkins Coie
- Dax Hansen, Partner Perkins Cole
- Scott Parsons, Partner, Parsons Consulting

On Thu, Apr 12, 2018 at 2 06 PM Hinman, William <hinmanw@sec.gov> wrote:

Dear Joe,

I greatly enjoyed meeting with you and your team at our offices a couple of months ago I was wondering if we could have a brief call in order to discuss the possibility of another meeting with you?

If this is something that could be possible, we can work with your assistant to set up a time and place.

Thanks,

Bill

William Hinman

Director of the Division of Corporation Finance

U.S. Securities and Exchange Commission

hinmanw@sec gov

From: Joseph Lubin [mailto:joseph.lubin@consensys.net] Sent: Thursday, April 12, 2018 6:00 PM To: Hinman, William Subject: Re: Invite

Hi Bill. Happy to get on a call Would you prefer that I be alone on the call or can I loop in members of our internal Legal team who have been in discussions with you and your colleagues')

John, can you please facilitate based on Bill's response?

On Thu, Apr 12, 2018 at 6 13 PM Hinman, William < hinmanw@sec.gov> wrote:

Thanks call is just to set up a possible meeting. Meeting was to learn more about the Ethereum support network. Would leave up to you whom from your group to invite.

I can give your more background on a call if you like. John does not appear on the email you sent me, but I am happy to work with him on logistics.

Thanks again,

Bill

On Thu, Apr 12, 2018 at 6:47 Pv1, Joseph Lubin < joseph lubin@consensys.net> wrote:

Sounds great, Bill. Looking forward to it Added John

From:	John Zimmerebner <john.zimmerebner@consensys.net></john.zimmerebner@consensys.net>
Sent:	Thursday, April 12, 2018 7:45 PM
То:	Hinman, William
Subject:	Re: Invite

Thanks Joe, moving you to bcc.

Hi Bill, pleasure to e meet you.

Anytime before noon tomorrow works for me, if your schedule permits, but can do later in the day too if necessary. Can also do next week.

Just let me know what time/day you prefer and best number to reach you on

Best, John

From:Hinman, WilliamSent:Friday, April 13, 2018 8:48 AMTo:Seaman, Michael P.Subject:FW: Invite

Subject:	Call with Joe Lubin
Start: End: Show Time As:	Mon 4/23/2018 5:00 PM Mon 4/23/2018 6:00 PM Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer: Required Attendees:	Seaman, Michael P. Hinman, William

Subject: Location:	Invitation: Call with Bill Hinman <> Joseph Lubin @ Mon Apr 23, 2018 5pm - 6pm (EDT) (b)(6) (b)(6)
Start: End: Show Time As:	Mon 4/23/2018 5:00 PM Mon 4/23/2018 6:00 PM Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	john.zimmerebner@consensys.net

more details »

#### Call with Bill Hinman <> Joseph Lubin

When	Mon Apr 23, 2018 5pm – 6pm Eastern Time
Where	(b)(6)
Calendar	(b)(6) @sec.gov
Who	john.zimmerebner@consensys.net organzer
	- - joseph.lubin@consensys.net - hinmanw@sec.gov

- hinmanw@sec.gov
- patrick.berarducci@consensys.net optiona
   matt.corva@consensys.net optional
   /hi/61
   @sec.gov\_optional

)(6)	
You are receiving this courtesy email at the account $(b)(6)$ gives govidecause you are an attended of this event	

To stop receiving future updates for this event, decline this event. Alternatively you can sign up for a Google account at https://www.google.com/calendar/ and control your notification settings for your entire calendar.

Forwarding this invitation could allow any recipient to modify your RSVP response. Learn More



invitelics

From: Seaman, Michael P. Sent: Friday, April 20, 2018 4:56 PM To: 'joseph.lubin@consensys.net' Cc: 'matt.corva@consensys.net' Subject: Monday Call with Bill Hinman

Hi Joe.

We look forward to speaking with you on Monday. You may have received the attached form previously, but we wanted to provide it again so you have the most updated version. It also is available on the SEC's website. If you think that anyone else will be on the call, please feel free to forward it along.

Please let us know if you have any questions, and thank you again for your time

Michael

Michael P. Seaman Senior Special Counsel to the Director Division of Corporation Finance U.S. Securities and Exchange Commission

(b)(6) (b)(6) (d sec.gov

From:	Seaman, Michael P.
Sent:	Friday, April 20, 2018 4:57 PM
То:	Hinman, William; Ingram, Jonathan; Szczepanik, Valerie
Subject:	FW: Monday Call with Bill Hinman
Attachments:	Form 1662.pdf

FYI. Form 1662 sent to Joe Lubin.

#### SECURITIES AND EXCHANGE COMMISSION Washington, D.C. 20549

#### Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena

#### A. False Statements and Documents

Section 1001 of Title 18 of the United States Code provides that fines and terms of imprisonment may be imposed upon:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false,

fictitious, or fraudulent statement or entry.

