REPORT

Futures & Derivatives Law

The Journal on the Law of Investment & Risk Management Products

May 2019 ▪ Volume 39 ▪ Issue 5

THE LEGEND OF THE "SECUMODITY": CAN THE SAME COIN BE A SECURITY OR COMMODITY AT DIFFERENT POINTS IN ITS EVOLUTION?

By Petal Walker

Petal P. Walker is a Special Counsel in the Securities Department and a member of the Futures and Derivatives Group at WilmerHale.

I. INTRODUCTION

Can a digital coin be a security one day under the oversight of the Securities and Exchange Commission (SEC), and a commodity the next under the oversight of the Commodity Futures Trading Commission (CFTC), or vice versa? And importantly, can a coin move from one jurisdiction to another without carrying forward lingering baggage from its previous jurisdiction? Though the line between the CFTC's and the SEC's jurisdictions over digital coins can be blurry, given the current state of CFTC and SEC oversight, it is possible for a digital coin to move between jurisdictions. In the following, I discuss: (1) the characteristics of digital coins that are defined as securities; (2) the characteristics of digital coins that are defined as commodities; and (3) and how a digital coin could move from one definition, and therefore from one jurisdiction, to another.

II. COMMODITY VS. SECURITY

BLURRY LINE BETWEEN A VIRTUAL CURRENCY (COMMODITY) AND AN INVESTMENT CONTRACT (SECURITY)

In reviewing the CFTC's and SEC's cases and guidance, the main distinguishing factor between the digital coin that is an investment contract (security) and the digital coin that is a virtual currency (commodity), is its *primary*, though not necessarily *sole*, purpose. The primary purpose of the former is to make an investment—though another purpose may be to build a network—what gives life to the contract is the investment opportunity. The opposite is true of the latter—the *primary* purpose is to establish a unit of exchange to access goods and service—though another purpose may be to acquire a valuable asset—what gives life to the transaction is its utility on a network.[1]

WHAT MAKES A DIGITAL COIN A VIRTUAL CURRENCY

Pursuant to its guidance and its enforcement actions, the CFTC has defined a digital coin that is a virtual currency as a commodity. The CFTC has identified a virtual currency as both a "digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value,"[2] and a "crypto-

graphic protocol[] to secure transactions . . . recorded on publicly available decentralized ledgers."[3] The CFTC also noted the similarity of virtual currencies to gold,[4] while indicating that they are distinct from "real" currencies since they are not considered legal tender.[5]

Commodities are defined in the Commodity Exchange Act (CEA) as, inter alia, "all . . . goods and articles . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in."[6] Consistent with that definition, a number of intangible interests such as currencies and fixed interest rate benchmarks are considered commodities.[7] The CFTC maintains that virtual currencies can be regulated as commodities because they are " 'goods' exchanged in a market for a uniform quality and value."[8]

As indicated by its enforcement actions, the CFTC interprets established digital coins on functioning networks such as Bitcoin and Litecoin as virtual currencies that are under its jurisdiction. This interpretation is evident in *CabbageTech*, where the Commission alleged that the defendants fraudulently misrepresented their trading in Bitcoin and Litecoin, and misappropriated customer funds.[9] And, it is also evident in *Gelfman Blueprint* where the Commission alleged that the defendants fraudulently misstated their success in trading Bitcoin.[10]

Interestingly, the CFTC has also interpreted un-established, and indeed what the CFTC portrays as fictitious, digital coins that purport to operate as virtual currencies as also being subject to their jurisdiction. A good example of that is *My Big Coin Pay*. In *My Big Coin Pay*, the CFTC brought charges against defendants for allegedly fraudulently claiming that My Big Coin (MBC) was a "fully-functioning virtual currency" that could be used to purchase goods and services, was traded on multiple exchanges, was part of a partnership with Mastercard and was backed by gold.[11] The Commission maintained that all of these assertions were untrue and intentionally misleading.[12] The Commission claimed that in reality, MBC was basically a Ponzi scheme—that the promoters were falsifying trading results and providing the funds from one set of investors to another set of investors to mimic proceeds from trading, while misappropriating the funds for their own use.[13] The CFTC also claimed that the promoters of MBC were arbitrarily changing the listed value of the coin to mimic actual activity when, in fact, there was none.[14]

