RECENT GUIDANCE

SECURITIES REGULATION — FINANCIAL TECHNOLOGY — SEC PROVIDES ANALYTICAL TOOLS FOR ASSESSING DIGITAL ASSETS. — SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS (2019).

"Get your act together": this was the pointed message that the Chairman of the Securities and Exchange Commission (SEC) delivered in a November 2018 interview to any startup funded by an initial coin offering (ICO).[1] But it is unclear how the typical startup should heed that warning as the ICO space has been burdened with regulatory ambiguity since its inception. On April 3, 2019, the SEC attempted to provide clarity by releasing a "Framework for 'Investment Contract' Analysis of Digital Assets,"[2] which is meant to "assist those seeking to comply with the U.S. federal securities laws."[3] This framework is promising because it illustrates that the SEC is willing to exempt certain blockchain-based digital assets from being treated as securities. While the guidance represents an improvement from the incredible ambiguity pervading this burgeoning field, it is an inadequate substitute for clear legislation and judicial rulings.

Cryptocurrencies, like Bitcoin, are digital currencies that depend on cryptography to verify and secure transactions, as well as to manage the creation of new units.[4] In contrast to conventional forms of money, cryptocurrencies generally are not backed by a trusted institution and are not liabilities of any particular entity.[5] This lack of backing likely contributes to the SEC's fear of fraud in the ICO space.[6] By way of

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[1] Zack Seward, *WATCH: SEC Chairman Jay Clayton's Full Consensus: Invest Interview*, COINDESK (Nov. 28, 2018, 5:13 PM), https://www.coindesk.com/sec-jay-clayton-consensus-invest-video [https://perma.cc/9RZ4-G2WU].

[2] SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS (2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets#_ednref9 [https://perma.cc/3G6P-GG85].

[3] Public Statement, Bill Hinman, Dir. of Div. of Corp. Fin., SEC & Valerie Szczepanik, Senior Advisor for Digital Assets & Innovation, SEC, Statement on "Framework for 'Investment Contract' Analysis of Digital Assets" (Apr. 3, 2019), https://www.sec.gov/news/public-statement/statement-framework-investment-contract-analysis-digital-assets [https://perma.cc/27BK-QEME].

[4] *See* Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159, 160 (2012). *See generally id.* at 162–65.

[5] Lael Brainard, Governor, Bd. of Governors of the Fed. Reserve Sys., Cryptocurrencies, Digital Currencies, and Distributed Ledger Technologies: What Are We Learning? (May 15, 2018), https://www.federalreserve.gov/newsevents/speech/brainard20180515a.htm [https://perma.cc/8DWS-CH5Q].

[6] For instance, SEC Chairman Jay Clayton expressed concern that, as cryptocurrency and ICO markets are "currently operating, there is substantially less investor protection than in our traditional securities markets, with correspondingly greater opportunities for fraud and manipulation."

background, an ICO is a fundraising mechanism in which new projects sell their underlying cryptotokens in exchange for fiat currency (for example, cash) or cryptocurrency (for example, Bitcoin).[7] An ICO functions much like an initial public offering (IPO) as a means to raise capital to fund a new development or project.[8]

But there is a key difference between ICOs and traditional fundraising mechanisms, such as IPOs, which makes it difficult to translate the legal framework that regulates IPOs directly to ICOs. Rather than relying on traditional backers and underwriters with a centralized ledger, ICOs and their associated cryptocurrencies depend on distributed ledger technology, of which blockchain technology forms a subset.[9] As a result, there is significant decentralization, and the underlying source information is open to any market participant.[10] This distributed ledger mitigates information asymmetry concerns, which the SEC regulations are designed to protect against.[11] Thus, the Securities Act of 1933[12] (Securities Act) and the Securities Exchange Act of 1934[13] (Exchange Act) are not necessarily proper fits for regulating blockchain-based digital assets.