Section 1519 of Title 18 of the United States Code provides that fines and terms of imprisonment may be imposed upon:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States ..., or in relation to or contemplation of any such matter.

#### **B.** Testimony

If your testimony is taken, you should be aware of the following:

- 1. *Record.* Your testimony will be transcribed by a reporter. If you desire to go off the record, please indicate this to the Commission employee taking your testimony, who will determine whether to grant your request. The reporter will not go off the record at your, or your counsel's, direction.
- Counsel. You have the right to be accompanied, represented and advised by counsel of your choice. Your
  counsel may advise you before, during and after your testimony; question you briefly at the conclusion of your
  testimony to clarify any of the answers you give during testimony; and make summary notes during your
  testimony solely for your use. If you are accompanied by counsel, you may consult privately.

If you are not accompanied by counsel, please advise the Commission employee taking your testimony if, during the testimony, you desire to be accompanied, represented and advised by counsel. Your testimony will be adjourned once to afford you the opportunity to arrange to be so accompanied, represented or advised.

You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

3. Transcript Availability. Rule 6 of the Commission's Rules Relating to Investigations, 17 CFR 203.6, states:

A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however*, That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

If you wish to purchase a copy of the transcript of your testimony, the reporter will provide you with a copy of the appropriate form. Persons requested to supply information voluntarily will be allowed the rights provided by this rule.

4. *Perjury*. Section 1621 of Title 18 of the United States Code provides that fines and terms of imprisonment may be imposed upon:

Whoever--

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify

SEC 1662 (08-16)

truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true.

5. *Fifth Amendment and Voluntary Testimony.* Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency.

You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you.

If your testimony is not pursuant to subpoena, your appearance to testify is voluntary, you need not answer any guestion, and you may leave whenever you wish. Your cooperation is, however, appreciated.

6. *Formal Order Availability.* If the Commission has issued a formal order of investigation, it will be shown to you during your testimony, at your request. If you desire a copy of the formal order, please make your request in writing.

#### C. Submissions and Settlements

Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(c), states:

Persons who become involved in . . . investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director or Regional Director with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

The staff of the Commission routinely seeks to introduce submissions made pursuant to Rule 5(c) as evidence in Commission enforcement proceedings, when the staff deems appropriate.

Rule 5(f) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(f), states:

In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

#### D. Freedom of Information Act

The Freedom of Information Act, 5 U.S.C. 552 (the "FOIA"), generally provides for disclosure of information to the public. Rule 83 of the Commission's Rules on Information and Requests, 17 CFR 200.83, provides a procedure by which a person can make a written request that information submitted to the Commission not be disclosed under the FOIA. That rule states that no determination as to the validity of such a request will be made until a request for disclosure of the information under the FOIA is received. Accordingly, no response to a request that information not be disclosed under the FOIA is necessary or will be given until a request for disclosure under the FOIA is received. If you desire an acknowledgment of receipt of your written request that information not be disclosed under the FOIA, please provide a duplicate request, together with a stamped, self-addressed envelope.

#### E. Authority for Solicitation of Information

Persons Directed to Supply Information Pursuant to Subpoena. The authority for requiring production of information is set forth in the subpoena. Disclosure of the information to the Commission is mandatory, subject to the valid assertion of any legal right or privilege you might have.

Persons Requested to Supply Information Voluntarily. One or more of the following provisions authorizes the Commission to solicit the information requested: Sections 19 and/or 20 of the Securities Act of 1933; Section 21 of the Securities Exchange Act of 1934; Section 321 of the Trust Indenture Act of 1939; Section 42 of the Investment Company Act of 1940; Section 209 of the Investment Advisers Act of 1940; and 17 CFR 202.5. Disclosure of the requested information to the Commission is voluntary on your part.

#### F. Effect of Not Supplying Information

Persons Directed to Supply Information Pursuant to Subpoena. If you fail to comply with the subpoena, the Commission may seek a court order requiring you to do so. If such an order is obtained and you thereafter fail to supply the information, you may be subject to civil and/or criminal sanctions for contempt of court. In addition, Section 21(c) of the Securities Exchange Act of 1934, Section 42(c) of the Investment Company Act of 1940, and Section 209(c) of the Investment Advisers Act of 1940 provide that fines and terms of imprisonment may be imposed upon any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry, or to produce books, papers, correspondence, memoranda, and other records in compliance with the subpoena.

Persons Requested to Supply Information Voluntarily. There are no direct sanctions and thus no direct effects for failing to provide all or any part of the requested information.

#### G. Principal Uses of Information

The Commission's principal purpose in soliciting the information is to gather facts in order to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or rules for which the Commission has enforcement authority, such as rules of securities exchanges and the rules of the Municipal Securities Rulemaking Board. Facts developed may, however, constitute violations of other laws or rules. Information provided may be used in Commission and other agency enforcement proceedings. Unless the Commission or its staff explicitly agrees to the contrary in writing, you should not assume that the Commission or its staff acquiesces in, accedes to, or concurs or agrees with, any position, condition, request, reservation of right, understanding, or any other statement that purports, or may be deemed, to be or to reflect a limitation upon the Commission's receipt, use, disposition, transfer, or retention, in accordance with applicable law, of information provided.