Despite alleging that MBC was not actually a functioning virtual currency, the Commission still treated it as such for purposes of the commodities fraud rules. The Commission brought charges against the defendants under 7 U.S.C.A. § 9(l) and Regulation 180.1(a). The former statute makes it unlawful to "use or employ . . . in connection with . . . any *commodity* in interstate commerce . . . any manipulative or deceptive device or contrivance . . ." (emphasis added). The latter makes it unlawful

> for any person . . . in connection with . . . any *commodity* in interstate commerce . . . to intentionally or recklessly:
>
> (1) Use or employ . . . any manipulative device, scheme, or artifice to defraud;
> (2) Make . . . any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;
> (3) Engage . . . in any act, practice, or course of business, which operates or would

> operate as a fraud or deceit upon any person . . . (emphasis added).

The Commission noted that the promoters violated these rules since, inter alia, in connection with a commodity—the purportedly fictitious coin—they made false and misleading statements.[15]

The CFTC's definition is consistent with the description of digital coins that are commodities in SEC Director Hinman's June 2018 speech.[16] For instance, in that speech, the list of questions that the Director provides to determine if a digital coin is a commodity all point to whether its primary use is as a medium of exchange for users of a network (as opposed to an investment opportunity). For instance:

(1) Is token creation commensurate with meeting the needs of users or, rather, with feeding speculation?

(2) Is it clear that the *primary motivation* for purchasing the digital asset is for personal use or consumption, as compared to investment? Have purchasers made representations as to their consumptive, as opposed to their investment, intent . . .?

(3) Are the tokens distributed in ways to meet users' needs? For example, can the tokens be held or transferred only in amounts that correspond to a purchaser's expected use . . .?[17] (Emphasis added.)

The picture that emerges is that the digital coin that is a virtual currency is functioning on an operating network, and the primary (but not necessarily the only reason) to purchase it is a means to access goods and services on that network. Thus, for established networks like Bitcoin and Ether, the digital coins are virtual currencies. But even where the promoters make false statements about a network that does not exist—but the network is portrayed as a functioning one that allows purchasers to access goods and services in the present—that still would fall into the virtual currency category and be subject to commodities fraud rules.

WHAT MAKES A DIGITAL COIN A SECURITY

The SEC has asserted, on numerous occasions, that a digital coin that is primarily an investment opportunity is a security—most frequently (though not exclusively) an "investment contract," and therefore subject to SEC jurisdiction.[18] The SEC outlines the elements in its DAO analysis[19] which is based on the *Howey* test, namely: "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . .."[20]

The elements that cause a digital coin to fall under the security definition are also outlined in Director Hinman's June 2018 speech. There he also provides a list of questions to determine if a digital coin is a security saying:

(1) Is there a person or group that has sponsored or promoted the creation and sale of the digital asset, the efforts of whom 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?

(3) Are purchasers "investing," that is seeking a return? In that regard, is the instrument marketed and sold to the general public instead of to potential users of the network for a price that reasonably correlates with the market value of the good or service in the network?[21]

These questions highlight the key elements of an investment contract: (1) potential purchasers would reasonably understand, because of the actions of the promoters, that this is primarily an investment opportunity; and (2) profits are generated mainly through the activities of others thereby creating an information differential that needs to be cured through disclosure.

The SEC has brought a number of cases under this analysis, but the ones that are the most illustrative are those that are closest to the dividing line between virtual currency and investment. For instance, in *AirFox*, the SEC order acknowledged that AirFox's digital coins, AirTokens, had some hallmarks of a virtual currency. For instance, AirFox claimed that AirTokens would be used as means to establish a network to "allow prepaid mobile phone users to earn free or discounted airtime or data by interacting with ads" and AirFox required that potential purchasers acknowledge that they were purchasing the coins to use as a utility not as an investment.[22] Moreover, AirFox apparently intended to build a functioning network by building an ecosystem, adding an AirFox app, and entering into agreements with telecommunication firms.[23]