Public Statement, Jay Clayton, Chairman, SEC, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017), https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11 [https://perma.cc/7UT9-4ARZ].

[7] *Investor Bulletin: Initial Coin Offerings*, INVESTOR.GOV (July 25, 2017), https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-initial-coin-offerings [https://perma.cc/TD62-SQSZ].

[8] *See* Nathaniel Popper, *An Explanation of Initial Coin Offerings*, N.Y. TIMES (Oct. 27, 2017), https://nyti.ms/2iGfts1 [https://perma.cc/PH8K-38BG].

[9] "Distributed ledger technology . . . refers to the protocols and supporting infrastructure that allow computers in different locations to propose and validate transactions and update records in a synchronised way across a network." Morten Bech & Rodney Garratt, *Central Bank Cryptocurrencies*, BIS Q. REV., Sept. 2017, at 55, 58. Distributed ledger technology provides a means of recording account balances. In most other contexts, electronic transactions are recorded on a centralized ledger, which is managed by a trusted intermediary (for example, a commercial bank) who "track[s] account holders' balances and, ultimately, vouch[es] for a transaction's authenticity." Trevor I. Kiviat, Note, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, 65 DUKE L.J. 569, 577 (2015). In contrast, with distributed ledger technology, the transaction record is distributed across computers and other internet-connected devices in separate locations globally, without the need for a trusted central authority. *See id.* at 577–78.

[10] *See* Kiviat, *supra* note 9, at 578, 580.

[11] *See* William Hinman, Dir., Div. of Corp. Fin., SEC, Digital Asset Transaction: When *Howey* Met *Gary* (*Plastic*), Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418 [https://perma.cc/7V44-8LSQ]; *see also* Blockchain Ass'n, *Open Blockchain Networks Are Incredibly Transparent, and It's Good Public Policy to Support Them*, MEDIUM (Apr. 8, 2019), https://medium.com/@BlockchainAssoc/open-blockchain-networks-are-incredibly-transparent-and-its-good-public-policy-to-support-them-be1288a74ecd [https://perma.cc/A5WF-AGBB].

[12] 15 U.S.C. §§ 77a–77aa (2012).

[13] *Id.* §§ 78a–78pp.

Agencies often struggle to capture emerging technologies in dusty regulatory frameworks[14] — and the SEC is no different as it attempts to capture ICOs in the Securities Act and the Exchange Act.[15] These statutes define a "security" as a commonly traded financial instrument, such as a note, stock, or bond.[16] The definition also broadly includes more variable financial instruments, for instance an investment contract.[17]

In *SEC v. W.J. Howey Co.*,[18] the Supreme Court articulated a test to determine if a financial instrument was an investment contract, and therefore a security subject to the Securities Act and the Exchange Act. The Court held that a transaction is an investment contract if: (1) there is an investment of money, (2) in a common enterprise, with (3) a reasonable expectation of profits to be derived from the efforts of a third party.[19] The Court has since focused on the substance of the transaction, rather than the form, to determine the nature of the financial instrument.[20]

In July 2017, the SEC applied existing securities laws — including the *Howey* test — to determine that some tokens were in fact securities.[21] The SEC scaled up enforcement by creating a cyber unit to specifically target "[v]iolations involving distributed ledger technology and

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[14] *See, e.g.*, Andy Pasztor & Robert Wall, *Drone Regulators Struggle to Keep Up with the Rapidly Growing Technology*, WALL ST. J. (July 10, 2016, 7:52 PM), https://www.wsj.com/articles/drone-regulators-struggle-to-keep-up-with-the-rapidly-growing-technology-1468202371 [https://perma.cc/5T95-6LJT]; Gary Stern, *Can Regulators Keep Up with Fintech?*, YALE INSIGHTS (Dec. 13, 2017), https://insights.som.yale.edu/insights/can-regulators-keep-up-with-fintech [https://perma.cc/Q5V6-D989].