#### H. Routine Uses of Information

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

Set forth below is a list of the routine uses which may be made of the information furnished.

1. To appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the SEC has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the SEC or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the SEC's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

2. To other federal, state, local, or foreign law enforcement agencies; securities self-regulatory organizations; and foreign financial regulatory authorities to assist in or coordinate regulatory or law enforcement activities with the SEC.

3. To national securities exchanges and national securities associations that are registered with the SEC, the Municipal Securities Rulemaking Board; the Securities Investor Protection Corporation; the Public Company Accounting Oversight Board; the federal banking authorities, including, but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; state securities regulatory agencies or organizations; or regulatory authorities of a foreign government in connection with their regulatory or enforcement responsibilities.

4. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.

5. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present members of its staff, is a party or otherwise involved in an official capacity.

6. In connection with proceedings by the Commission pursuant to Rule 102(e) of its Rules of Practice, 17 CFR 201.102(e).

7. To a bar association, state accountancy board, or other federal, state, local, or foreign licensing or oversight authority; or professional association or self-regulatory authority to the extent that it performs similar functions (including the Public Company Accounting Oversight Board) for investigations or possible disciplinary action.

8. To a federal, state, local, tribal, foreign, or international agency, if necessary to obtain information relevant to the SEC's decision concerning the hiring or retention of an employee; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit.

9. To a federal, state, local, tribal, foreign, or international agency in response to its request for information concerning the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

10. To produce summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies; may also be used to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act.

11. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction, or as a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of violations of the federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)) or pursuant to the Commission's Rules of Practice, 17 CFR 201.100 – 900 or the Commission's Rules of Fair Fund and Disgorgement Plans, 17 CFR 201.1100-1106, or otherwise, where such trustee, receiver, master, special counsel, or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Fair Fund and Disgorgement Plans.

12. To any persons during the course of any inquiry, examination, or investigation conducted by the SEC's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

13. To interns, grantees, experts, contractors, and others who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient administration of its programs, including by performing clerical, stenographic, or data analysis functions, or by reproduction of records by electronic or other means. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

14. In reports published by the Commission pursuant to authority granted in the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), which authority shall include, but not be limited to, section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)).

15. To members of advisory committees that are created by the Commission or by Congress to render advice and recommendations to the Commission or to Congress, to be used solely in connection with their official designated functions.

16. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.735-1 to 200.735-18, and who assists in the investigation by the Commission of possible violations of the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commission's enforcement or regulatory functions under the federal securities laws.

17. To a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

18. To members of Congress, the press, and the public in response to inquiries relating to particular Registrants and their activities, and other matters under the Commission's jurisdiction.

19. To prepare and publish information relating to violations of the federal securities laws as provided in 15 U.S.C. 78c(a)(47)), as amended.

20. To respond to subpoenas in any litigation or other proceeding.

21. To a trustee in bankruptcy.

22. To any governmental agency, governmental or private collection agent, consumer reporting agency or commercial reporting agency, governmental or private employer of a debtor, or any other person, for collection, including collection by administrative offset, federal salary offset, tax refund offset, or administrative wage garnishment, of amounts owed as a result of Commission civil or administrative proceedings.

#### \* \* \* \* \*

*Small Business Owners*: The SEC always welcomes comments on how it can better assist small businesses. If you would like more information, or have questions or comments about federal securities regulations as they affect small businesses, please contact the Office of Small Business Policy, in the SEC's Division of Corporation Finance, at 202-551-3460. If you would prefer to comment to someone outside of the SEC, you can contact the Small Business Regulatory Enforcement Ombudsman at http://www.sba.gov/ombudsman or toll free at 888-REG-FAIR. The Ombudsman's office receives comments from small businesses and annually evaluates federal agency enforcement activities for their responsiveness to the special needs of small business.

#### Hi Joc

We look forward to speaking with you on Monday. You may have received the attached form previously, but we wanted to provide it again so you have the most updated version. It also is available on the SEC s website. If you think that anyone else will be on the call, please feel free to forward it along.

Please let us know if you have any questions, and thank you again for your time.

Michael

Michael P. Seaman

Senior Special Counsel to the Director

Division of Corporatio (b)(6) a sec.gov

U.S. Securities and Exchange Commission

Noted. Thank you, Michael.

