

Federal Judge Rules That ICO Tokens Are Securities and Grants Preliminary Injunction

I. Overview

On February 14, 2019, Judge Gonzalo P. Curiel of the United States District Court for the Southern District of California determined that ICO tokens constituted securities, modifying his prior ruling and granting the motion of the Securities and Exchange Commission (the “SEC”) for a [preliminary injunction](#) against Blockvest, LLC (“Blockvest”).¹ The ruling reversed Judge Curiel’s prior decision from November 2018, in which he concluded that the SEC had failed to meet its burden of establishing that the initial coin offering (“ICO”) tokens in question were securities.² Judge Curiel deemed reconsideration of the SEC’s injunction request to be warranted “based upon a prima facie showing of Defendants’ past securities violation and newly developed evidence which supports the conclusion that there is a reasonable likelihood of future violations.”³

As we stated in our prior [client alert](#), which describes the facts of the Blockvest ICO matter in depth, Judge Curiel’s initial decision was best understood as dealing a “temporary setback” to the agency.⁴ That setback was indeed temporary; it lasted approximately two and a half months. On reconsideration, Judge Curiel relied on Ninth Circuit authority when assessing whether the Blockvest tokens were a security by reviewing “the ‘terms of promotional materials, information, economic inducements or oral representations’ . . . [to] inquir[e] into the ‘character of the instrument or transaction offered’”⁵ Judge Curiel held that the SEC had sufficiently demonstrated that “the promotion of the ICO of the [Blockvest] token was a ‘security’”⁶ and therefore that the Blockvest tokens satisfied the “investment contract” test set forth in the Supreme Court’s landmark decision in *SEC v. W.J. Howey Co.*⁷

II. Conclusion

In granting the requested injunction, Judge Curiel applied the SEC’s favored analysis under *Howey*. The decision is thus an unqualified victory for the SEC’s Division of Enforcement, which first articulated the agency’s thinking with respect to digital assets in a July 2017 [report of investigation](#) on the DAO.⁸ We expect that the SEC will continue to bring enforcement actions against ICOs on similar theories and now will have an important ruling by a prominent judge to cite in its favor.

¹ Order Granting Plaintiff’s Motion for Partial Reconsideration *Sec. & Exch. Comm’n v. Blockvest, LLC, et. al.*, No. 18CV2287-GPB(BLM), 2019 WL 625163 (S.D. Cal. Feb. 14, 2019).

² *Id.*

³ *Id.* at *4.

⁴ Cahill Gordon & Reindel LLP, *Federal Judge Rules SEC Failed To Establish ICO Tokens Are Securities* (Dec. 6, 2018).

⁵ *Id.* at *5.

⁶ *Id.* at *7.

⁷ 328 U.S. 293, 298-99 (1946).

⁸ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017).

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks (212.701.3439, hbanks@cahill.com); Bradley J. Bondi (202.862.8910, bbondi@cahill.com); Charles A. Gilman (212.701.3403, cgilman@cahill.com); Elai Katz (212.701.3039, ekatz@cahill.com); Geoffrey E. Liebmann (212.701.3313, gliebmann@cahill.com); Ross Sturman (212.701.3831, rsturman@cahill.com); C. Wallace Dewitt (202.862.8932, cwdewitt@cahill.com); or Matthew M. McDonagh (212.701.3959, mmcdonagh@cahill.com).

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