[15] Hester M. Peirce, Comm'r, SEC, Regulation: A View from Inside the Machine, Remarks at Protecting the Public While Fostering Innovation and Entrepreneurship: First Principles of Optimal Regulation (Feb. 8, 2019), https://www.sec.gov/news/speech/peirce-regulation-view-inside-machine [https://perma.cc/EQN2-PF5N] (acknowledging that "[t]oken offerings do not always map perfectly onto traditional securities offerings").

[16] 15 U.S.C. §§ 77b(a)(1), 78c(a)(10).

[17] *Id.*

[18] 328 U.S. 293 (1946). In *Howey*, the owner of a Florida citrus grove proposed to sell a land interest to investors. *Id.* at 295. The investors would then each contract with the current owner of the citrus grove so that the current owner would tend to the trees and harvest the resulting produce. *Id.* Any profit from the fruit would be shared between the investor and the citrus grove tender. *See id.* at 296.

[19] *Id.* at 298–99.

[20] *See* SEC v. Edwards, 540 U.S. 389, 393 (2004) ("Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called." (quoting Reves v. Ernst & Young, 494 U.S. 56, 61 (1990))).

[21] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81,207, 2017 WL 7184670 (July 25, 2017). In this report, the SEC described an investigation of the DAO, a virtual organization, and its use of distributed ledger or blockchain technology to facilitate the offer and sale of DAO tokens to raise capital. *Id.* at *1–2.

initial coin offerings"[22] and brought its first ICO enforcement action for fraud against Maksim Zaslavskiy.[23] Zaslavskiy started off his ICO scheme with REcoin, marketing it as "The First Ever Cryptocurrency Backed by Real Estate,"[24] and pivoted to his second ICO, tokens that were backed by diamond investments.[25] But there were neither diamonds nor real estate.[26] Although Zaslavskiy eventually pleaded guilty,[27] he and REcoin initially stated by way of defense that they thought the whole scenario boiled down to a "lack of legal clarity as to when an ICO or a digital asset is a security."[28]

Recently, the SEC's Strategic Hub for Innovation and Financial Technology[29] (FinHub) attempted to provide some clarity by issuing a "Framework for 'Investment Contract' Analysis of Digital Assets," which provides a toolkit to apply the *Howey* test to digital assets.[30] The guidance quickly dispenses with the first and second prongs of the *Howey* test, stating that the requirements for an "investment of money"

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[22] Press Release, SEC, SEC Announces Enforcement Initiatives to Combat Cyber-Based Threats and Protect Retail Investors (Sept. 25, 2017), https://www.sec.gov/news/press-release/2017-176 [https://perma.cc/36YJ-L28H].

[23] *See* Patricia Hurtado, *First Initial Coin Offering Fraud Case Ends in Guilty Plea*, BLOOMBERG (Nov. 15, 2018, 5:17 PM), https://www.bloomberg.com/news/articles/2018-11-15/first-fraud-case-for-initial-coin-offering-set-for-guilty-plea [https://perma.cc/L9R5-QGM3]; *see also* Patricia Hurtado et al., *U.S. Judge Says Initial Coin Offering Covered by Securities Law*, BLOOMBERG (Sept. 11, 2018, 11:48 AM), https://www.bloomberg.com/news/articles/2018-09-11/u-s-judge-says-initial-coin-offering-covered-by-securities-law [https://perma.cc/W2U4-D8GC].

[24] SEC v. REcoin Grp. Found., Litigation Release No. 24,081, 2018 WL 1468815 (Mar. 26, 2018). Zaslavskiy promised huge returns and fabricated a "team of lawyers, professionals, brokers, and accountants" to raise hundreds of thousands of dollars from investors. *Id.* The SEC concluded that there was no team and the coin was backed by nothing, and it warned Zaslavskiy he was breaking the law. *Id.* With REcoin, Zaslavskiy "allegedly misrepresented [REcoin] had raised between $2 million and $4 million from investors when the actual amount [was] approximately $300,000." *Id.*; *see also* Complaint at 2–3, SEC v. REcoin Grp. Found., LLC, No. 17-cv-05725 (E.D.N.Y. Sept. 29, 2017), ECF No. 1.