<sup>From: Joseph Lubin [mailto:)oseph.lubin@consensys.net]
Sent: Friday, April 20, 2018 4:59 PM
To: Seaman, Michael P.
Cc: matt.corva@consensys.net
Subject: Re: Monday Call with Bill Hinman</sup> 

Subject:	Call with Joe Lubin
Location:	CF Only SP1 4520 Phone Small 12
Start:	Mon 4/23/2018 5:00 PM
End:	Mon 4/23/2018 6:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Seaman, Michael P.
Required Attendees:	Hinman, William; Goldsholle, Gary; Ingram, Jonathan
Optional Attendees:	Greiner, Natasha (Vij)

From: Sent: To: Subject: Seaman, Michael P. Thursday, May 10, 2018 1:40 PM Hinman, William; Ingram, Jonathan Buterin Discussion

Matt Corva at ConsenSys called about my inquiry to Joe Lubin to help arrange a discussion with Buterin.

They think it is a good idea and would be happy to try to help set something up. They had two suggestions they think would help make him more comfortable with the idea and make for a more productive discussion:

- Could we provide a list of questions or at least a list of topics in advance?
- Could he bring one or two people with him to the discussion?

I told Matt that I thought these suggestions were both fine, but would confirm and get back to him.

Michael

From: Matt Corva [mailto:matt.corva@consensys.net]
Sent: Tuesday, May 22, 2018 3:47 PM
To: Vitalik Buterin; Aya Miyaguchi; Janet Kim; Tju Liang Chua; Seaman, Michael P.
Cc: Aaron Wright; Patrick Berarducci
Subject: Connecting Staff < > Ethereum Foundation to schedule tomorrow's call

Michael,

Please meet Vitalik Buterin, Aya Miyaguchi, and Tju Liang from the Ethereum Foundation. I'm also copying in Janet Kim who's been helping on their side with logistics.

Vitalik, Aya, Tju,

Please meet Michael Seaman, a senior member of the SEC Staff we've been in contact with on this.

I've confirmed with both of you that **<u>10 AM ET tomorrow, Wednesday, May 23</u>**, works for a video conference.

I've also added Pat and Aaron to this thread as one of us would like to join if the Staff is amenable with us serving as a familiar face for both sides to the extent we can help facilitate any of the conversation I've separately messaged Michael to confirm the Staff is OK with this.

Best

Matt

#### On Tue, May 22, 2018 at 5 34 PM, Seaman, Michael P. (6)(6)

Hello. It is nice to meet everyone.

Thank you all for taking the time to speak with us tomorrow. We are very much looking forward to the call. Joining me from the SEC will be:

- Bill Himman, Director, Division of Corporation Linance (CI)
- David Fredrickson, Chief Counsel, CF
- Jonathan Ingram, Deputy Chief Counsel, CF
- Natasha Greiner, Assistant Director, Division of Trading and Markets

Thank you again, Matt, for helping coordinate everything. Will someone circulate a video conference invitation?

Best,

Michael

Michael P. Seaman

Senior Special Counsel to the Director

Division of Corporation Finance

U.S. Securities and Exchange Commission

From:	Seaman, Michael P.
Sent:	Wednesday, May 23, 2018 7:58 AM
То:	Hinman, William; Fredrickson, David R.; Ingram, Jonathan; Greiner, Natasha (Vij)
Subject:	Call Participants

Good morning. On the call today, Vitalik will be joined by:

Aya Miyaguchi – Director of Ethereum Loundation Tju Liang – GC for the Foundation Someone from ConsenSys, probably Matt Corva, GC From: Matt Corva [mailto:matt.corva@consensys.net] Sent: Wednesday, May 23, 2018 5:53 AM To: Seaman, Michael P. Cc: Vitalik Buterin; Aya Miyaguchi; Janet Kim; TJu Liang Chua; Aaron Wright; Patrick Berarducci Subject: Re: Connecting Staff<---> Ethereum Foundation to schedule tomorrow's call

I've circulated an invite to the extent Zoom that works for everyone.

### Michael, I took a guess at the emails for David and Natasha as I haven't corresponded with either via email so please make sure they get the invite. I think I successfully added Bill and Jonathan.

From: Tju Liang Chua [mailto:tjuliang@ethereum.org]
Sent: Wednesday, May 23, 2018 8:00 AM
To: 'Matt Corva'; Seaman, Michael P.
Cc: 'Vitalik Buterin'; 'Aya Miyaguchi'; 'Janet Kim'; 'Aaron Wright'; 'Patrick Berarducci'
Subject: RE: Connecting Staff < > Ethereum Foundation to schedule tomorrow's call

Dear Michael, Matt,

Our sincerest apologies, but due to unforeseen circumstances, we're going to need to postpone this video conference. We'll reach out as soon as we can to reschedule. Apologies again for the late notice.

