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SEC Releases Long-Awaited ‘Plain English’ Guidance for Digital Assets and Investment Contract Analysis

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On April 3, the SEC Division of Corporation Finance released a No Action Letter and a suggested framework for applying the investment contract analysis to tokens and digital assets.

No Action Letter reaffirms 1958 guidance: streetcar and private jet tokens are not securities

The Division of Corporation Finance FinHub released a No Action Letter that reaffirms decades old guidance that prepaid coupons are not securities. While the facts of the letter submitted by TurnKey Jet, Inc. have updated the 1958 guidance provided by the Commission in *Release No. 33-3890 (January 21, 1958)* to 21st century facts involving blockchains and private jets, the principles remain the same: trading stamps redeemable for cash or merchandise, streetcar tokens redeemable for a ride, Christmas gift certificates, box tops and meal tickets are not securities and were not intended to be included within the scope of the securities law statutes. While Turnkey Jet has a modern twist on a streetcar token by virtue of tracking the tokens via a blockchain rather than a physical token to be dropped into a machine, and the streetcar is now a private jet that can transport you across the eastern seaboard, the basic structure of a non-transferable, single use token redeemable for a singular purpose is the same. And now, despite the introduction of a blockchain for TurnKey Jet's users and carriers to facilitate ease of payment and lower transactions costs in connection with buying private jet flights via a prefunded escrow account, the conclusion is also the same. A non-transferable, pre-paid coupon, redeemable for cash, a specific service or merchandise only, is not a security. The no action request, originally submitted to the Staff on behalf of TurnKey Jet in May 2018, provided a detailed analysis applying the investment contract factors set forth in *Howey* to TurnKey Jet's proposed tokens; however, given the clear factual analogy and similarity to the Commission's 1958 guidance, the ultimate position reached by the Staff is hardly surprising.

Corp Fin staff expands Director Hinman’s guidance, publishes “framework” for investment contract analysis

The application of the SEC's historical guidance to a single use, non-transferable, dollar backed digital token has limited application across the broader implementations of blockchain technologies, particularly with respect to decentralized systems utilizing publicly available open source software. To address the more common implementations and applications of blockchain, tokens and cryptocurrencies, Division of Corporation Finance Staff announced the release of a "Framework for 'Investment Contract' Analysis of Digital Assets" which appears to expand upon the factors, originally laid out in Director Hinman's June 2018 speech, that may help inform an issuer's *Howey* analysis. The factors, which the release prominently notes are the views of the Staff and are not a rule, regulation, or statement of the Commission, are more numerous and more detailed than those provided in June. The Framework also identifies factors relevant to projects that have already launched a blockchain project or application and distributed a token. The Staff warns that such projects must evaluate whether the token should be subject to the application of the federal securities laws – in each case requiring the promoter or active participant to make nuanced determinations regarding the relative functionality of the network, the relative liquidity of the token, the nature of the active participant's ongoing role with respect to the network, whether or not the other 30+ factors cited by the Staff have been adequately addressed and how those factors should be weighted.

We will provide further analysis of the Framework, and its practical implications, in an upcoming alert.

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