[25] Hurtado, *supra* note 23.

[26] *Id.*

[27] *Id.*

[28] Luis Urbina, *SEC Brings Enforcement Action Against Two Companies Related to Initial Coin Offerings*, COVINGTON (Oct. 10, 2017), https://www.covfinancialservices.com/2017/10/sec-brings-enforcement-action-against-two-companies-related-to-initial-coin-offerings/ [https://perma.cc/8TY4-YR8D]. But this ambiguity was not an adequate shield. The court disagreed with Zaslavskiy and held that neither the Exchange Act nor Rule 10b-5 was unconstitutionally vague as applied. *See* United States v. Zaslavskiy, No. 17-cr-647, 2018 WL 4346339, at *7–9 (E.D.N.Y. Sept. 11, 2018).

[29] In October 2018, the SEC announced the launch of FinHub to "serve as a resource for public engagement on the SEC's FinTech-related issues and initiatives, such as distributed ledger technology (including digital assets), automated investment advice, digital marketplace financing, and artificial intelligence/machine learning." Press Release, SEC, SEC Launches New Strategic Hub for Innovation and Financial Technology (Oct. 18, 2018), https://www.sec.gov/news/press-release/2018-240 [https://perma.cc/XWH5-X7GE].

[30] SEC, *supra* note 2.

in a "common enterprise" are "typically satisfied" in a digital asset transaction.[31] FinHub focuses on the third prong of the *Howey* test and provides an exhausting, but "not intended to be an exhaustive,"[32] list of over thirty factors to help determine if an investor has a reasonable expectation of profits derived from the efforts of others.[33] For instance, the guidance suggests looking at an active participant's managerial role, the functionality and progress of the project, and the quantity of the funds raised.[34]

In conjunction with the framework, the SEC's Division of Corporation Finance issued a no-action letter stating that tokens issued by TurnKey Jet (TKJ), an on-demand air charter service,[35] were not securities.[36] TKJ members purchase blockchain-based tokens, which "decreases the settlement time and improves the efficiencies of paying for and obtaining air charter services."[37] In deciding not to bring an enforcement action, the SEC relied on, inter alia, findings that the project was "fully developed and operational," the tokens were "immediately usable for their intended functionality," and the tokens were "marketed in a manner that emphasize[d] the functionality of the [t]oken, and not the potential for the increase in [its] market value."[38]

The framework and no-action letter indicate that the SEC is open to excluding some blockchain-based digital assets from securities regulations. This development is meaningful because it marks a shift away from the former uncertainty, which was likely a function of the SEC's desire to promote innovation. Though the new framework is helpful, it is not binding and is not an adequate substitute for clear rules upon which market participants could rely. Through selective enforcement of the most egregious fraud cases, the SEC has prevented judges from interpreting the application of securities laws to digital assets, leading to vague and nebulous regulation. As a result, some market participants are calling for judicial intervention, and the framework may be geared more toward guiding judges' analyses in inevitable litigation than equipping citizens to navigate ICOs.

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[31] *Id.*

[32] Public Statement, Hinman & Szczepanik, *supra* note 3.

[33] SEC, *supra* note 2.

[34] *Id.*

[35] Letter from James Prescott Curry, Counsel, TurnKey Jet, Inc., to Office of Chief Counsel, Div. of Corp. Fin., SEC 1 (Apr. 2, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1-incoming.pdf [https://perma.cc/4D5N-BL7M] [hereinafter TurnKey Jet Incoming Letter].

[36] TurnKey Jet, Inc., SEC No-Action Letter (Apr. 3, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm [https://perma.cc/A8GV-6X7Y] [hereinafter TurnKey Jet No-Action Letter].