Best regards,

Tju Liang

Cell: <mark>₹<sup>b)(6)</sup></mark> tjuliang@ethereum.org

Subject:	Invitation: SEC/Ethereum @ Wed May 23, 2018 10am - 11:30am (EDT) ( <sup>(b)(6)</sup> @sec.gov)
Location:	(b)(6)
Start: End: Show Time As:	Wed 5/23/2018 10:00 AM Wed 5/23/2018 11:30 AM Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	matt.corva@consensys.net

#### <u>more details »</u> SEC/Ethereum

When	Wed May 23, 2018 10am – 11:30am Eastern Time
Where	(b)(6)
Calendar	(b)(6) @sec.gov
Who	<ul> <li>matt.corva@consensys.net - organizer</li> </ul>
	• (b)(6) @sec.gov
	Vitalik Buterin
	Vitalik Buterin
	• (b)(6) @sec.gov
	<ul> <li>tjuliang@ethereum.org</li> </ul>
	• (b)(6) @sec.gov
	• (b)(6) @sec.gov
	• (b)(6) @sec.gov
	<ul> <li>janet@ethereum.org</li> </ul>

aya@ethereum.org

Sending around one of our dial-ins to the extent that works for everyone and is convenient.

Hi there,

Matt Corva is inviting you to a scheduled Zoom meeting.

(b)(6)

On Wed, May 23, 2018 at 8:29 AM, Scaman, Michael P - @sec.gov> Wrote:

#### l Hi Everyone

Thank you for letting us know. We understand and look forward to finding another time. In the meantime, please let me know if there is anything we can do to help coordinate or if you have any questions for us

Michael

From: Sent: To:	Seaman, Michael P. Wednesday, May 23, 2018 10:11 AM Hinman, William	
Subject:	FW: Connecting Staff < > Ethereum Foundation to schedule tomorrow's call	
From: Matt Corva [mailto:matt.corva@consensys.net] Sent: Wednesday, May 23, 2018 9:53 AM To: Seaman, Michael P. Subject: Re: Connecting Staff <> Ethereum Foundation to schedule tomorrow's call		

Michael

My apologies for this as it caught me by surprise 1 thought we were all systems go. Let us do some gentle digging on what happened and see what we can do to try and get this back on course. If I had to guess, someone on their side is too caught up in a world of WSJ and CoinDesk stories and they haven't had the personal interaction we've had with the Staff to appreciate the thoughtful process, which is why I thought us joining might be a good idea as familiar faces. I know Vitalik is looking forward to the call as he is the one who pushed for Wednesday.

Please send my apologies to Bill and the rest of the team We know this is important and remain committed to being as helpful as we can

Matt

From: Sent: To: Subject: Seaman, Michael P. Wednesday, May 30, 2018 3:22 PM Hinman, William FW: Ethereum Foundation meeting

This just in.

From: Kim, Thomas [mailto:thomas.kim@sidley.com]
Sent: Wednesday, May 30, 2018 2:28 PM
To: Seaman, Michael P.
Cc: Aronow, Geoffrey; Callcott, W. Hardy
Subject: Ethereum Foundation meeting

Hi Michael:

We represent the Ethereum Foundation. I understand that a conference call with the Staff and Ethereum was originally contemplated for Wednesday, May 23, which Ethereum was not able to attend. The reason for this email is to follow up by suggesting an in-person meeting at the SEC.

In attendance would be the two Foundation Council members, Vitalik Buterin, who is the creator of Ethereum, and Patrick Storchenegger, as well as Aya Miyaguchi, Executive Director at the Foundation. We've looked at our schedules, which you can imagine requires some coordination, and would propose a meeting with the Staff on the afternoon of Monday, June 25.

I'd like to get on a call with you to discuss any specific issues you'd like us to address, as well as to confirm the date of the meeting. I hope this date and time works for the Staff; if it doesn't work, we can discuss alternative dates and times.

We look forward to the meeting. Let me know when we can talk.

Thanks, Tom

THOMAS J. KIM

SIDLEY AUSTIN LLP 1501 K Street, N.W. Washington, DC 20005 +1 202 736 8615 thomas.kim@sidley.com www.sidley.com

This e-mail is sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

From: Sent: To:	Hinman, William Monday, June 4, 2018 11:11 AM Moskowitz, Lucas; Memon, Sean; Fox, Raquel; Redfearn, Brett; Blass, Dalia; Avakian, Stephanie; Peikin, Steven; Karp, David S.; Stebbins, Robert; Jarsulic, Laura; Morris,
	Daniel (Bryant); McHugh, Jennifer B.; Bartels, David P.; Goldsholle, Gary; Seidel, Heather
Cc:	Fredrickson, David R.; Szczepanik, Valerie; Seaman, Michael P.
Subject:	Ether speech
Attachments:	DRAFT Digital Assets Speech 2018-06-04.docx

Attached please find a draft of the speech I had mentioned, which suggests that we do not need to see a need to regulate Ether, as it is currently offered, as a security. That language is in brackets and would be used if we all are in agreement. We also have a call with Buterin later this week to confirm our understanding of how the Ethereum Foundation operates.

Please feel free to share any comments with me and the folks in the cc line.