However, the SEC alleged that, despite these statements and intentions, AirFox's actual activity demonstrated that it was really selling purchasers a profit-making venture, not a medium to exchange services on mobile phones, including: (1) AirFox noted that it was intentionally reducing its digital coin supply to in order to increase the value of the coin;[24] (2) AirFox touted how aspects of its functionality would create demand for its digital coins among lenders who would be required to purchase the coins, thereby increasing their value;[25] and (3) AirFox marketed the coins to individuals who would not be able to use them—U.S. persons—on a network that was intended to be used only by non-U.S. persons).[26]

The SEC therefore characterized AirFox's efforts not mainly as a means to create a functioning network, but to "increase the value of AirTokens."[27] So, in sum, the SEC characterized a digital coin for which the promoters demonstrated some intentionality to actually create a functioning network as an investment nonetheless because of the SEC's interpretation of its primary purpose.

Similarly, in *AriseBank*, the SEC brushed off the virtual currency elements of the digital coin at issue and characterized it as a security. The SEC claimed that the promoters of AriseBank offered AriseCoin as a means to raise money to establish a cryptocurrency bank, and in doing so, made false statements including that it had acquired a commercial bank[28] and that it could offer a credit card.[29] The SEC maintained, despite the virtual currency indications, that the venture was mainly a profit-making scheme since: (1) the promoters did not screen the individuals who purchased the coins (to limit it to persons who could use it); and (2) the purchasers would be

partly paid in an expiring coin—eACO—purposely designed to increase the value of AriseCoin.[30]

In *Blockvest*, the exception proved the rule. There, the SEC maintained that though the promoters' stated goal was to create a virtual currency that would withstand volatility, the real purpose was to promote an investment opportunity.[31] Specifically, the promoters' stated goal was to raise money from the sales of the coin in order to fund a series of products including an index fund, a stablecoin, a portfolio management tool, and an exchange.[32] The SEC alleged that there were multiple indications that the purpose of the coin was to raise capital, including promises in the white paper that the Blockvest holder would make specified profits per share.[33] The Court however, disagreed, finding instead that the SEC failed to prove conclusively that the buyers were influenced by the defendant's promotional materials[34] or an expectation of profits.[35] So, in *Blockvest*, the Court accepted the Howey paradigm, but found that, under these facts, the SEC did not prove that the purchasers relied on the promoters' promises in deciding to purchase the coins.

Probably one of the closest SEC cases is *Plexcorps*, which involved a digital coin designed for use in the cannabis industry. As in the other cases, Plexcorps engaged in activities that suggested that it wanted to create a functioning coin. For instance, the promoters claimed that they would use generated proceeds to build an ecosystem and purchase real estate.[36] Further, the SEC noted that Plexcorps did take actual steps to execute the plan including establishing a ParagonSpace working space that, at the time, was operational.[37] The SEC also noted that the promoters of the PlexCoin Tokens made false statements in the sale of the coin including claiming that (1) there was a cadre of experts developing the coin when there was no such team; (2) they could not name the executives overseeing the coin to avoid anti-competitive practices when in fact they were trying to hide their identity because of their record of past misconduct; and (3) the Plexcoin would be used to pay for other products.[38]

In reviewing *Plexcorps*, many of the actual activities of the promoters—and the allegedly fictitious ones—seemed to suggest that it was a functioning coin. But despite all of this evidence, the SEC noted the multiple references to potential increase in value of the coin in the advertising materials, including the advertisement of a deflation algorithm "which was designed to decrease supply of PRG tokens and in turn, increase the value of PRG tokens" and "burning" certain fees because that would "decreas[e] the amount of coins in circulation. More adoption = less coins, more value."[39]

CLARIFYING THE BLURRY LINE: COMMODITY VS. SECURITY

The CFTC and SEC cases help to bring into sharp relief the edge between the SEC's and CFTC's jurisdictions. At first glance, several of the SEC cases seem as though they could have been brought as CFTC cases since, for all intents and purposes, the coin was either actually intended, or was allegedly falsely portrayed as, a fully functioning currency. Conversely, in the CFTC case, *My Big Coin Pay*, there are elements that are investment-like. For instance, the MBC promoters did advertise that the MBC was increasing in value. The CFTC noted that the promoters "tout[ed] the rising trading value of