[37] TurnKey Jet Incoming Letter, *supra* note 35, at 2.

[38] TurnKey Jet No-Action Letter, *supra* note 36.

The SEC's guidance in the past suffered from internal ambiguity. For instance, when the SEC announced that it would apply the *Howey* test to tokens, the SEC's press release title read: "SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities."[39] But, hedging slightly and adding to the ambiguity of whether the SEC would, as a policy, apply securities law to ICOs, the press release's subtitle read: "U.S. Securities Laws *May* Apply to Offers, Sales, and Trading of Interests in Virtual Organizations."[40] The SEC also seemed to conflate the regulation of tokens as cryptocurrencies with tokens as investment contracts. Acknowledging the important nomenclature difference in a Senate hearing, SEC Chairman Jay Clayton stated: "I want to go back to separating ICOs and cryptocurrencies. ICOs that are securities offerings, we should regulate them like we regulate securities offerings."[41] But, again adding to the confusion and glossing over the regulatory nuances in the same Senate hearing, the Chairman unequivocally stated: "I believe *every* ICO I have seen is a security."[42] As institutional market participants enter the blockchain and cryptocurrency arena,[43] clarity will be crucial.

The SEC justified an ambiguous application of securities regulation as an effort to promote a particular objective — innovation. Specifically, Commissioner Hester Peirce stated that "[a]mbiguity [in SEC policy] is not all bad, of course. We might be able to draw clearer lines once we see more blockchain projects mature. Delay in drawing clear lines may actually allow more freedom for the technology to come into its own."[44] However, as a counterpoint, lack of regulatory clarity may be a barrier to entry and give market participants less appetite to take risks. The uncertain landscape likely dampens innovation in blockchain technology.

The ambiguity's impact is evident in a recent ICO case in the Southern District of California. In October 2018, the SEC obtained an emergency court order enjoining Blockvest, a company that allegedly made a series

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[39] Press Release, SEC, SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities (July 25, 2017), https://www.sec.gov/news/press-release/2017-131 [https://perma.cc/VNU9-Q4CM].

[40] *Id.* (emphasis added).

[41] *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 115th Cong. 24 (2018) (statement of Jay Clayton, Chairman, SEC).

[42] *Id.* at 5 (emphasis added).

[43] *See, e.g.*, Michael J. de la Merced & Nathaniel Popper, *JPMorgan Chase Moves to Be First Big U.S. Bank with Its Own Cryptocurrency*, N.Y. TIMES (Feb. 14, 2019), https://nyti.ms/2EbTNMW [https://perma.cc/5JVP-UC8N].

[44] Peirce, *supra* note 15.

of fraudulent claims regarding its upcoming ICO, from selling any securities.[45] But in November 2018, Judge Curiel denied the SEC's request for a preliminary injunction, finding the Commission could not show that investors bought into the Blockvest ICO with an expectation of making a profit from the efforts of others.[46] This outcome represented pushback from at least one court against the SEC Chairman's warning that "[i]f you finance a venture with a token offering, you should start with the assumption that it is a security."[47] It was also the first time a federal court determined that the SEC had not shown that a digital asset offered in an ICO was a security. As a result, *SEC v. Blockvest, LLC*[48] realized the SEC's worst fears, as the court took away the SEC's sole discretion to interpret which tokens should qualify as securities.

However, in a reversal of the decision, in February 2019, Judge Curiel granted the agency's renewed injunction bid, finding that the SEC had indeed made the case that Blockvest's promotional materials constituted an offer of unregistered securities containing materially false statements.[49] Judge Curiel "agree[d] with the SEC that the *Howey* test is unquestionably an objective one"[50] but disputed the SEC's assertion that, in the order denying the SEC's request for a preliminary injunction, "the court [had] applied a subjective test" by relying "solely on the beliefs of some individual investors."[51] Casting a wider aperture this time, the court reapplied the *Howey* test to find that the tokens were in fact securities and the promotional materials presented by the defendant concerning the ICO constituted a prima facie violation of the Securities Act.[52] This reversal is evidence of the previous ambiguity in the space regarding tokens as securities.