Thanks Bill

William Hinman Director of the Division of Corporation Finance U.S. Securities and Exchange Commission <u>hinmanw@sec.gov</u> (b)(6)

#### **Digital Asset Morphing**

There has been considerable discussion recently in the press and at legal conferences regarding whether a digital asset offered as a security can over time become something other than a security. I think framing the question that way might miss an important point, which I hope to make with my remarks here today.

To start, I think a better line of inquiry is: "Can a digital asset or token that was originally offered in a securities offering ever be sold in a manner that does not constitute a securities offering?" In cases where the digital asset or token represents a set of rights that give the holder a financial interest in an enterprise the answer is likely no. In these cases, calling the transaction an initial coin offering, or "ICO," won't take it out of the purview of the U.S. securities laws.

But what of those cases where there is no central enterprise being invested in and where the digital asset or token is sold only to be used to purchase a good or service available through the network on which it was created? I believe in these cases the answer is a qualified "yes," and I'd like to share my thinking with you today about the circumstances under which that could occur.

First, I would like to start with a little background on the new world of digital assets. Most of you are no doubt quite familiar with Bitcoin and know of blockchain – or distributed ledger – technology. As I have come to learn, what may be most exciting about this technology is the ability to share information, transfer value, and record transactions in a decentralized digital environment. What does that mean? Payment systems, supply chain management, intellectual property rights licensing, stock ownership transfers and countless other potential applications can be conducted electronically, with a public, immutable record

l

without the need for a trusted third party to verify transactions. Using these new networks, one can create digital information packets that can be transferred using encryption keys. These packets are sometimes called coins or tokens, and can be obtained through mining, distribution, sale or exchange by users in the network. Some people believe these new systems will forever transform e-commerce as we know it. There is excitement around this new technology. There is also a great deal of "irrational exuberance" and, unfortunately, many cases of fraud.

But that is not what I want to focus on today. I am here to talk about how these digital tokens and coins are being issued, distributed and sold. In order to raise money to develop these new systems, promoters<sup>1</sup> often sell the tokens themselves, rather than sell shares, issue notes or obtain bank financing. We have seen public distributions on the internet and private placements to sophisticated investors. But, in many cases, the economic substance is the same: funds are raised with the expectation that the promoters will build their system and investors can earn a return on the instrument – usually by selling their tokens in the secondary market as the value of the digital enterprise increases once the promoters create something of value with the proceeds.

When we see that kind of economic transaction, it is easy to apply the Supreme Court's "investment contract" test first announced in SEC v. Howey.<sup>2</sup> As you will remember, the test requires an investment of money in a common enterprise with an expectation of profit derived from the efforts of others. And it is important to reflect on the facts of Howey. A Florida hotel operator sold interests in a citrus grove to its largely out-of-

<sup>&</sup>lt;sup>1</sup> I am using the term "promoters" in a broad, generic sense. The important factor in the legal analysis is that there is a person or coordinated group that is working actively to develop the infrastructure of the network. This person or group may be, variously, founders, sponsors, developers, or "promoters" in the traditional sense. The presence of promoters in this context is important to distinguish from the circumstance where multiple, independent actors work on the network but no individual actor's or coordinated group of actors' efforts are essential.

<sup>&</sup>lt;sup>2</sup> SEC v. W.J. Howev Co. 328 U.S. 293 (1946).

state guests. The transaction was recorded as a real estate sale, together with a service contract. In theory, purchasers could arrange to service the grove themselves, but few pursued that option. In fact, the purchasers were passive, relying largely on the Howey Service Company's efforts tending the assets for a return. And in articulating the test for an investment contract, the Supreme Court stressed: "Form [is] disregarded for substance and the emphasis [is] placed on economic realities."<sup>3</sup> So the purported real estate purchase was found to be an investment contract, and hence a security.

In the ICOs we have seen, overwhelmingly, promoters tout their ability to create some innovative application of blockchain technology. The investors are passive. Marketing efforts are rarely targeted to potential users of the application. And the viability of the application is still uncertain. At that stage, the purchase of a token looks a lot like a bet on the success of the enterprise and not the purchase of something that may someday be used to exchange for goods or services on the network.

As an aside, you might ask, given that these token sales often look like securities offerings, why are the promoters choosing to package the investment as an ICO or token offering? This is an especially good question if the network on which the token or coin will function is not yet operational. I think there can be a number of reasons. For a while, it was believed such labeling might, by itself, remove the transaction from the securities laws. I think people now realize labeling an investment opportunity as a coin or token, does not achieve that result. Second, this labelling might be hoped to bring some marketing "sizzle" to the enterprise. That might still work to some extent, but the track record of ICOs is still being sorted out and some of the sizzle may now be more of a potential warning flare for investors. Some may be attracted to crowdfund through a blockchain mediated process.

<sup>3</sup> Id. at 298.

Digital assets can represent a relatively frictionless way to reach a global audience in order to seed a network where initial purchasers have stake in the success of the network and become part of its early adopting participants who add value beyond their investment contributions. Related to this, some believe that once the token or coin is operational, it will cease to be a security and secondary liquidity may be easier to achieve. While I recognize that possibility, as I will discuss, the ability to transact in a coin or token on the secondary market requires a careful and fact-sensitive legal analysis.