MBC in U.S. Dollars."[40] And indeed, the allegedly false prices that the CFTC listed did *increase* over time.[41]

So what makes *My Big Coin Pay* meaningfully different than *Plexcorps* or *AriseBank*? They all have some elements that are indicative of a virtual currency and an investment contract. The answer to which seems to be two-fold: (1) their primary purpose; and (2) their developmental stage. First, though their conclusions are subject to debate, the SEC does present the alleged securities as primarily investments, and the CFTC portrays the alleged virtual currencies as primarily mediums of exchange.[42] And second, the digital coins that are pre-network or much more likely to be considered securities, and the digital coins that are on a network are much more likely to be considered commodities.

In fact, the SEC cases demonstrate how difficult it is for a coin without a functioning network to avoid the "security" designation, and explains the statements of SEC officials that, from the SEC's perspective, virtually every initial coin offering is a security.[43] Before a network has been established and the coin is operational, the digital coin is little more than a concept—it may be a well-described concept in a thorough white paper, but it is a concept nonetheless. The promoters describe what the digital coin will do, and the network that it will operate on, in order to convince would-be buyers to purchase it. The promoter has to entice the buyer with something; and that "something" can be easily interpreted by the SEC as a promise of future growth. Conversely, when a coin is operating on a network, it could be considered a digital coin even though it may have investment elements. For instance, Director Hinman noted in his speech that Bitcoin and Ether today would both fall into the virtual currency category. This assertion is illustrative because both Bitcoin and Ether are currently trading on exchanges and are being purchased by individuals who are interested not only in using them as mediums of exchange but also in holding them in hopes their value will increase.

III. TRANSFORMING COIN

Given the distinction between a commodity and a security, it is possible for a digital coin to be defined as a virtual currency and an investment at different points in its evolution. While this option is not available for all securities, it is a possibility for securities that consist of a non-security element coupled with another aspect of the contract that together create an investment opportunity ("coupled" contracts).

A prime example of that is *Howey*, where the Court found a security was formed by the coupling of a land sale on units on a citrus grove with a service contract to cultivate the groves.[44] According to the Court, the facts demonstrate that the land sales contract and the service contract were inextricably linked—for instance: (1) clients were told that it was not feasible for them to make the investment unless they agreed to the service contracts;[45] (2) the service contract gave the Howey Company, the contract company, a lease and possession of the land;[46] and (3) the clients were business people who lacked the expertise to otherwise cultivate the orange groves themselves.[47]

Thus, what constituted the security was not the land sales contract, or for that matter, the land, the groves, or the oranges—what constituted the security was the combination of the land sales contract, the warranty deed and the service con-

tract *together*.[48] Similarly, in *Stevens*, the Court found a security where the defendants sold a "lease" (ownership agreement) in rabbits, coupled with a contract with a third party to breed them.[49] And, in *Joiner*, the Court similarly determined that a combination of oil leases coupled with an agreement that the defendant would drill for oil constituted a security.[50]

Importantly, according to the SEC, to form a security, the two contracts are not merely coupled, but the adjoining contract is really at the heart of the entire transaction; it creates the investment opportunity. For instance, in *Joiner*, the Court explained that the drilling agreement gave life to the entire investment scheme, forming the consideration for the whole enterprise.[51] The Court noted, "It is clear that an economic interest in this well-drilling undertaking was what brought into being the instruments that defendants were selling and gave to the instruments most of their value and all of their lure."[52] Similarly, in *Howey*, the Court found that the entire enterprise only made sense as an investment for profit, including that the plots of land sold were actually too small to be profitably cultivated on their own.[53]

Nowhere in any of these "coupled" contracts did the courts indicate that the non-investment component of the package was transformed into a security by being part of a security. There was no indication that a lease in orange groves, sale of rabbits, purchase of cemetery lots, or any of the other examples were in and of themselves securities because they had been part of a security. In fact, the language suggests the opposite. For instance, in *Joiner*, the Court noted that without the drilling agreement, the overall contract would not have been a security saying, "[h]ad the offer mailed by defendants omitted the economic inducements of the proposed and promised exploration well, it would have been a quite different proposition."[54] Also, in a 1973 guidance, the SEC noted that if real estate that was part of a coupled contract was offered without the additional contract, it would not be considered a security.[55]