The SEC's new framework demonstrates the agency's desire to provide clarity and, more importantly, acknowledges that some blockchain-based digital assets should not be treated as securities. For instance, the

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[45] SEC v. Blockvest, LLC, No. 18-cv-2287, 2018 WL 4955837, at *7 (S.D. Cal. Oct. 5 2018). The SEC alleged Blockvest's ICO fraudulently claimed it had been registered with the SEC and even advertised approval from a fictitious government agency called the Blockchain Exchange Commission. Complaint at 2, SEC v. Blockvest, LLC, No. 18-cv-2287 (S.D. Cal. Oct. 3, 2018), ECF No. 1.

[46] *See* SEC v. Blockvest, LLC, No. 18-cv-2287, 2018 WL 6181408, at *7 (S.D. Cal. Nov. 27, 2018).

[47] Seward, *supra* note 1.

[48] No. 18-cv-2287, 2018 WL 6181408.

[49] *See* SEC v. Blockvest, LLC, No. 18-cv-2287, 2019 WL 625163, at *1 (S.D. Cal. Feb. 14, 2019).

[50] *Id.* at *5.

[51] *Id.* Rather, the court stated that it had "objectively inquire[d] into the 'terms of promotional materials, information, economic inducements or oral representations at the seminars,' or in other words, [inquired] into the 'character of the instrument or transaction offered' to the 'purchasers.'" *Id.* (internal citation omitted) (first quoting *Blockvest*, 2018 WL 6181408, at *7; and then quoting Warfield v. Alaniz, 569 F.3d 1015, 1021 (9th Cir. 2009)).

[52] *Id.* at *7, *9.

framework advises that a purchaser is less likely to be relying on the efforts of others if an "unaffiliated, dispersed community of network users (commonly known as a 'decentralized' network)," rather than an active participant, is responsible for "essential tasks or responsibilities" of the project.[53] This implies that the use of decentralized networks makes a digital asset somewhat less likely to be an investment contract — and therefore less likely to be classified as a security. The fact that the SEC specifically named "decentralized networks" indicates that it is signaling support for decentralized, distributed ledger technology and is trying to meaningfully carve out a space where blockchain-based tokens can function without being labeled securities. The SEC's decision not to classify TKJ tokens as securities further supports the conclusion that the SEC is providing a functional space for blockchain-based assets to operate.

While the SEC's framework marks progress in providing clarity, it is not a substitute for transparent legislation or judicial rulings to guide market participants. The SEC has been careful to say that the framework is simply "[s]taff guidance," is not legally binding on the SEC, and is only meant to be an "analytical tool" to evaluate digital assets.[54] Congress may provide more concrete guidance. On April 9, 2019, Representative Warren Davidson reintroduced the Token Taxonomy Act in Congress with growing support and an expanded list of cosponsors.[55] The bill is specifically aimed at "exclud[ing] digital tokens from the definition of a security" in the Exchange Act and Securities Act.[56] Proponents of the bill believe that it would "eliminate . . . uncertainty" and provide the clarity "required to spur continued investment and innovation in this technology."[57]

As to courts providing clarification, through selective enforcement the SEC has essentially precluded judges from interpreting how securities regulations apply to digital assets. The SEC has only acted in the most flagrant fraud cases, which are more likely to settle out of court.[58] The agency may delay providing clarity by all but ensuring that judges do not get the chance to draw bright-line rules. But this approach leaves the majority of the industry in the lurch. At this point, some market

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[53] SEC, *supra* note 2.

[54] Public Statement, Hinman & Szczepanik, *supra* note 3.