I believe some industry participants are beginning to realize that, in some circumstances, it might be easier to start a blockchain-based enterprise in a more conventional way. In other words, do the initial funding through a conventional equity or debt offering and once the network is up and running, distribute or offer blockchain based tokens or coins to participants who need the functionality the network and the digital assets offer. This allows the tokens or coins to be structured and offered in a way where it is evident purchasers are not making an investment in the development of the enterprise.

Returning to the ICOs we are seeing, strictly speaking, the token or coin or whatever the digital information packet is called – all by itself is not a security, just as the orange groves in Howey were not. Central to determining whether a security is being sold is how it is being sold. For example, when a certificate of deposit is sold by a federally regulated bank, the CD is not a security.<sup>4</sup> When a CD is sold as a part of a program organized by a broker who offers retail investors promises of liquidity and ability to profit from changes in interest rates, the CD is part of an investment contract that is a security.<sup>5</sup> Similarly, when someone buys a housing unit to live in – even when represented by an

<sup>&</sup>lt;sup>1</sup> Marine Bank v. Weaver, 455 U.S. 551 (1982).

<sup>&</sup>lt;sup>5</sup> Gary Plastics Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230 (2d Cir, 1985).

instrument called "stock" – it is probably not a security.<sup>6</sup> When the housing unit is offered with a management contract or other services as an investment, it can be a security.<sup>7</sup>

And so with digital assets. The digital asset itself is simply code. But the way it is sold – as part of an investment; to non-users; by promoters to develop their idea – can be, and, in that context, most often is, a security – because it evidences an investment contract. And regulating these transactions as securities transactions makes sense. The impetus of the Securities Act is to remove the information asymmetry between promoters and investors. In a public distribution, the Securities Act prescribes the information investors need in order to make an informed decision, and the promoter is liable for material misstatements in the offering materials. These are important safeguards, and they are appropriate for most ICOs. The disclosure marries nicely with the Howev investment contract element about the efforts of others. As an investor, the success of the enterprise - and the ability to realize a profit on the investment – turns on the efforts of the third party. The investor is relying on the third party. So learning material information about the third party its background, financing, plans, financial stake, and so forth is a prerequisite to making an informed investment decision. Unless the third party is compelled by the securities law to disclose what it alone knows of these topics and the risks associated with the venture, investors will be uninformed and are at risk.

But this also points the way to when a digital asset may no longer represent a security. When the efforts of the third party are no longer a key determining factor for the enterprise's success, material information asymmetries recede. Moreover, as a network becomes truly

<sup>\*</sup> United Housing Found., Inc. v. Forman, 421 U.S. 837 (1975).

<sup>&</sup>quot; Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, SEC Rel. No. 33-5347 (Jan. 4, 1973).

decentralized, the ability to identify an issuer to make the disclosure becomes difficult, and perhaps meaningless.

And so, when we look at Bitcoin, we do not see a third party whose efforts are a key determining factor in the enterprise. The value of Bitcoin turns on the efforts of decentralized miners and independent market participants' assessments of an open-source payment mechanism. Applying the disclosure provisions of the securities laws in this situation would seem to add little value. [Note to Draft: We expect to use the following bracketed language subject to confirmation of our understanding of the Ethereum network in discussions with representatives of Ethereum Foundation.] [Likewise, based on our understanding of the present state of Ether and the Ethereum network, regulating Ether as a security does not seem to be warranted.] [There may be other decentralized networks where regulating the tokens that function on them as a security may not be warranted.] And of course there continue to be systems that rely on central actors whose efforts are key to the success of the enterprise. In those cases, application of the securities laws can protect the investors who purchase the coins. There will be disclosure requirements and SEC-supervised trading mediated by regulated entities.

As I have tried to point out, the analysis is not static and the nature of a security does not inhere to the instrument.<sup>8</sup> Like CDs — which when issued by a federally regulated bank are not securities but when repackaged as part of an investment strategy can be securities – even digital assets with utility in an existing eco-system could be packaged and sold as an investment strategy that can be a security. A promoter could place Bitcoin in a fund or trust and sell interests, creating a new security. Similarly, investment contracts can be made out of

<sup>&</sup>lt;sup>8</sup> The Supreme Court's investment contract test "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." Howey, at 299.

virtually any asset (including virtual assets), provided the investor is reasonably expecting profits from the promoter's efforts.

Let me emphasize an earlier point: simply labeling a digital asset a "utility token" does not turn the asset into something that is not a security.<sup>9</sup> True, the Supreme Court has acknowledged that if someone is purchasing an asset for consumption only, it is likely not a security.<sup>10</sup> But the economic substance of the transaction determines the legal analysis, not the labels.<sup>11</sup> The oranges in Howey had utility. Or in my favorite example, the Commission warned in the late 1960s about investment contracts sold in the form of whisky warehouse receipts.<sup>12</sup> Promoters sold the receipts to US investors to finance the aging and blending processes of Scotch whisky. The whisky was real – and, for some, had exquisite utility. But Howey was not selling oranges and the warehouse receipts promoters were not selling whisky for consumption. They were selling investments, and the purchasers were expecting a return.