If the non-investment component of the investment contract is not transformed by its coupling then it is possible for it to be de-coupled. Therefore, a digital coin could be decoupled from the profit-making aspect of its package, and continue as a commodity on an established network. This idea is supported by a speech by Director Hinman, where he stated:

> Can a digital asset that was originally offered in a securities offering ever be later sold in a manner that does not constitute an offering of a security? In cases where the digital asset represents a set of rights that gives the holder a financial interest in an enterprise, the answer is likely 'no' . . .. But what about cases where there is no longer any central enterprise being invested in or *where the digital asset 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."[56] *(Emphasis added.)*

As the Director notes, in instances where there is a digital coin that is a virtual currency that is being sold as an investment, but it itself is virtual currency, the coin could be sold separately in the future outside the securities laws—i.e., as a commodity. In order to be considered a separate virtual currency on a network, Director Hinman noted that "purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial effort - the assets may not represent an investment

contract."[57] The Director indicates that both Bitcoin and Ether meet these criteria and are virtual currencies.[58]

Consistent with the Director's statements, the CFTC subsequently issued a "Request for Input (RFI) about Ethereum."[59] The CFTC notes that one of the motives for the RFI is to understand Ethereum because of its possible effect on Bitcoin, which, like Ether, the CFTC has defined as a virtual currency under its jurisdiction.[60] Consistent with its jurisdictional claim, the CFTC asks questions in its RFI about, inter alia, the Ethereum network's anticipated change from a "proof of work" consensus mechanism to a "proof of stake" mechanism.[61] The questions demonstrate the CFTC's concern that this change may inhibit the efficient validation of blocks, and potentially cause a fragmentation in the network.[62] The RFI is a clear indication that the CFTC's view is consistent with Director Hinman's assertion that even if an offering of a digital coin may be viewed as an offering of a security, once the coin is operating as a true virtual currency on an operating network, it can shed its security definition.

This conclusion is logical. If, for sake of argument, the Howey Company later tried to sell its orange groves outright, it would be illogical to assume that sale would be a security. In the same way, if a bona fide virtual currency is wrapped in an investment contract at the pre-network stage, but used as a stand-alone currency on that network, it would be illogical and inconsistent with SEC case law and Director Hinman's remarks, to call it a security. What is essential in this analysis is the understanding that the investment contract and the coin are regulatorily two different things. If the entire investment contract were sold on a platform, given the SEC's assertions, that platform would have to register as a securities exchange. But extricating a true virtual currency from the investment contract creates an entirely different transaction.

IV. CONCLUSION

Therefore, it is possible for a digital coin to be treated as a security or commodity at different points in its evolution. Importantly though, it is not the same asset that is changing from a security to a commodity. In the offering stage, the digital coin could be part of a package that presents an investment opportunity which is therefore a security. Once the network is established, the virtual currency within the initial package can be extracted and survive on the network as a virtual currency. Thus, the coin is not changing from one definition to another. The coin that is a security remains a security, and the coin that is a virtual currency remains one as well. However, depending on how a digital coin that is a virtual currency is packaged, it could be treated as both a commodity and security at different stages of its evolution.

ENDNOTES:

[1]Both Agencies have asserted that their jurisdictions do not overlap. The CFTC has noted that the SEC's analysis that some digital coins are securities is not inconsistent with their finding that "virtual currencies are commodities and that virtual tokens may be commodities or derivatives contracts depending on the particular facts and circumstances." CFTC. *Primer on Virtual Currencies*, at 14. LabCFTC, 2017; similarly, the SEC has indicated that their jurisdiction is not inconsistent with the CFTC's noting that, "The CFTC has designated bitcoin as a commodity. Fraud and manipulation involving bitcoin traded

in interstate commerce are appropriately within the purview of the CFTC, as is the regulation of commodity futures tied directly to bitcoin." SEC, "Statement on Cryptocurrencies and Initial Coin Offerings," note 2. Chairman Jay Clayton. Washington D.C., Dec. 11, 2017.