[55] *See* H.R. 2144, 116th Cong. (2019). An initial version of the bill was introduced by Rep. Davidson on December 20, 2018. *See* H.R. 7356, 115th Cong. (2018). The Token Taxonomy Act now has five cosponsors. *See* Blockchain Ass'n, *The Token Taxonomy Act is Back, and We Need it More than Ever,* MEDIUM (Apr. 9, 2019), https://medium.com/@BlockchainAssoc/the-token-taxonomy-act-is-back-and-we-need-it-more-than-ever-d2cbf0154776 [https://perma.cc/FX5Q-DYBD].

[56] H.R. 2144.

[57] Blockchain Ass'n, *supra* note 55.

[58] *See, e.g.*, Mayweather, Securities Act Release No. 10,578, 2018 WL 6266203 (Nov. 29, 2018).

participants are so frustrated with the SEC's nebulous guidance that they are explicitly requesting that courts intervene to provide clarity. For instance, the SEC served Kik, a secure messaging platform, with a notice stating that Kin, Kik's token for in-app purchases, should have been registered — but Kik claims "that Kin is a currency, not a security," and "does not need to be registered."[59] A court ruling on this particular case "could help determine the scope of the SEC's authority to tame the unruly ICO market."[60]

The framework may be the SEC's attempt to speak to judges more than to market participants as cases like those involving Kik and Blockvest reach maturity. In discussing the analysis for digital assets, for instance, the framework is careful to point out that the inquiry "is an objective one, focused on the transaction itself and the manner in which the digital asset is offered and sold."[61] While Director William Hinman promised "plain English" guidance,[62] the framework's discussion of objective, rather than subjective, analysis seems to directly address the point of contention the SEC had with Judge Curiel in *Blockvest*. In that sense, the SEC's framework may be more about guiding judges' analysis in future litigation than providing tools for an average market participant to evaluate her digital assets.

While the SEC's framework for analyzing digital assets is promising in that it indicates that not all blockchain-based digital assets will be treated as securities, clear guidance through judge-made bright-line rules or legislation may be inevitable and necessary in the ICO space. Even though there has been a "regulatory crackdown that threatened to stifle the nascent market," industry participants "have continued to pour money into cryptocurrency startups."[63] Though the SEC "trie[s] to pursue cases that deliver broad messages and have market impact beyond their own four corners,"[64] its selective enforcement approach and nebulous guidance foreshadows intervention.

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59 *See* Yoav Vilner, *The Case of Authorities vs. Kik: What Do We Know So Far?*, FORBES (Feb. 18, 2019, 1:59 AM), https://www.forbes.com/sites/yoavvilner/2019/02/18/the-case-of-authorities-vs-kik-what-do-we-know-so-far/#7da29a631b86 [https://perma.cc/3USH-ZPAW].

60 *See* Paul Vigna & Dave Michaels, *Are ICO Tokens Securities? Startup Wants a Judge to Decide*, WALL ST. J. (Jan. 27, 2019, 11:00 AM), https://www.wsj.com/articles/are-ico-tokens-securities-startup-wants-a-judge-to-decide-11548604800 [https://perma.cc/3VLG-YRFR].

61 SEC, *supra* note 2.

62 Nikhilesh De & Aaron Stanley, *SEC Official Says "Plain English" Guidance on ICOs Is Coming*, COINDESK (Nov. 6, 2018, 1:05 PM), https://www.coindesk.com/sec-official-says-plain-english-guidance-on-icos-is-coming [https://perma.cc/SM5E-WC6M].

63 Paul Vigna et al., *What Crypto Downturn? ICO Fundraising Surges in 2018*, WALL ST. J. (July 1, 2018, 1:26 PM), https://www.wsj.com/articles/what-crypto-downturn-ico-fundraising-surges-in-2018-1530466008 [https://perma.cc/NN27-NX9A].

64 SEC, DIVISION OF ENFORCEMENT ANNUAL REPORT 3 (2018), https://www.sec.gov/files/enforcement-annual-report-2018.pdf [https://perma.cc/3KPY-VNAK].