We expect issuers and market participants will want to understand whether transactions in a particular digital asset involve the sale of a security. We are not trying to play "regulatory gotcha." We are happy to help promoters and their counsel work through these issues. We stand prepared to provide more formal interpretive or no action guidance to market participants about the proper characterization of a digital asset in a proposed use.

What are some of the factors we would look to? Whether a digital asset is offered as an investment contract and is thus a security will always depend on the particular facts and circumstances, and this list is illustrative, not exhaustive:

<sup>&</sup>lt;sup>3-2</sup>[T]he name given to an instrument is not dispositive." Forman, at 850.

<sup>10</sup> Forman, at 853.

<sup>11</sup> See above

<sup>&</sup>lt;sup>12</sup> SEC Rel. No. 33-5018 (Nov. 4, 1969). Investment in Interests in Whisky, SEC Rel. No. 33-5451 (Jan 7, 1974).

- Is there a person or organized group that has sponsored or promoted the creation and sale of the digital assets, the efforts of which play a significant role in the development and maintenance of the asset and its potential increase in value?
- 2. Has this person or group retained a stake or other interest in the digital asset such that it would be motivated to expend efforts to cause an increase in value in the digital asset? Would purchasers reasonably believe such efforts will be undertaken and may result in a return on their investment in the digital asset? Does the promoter continue to expend funds from proceeds or operations to enhance the functionality and/or value of the system within which the token operate? Has the promoter raised an amount of funding that seems reasonably related to the costs of creating the network?
- 3. Is the instrument marketed and sold to potential users of the network for a price that reasonably correlates with the market value of the good or service in the network?
- 4. Does application of Securities Act protections make sense? Is there a person or entity others are relying on that plays a key role in the profit-making of the enterprise such that disclosure of their activities and plans would be helpful to investors? Do informational asymmetries exist between the promoters and potential purchaser/investors in the digital asset?

In the meantime, are there contractual or technical ways to structure digital assets so they are less likely to act like a security? I believe so. Again, these are certainly not "get out of jail free" cards, and we would look to the economic substance of the transaction, but promoters and their counsels should consider these, and other, possible features. This list is not intended to be exhaustive and by no means do I believe each and every one of these factors needs to be present to establish a case that a token is not being offered as a security.

8

- Is token creation commensurate with meeting the needs of users or, rather, with feeding speculation?
- 2. Can tokens be hoarded or are they distributed in ways to meet users' needs? For example, does the token degrade in value over time or can it only be held or transferred in amounts that correspond to a purchaser expected use?
- 3. Are the assets dispersed across a diverse user base or concentrated in the hands of a few that can exert influence over the application?
- 4. Have purchasers made representations as to their consumptive, as opposed to their investment, intent?
- 5. Is the promoter supporting the secondary market for the assets or are independent actors setting the price?
- 6. Is the application in early stage development or fully functioning?
- 7. Is the asset marketed and distributed to potential users or the general public?

These are exciting legal times and I am pleased to be part of a process that can help promoters of this new technology and their counsel navigate and comply with the federal securities laws.

From: Sent:	Seaman, Michael P. Thursday, June 7, 2018 1:51 PM
То:	Hinman, William; Fredrickson, David R.; Ingram, Jonathan; Goldsholle, Gary
Subject:	Call Tomorrow
Attachments:	Questions for Call.docx

Below are the participants for the call. Also, in agreeing to have this call tomorrow – instead of at a later date as they originally proposed – they asked that the focus remain on the attached questions that we previously provided them.

#### Foundation

- Vitalik Buterin (Board)
- Aya Miyaguchi (Board)
- Patrick Storcheneggar (Board)
- Tju Llang Chua (GC)
- Amber Fowler (Director of Finance)

#### Sidley.

- Tom Kim
- Geoff Aronow
- Hardy Callcott
- Andrew Sloson

#### Pryor Cashman

Jeffrey Alberts

#### Questions for Call

- 1. Can you describe the early days of Ethereum development (following the initial presale)?
- 2. What is the current role of the Foundation?
- 3. Are you familiar with any current concentrations or lack thereof of holdings of Ether? What about concentrations of mining power?
- 4. How are big decisions about the network made? Who weighs in? How are decisions implemented?
- 5. Can you describe the status of the potential decision to move from proof of work something like proof of stake or a hybrid version of proof of work/proof of stake? Who is involved in that decision?
- 6. What is the role of the group that met in Toronto in early May? Who is behind/involved with that group? Does that group have any decision making authority? How will their decisions be implemented?
- 7. Do you feel that there is a good correlation between the price/value of Ether and the value of its utility?