[2]CFTC, *Primer on Virtual Currencies, at 4*. LabCFTC, 2017.

[3]*See Commodity Futures Trading Commission v. McDonnell*, 287 F. Supp. 3d 213, Comm. Fut. L. Rep. (CCH) P 34222 (E.D. N.Y. 2018), adhered to on denial of reconsideration, 321 F. Supp. 3d 366, Comm. Fut. L. Rep. (CCH) P 34289 (E.D. N.Y. 2018), at 218, (Memorandum & Order).

[4]*Id.*

[5]*Id.* at 6.

[6]Title 7 U.S.C.A. § 1(a)(9)

[7]*See e.g.*, *In the Matter of: Barclays PLC, Barclays Bank PLC, and Barclays Capital Inc., Respondents, CFTC No. 15-25*, 2015 WL 2445060 (May 20, 2015).

[8]*See supra* note 3 at 24. Importantly, digital coins could also be derivatives. If, for instance, what is called a digital coin is not a virtual currency, but actually a smart contract, it may fall into the definition of a swap if, inter alia, it

(i) is an "option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies . . . or other financial or economic interests or property of any kind"; or

(ii) "provides for any purchase, sale, payment, or delivery . . . that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 7 U.S. Code § 1a(47)(i)&(ii).

The CFTC has acknowledged this possibility, noting, for example, that "[d]epending on its structure, operation, and relevant facts and circumstances, a smart contract could be a . . . futures contract, option on futures contract, [or] swap." See e.g., CFTC, *Primer on Smart Contracts, at 22*. LabCFTC, 2018. Indeed, the CFTC's own definition of a smart contract indicates its susceptibility to being defined as a swap; the CFTC states:

> a set of coded computer functions . . . [which] may incorporate the elements of a binding contract (e.g., offer, acceptance, and consideration), or may simply execute certain terms of a contract . . . [and] allows self-executing computer code to take actions at specified times and/or based on reference to the occurrence or non-occurrence of an action or event (e.g., delivery of an asset, weather conditions, or change in a reference rate) (emphasis added) See e.g., CFTC, *Primer on Smart Contracts, at 4*. LabCFTC, 2018.

Though this has not gotten a lot of attention, it is an important aspect of CFTC regulation that could affect the legal standing of applicable digital coins.

[9]*See* supra note 3 at 2.

[10]*See CFTC v. Gelfman Blueprint, et al.*, 2017 WL 4228737 (S.D. N.Y. 2017) (Final Judgment).

[11]*See Commodity Futures Trading Commission v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492, Comm. Fut. L. Rep. (CCH) P 34345 (D. Mass. 2018), at 494, (Memorandum of Decision); see also *CFTC v. My Big Coin Pay, Inc.*, Case No. 1:18-cv-10077 (D. Mass. Jan. 16, 2018), at 1-2, 7-8, (Complaint).

[12]See *CFTC v. My Big Coin Pay, Inc.*, Case No. 1:18-cv-10077 (D. Mass. Jan. 16, 2018), at 2 (Complaint).

[13]*Id.*

[14]*Id.* at 10.

[15]*Id.* at 17.

[16]SEC, "Digital Asset Transactions: When Howey Met Gary (Plastic)." William Hinman, Director of Division of Corporate Finance. San Francisco, CA, June 14, 2018.

[17]*Id.*

[18]*See e.g., United Housing Foundation, Inc. v. Forman*, 421 U.S. 837,at 9, 95 S. Ct. 2051, 44 L. Ed. 2d 621, Fed. Sec. L. Rep. (CCH) P 95206 (1975).

[19]SEC, "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO," at 6 (July 25, 2017), available at https://www.sec.gov/litigation/investreport/34-81207.pdf.

[20]*S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-9 66 S. Ct. 1100, 1102-1103, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946). The SEC has made clear, subsequent to Howey, that the Howey test does not require that the third party be *solely* responsible for the profits, but mainly. See e.g., SEC, "Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development." Washington, D.C., Jan. 4, 1973.

[21]SEC, "Digital Asset Transactions: When Howey Met Gary (Plastic)." William Hinman, Director of Division of Corporate Finance. San Francisco, CA, June 14, 2018.

[22]*See* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Cease-and-Desist Order and Civil Penalty, Securities Act Rel. No. 10575 (Nov. 16, 2018), (Admin. Proc. File No. 3-18898).

[23]*See* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Cease-and-Desist Order and Civil Penalty, at 7, Securities Act Rel. No. 10575 (Nov. 16, 2018), (Admin. Proc. File No. 3-18898).

[24]*Id.*

[25]*Id.*

[26]*Id.*

[27]*Id.*

[28]*Securities and Exchange Commission v. AriseBank, Jared Rice Sr., and Stanley Ford*, No. 3-18-cv-0186-M, at 2 (N.D. Tex. filed January 25, 2018).

[29]*Id.*

[30]*Id.* at 6. *See also* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Actions and a Cease-and-Desist Order, Securities Act Rel. No. 10608, (Feb. 20, 2019), (Admin. Proc. File No. 3-19004).

[31]*See Securities and Exchange Commission v. Blockvest, LLC*, Fed. Sec. L. Rep. (CCH) P 100309, 2018 WL 6181408 (S.D. Cal. 2018), on reconsideration, Fed. Sec. L. Rep. (CCH) P 100351, 2019 WL 625163 (S.D. Cal. 2019), *9 (Order Denying Plaintiff's Motion for a Preliminary Injunction).

[32]*Id.*

[33]*See SEC v. Blockvest et al.*, Case No. 18CV2287-GPC (BLM) (S.D. Cal. Oct. 3, 2018), at 13 (Complaint).

[34]*See supra* note 31 at 13.

[35]*Id.*

[36]*See* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Remedial Actions and a Cease-and-Desist Order, Securities Act Rel. No. 10574, at 1, 8, (Nov. 16, 2018), (Admin. Proc. File No. 3-18897).

[37]*Id.* at 3.

[38]*Securities and Exchange Commission v. PlexCorps*, 2018 WL 3038500 (E.D. N.Y. 2018), *3 (Complaint).

[39]*See* supra note 36 at 5.

[40]See supra note 12 at 10, 11.

[41]*Id.* at 10.

[42]*See* supra note 12 at 10-12.

[43]SEC, Chairman's Testimony on Virtual Currencies: The Roles of the SEC and CFTC. Chairman Jay Clayton. Washington D.C., Feb. 6, 2018; see also SEC, Chairman's Testimony on Virtual Currencies: The Roles of the SEC and CFTC. Chairman Jay Clayton. Washington D.C., Feb. 6, 2018; see also See Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Actions and a Cease-and-Desist Order, Securities Act Rel. No. 84075 (Aug. 14, 2018), (Admin. Proc. File No. 3-18739).

[44]*S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).

[45]*Id*. at 295.

[46]*Id*. at 296.

[47]*Id*.

[48]*Id*. at 297, 299.

[49]*Stevens v. Liberty Packing Corp.*, 111 N.J. Eq. 61, 161 A. 193 (Ch. 1932).

[50]*Securities and Exchange Commission v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S. Ct. 120, 88 L. Ed. 88 (1943), judgment entered, 53 F. Supp. 714 (N.D. Tex. 1944).

[51]*Id*. at 348.

[52]*Id*. at 349.

[53]*See supra* note 44 at 300.

[54]*See supra* note 50 at 348.

[55]SEC, "Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development," at 2. Washington, D.C., Jan. 4, 1973.

[56]SEC, "Digital Asset Transactions: When Howey Met Gary (Plastic)." William Hinman, Director of Division of Corporate Finance. San Francisco, CA, June 14, 2018.

[57]*Id*.

[58]*Id*.

[59]*See* CFTC. (December 2018). *Request for Input on Crypto-asset Mechanics and Markets*, at 6.

[60]*Id*. at 7.

[61]*Id*. at 6.

[62]E.g., *id*. at 8-9 ("Relative to a proof of work consensus mechanism does proof of stake have particular vulnerabilities, challenges, or features that make it prone to manipulation? In responding consider, for example, that under a proof of stake consensus mechanism, the chance of validating a block may be proportional to staked wealth.")