



Sep 12, 2018

Categories:

[Blockchain and Digital](#)

[Assets](#)

[Blogs](#)

[Publications](#)

Authors:

[Courtney Rogers Perrin](#)

[Alan K. MacDonald](#)

Cryptocurrency or a Security? Only the Jury Knows for Sure

As anyone launching an initial coin offering (ICO), token-generation event or whatever else they want to call it knows well—whether a token offering is a security or a cryptocurrency is a hot topic. The SEC seems to indicate many tokens are securities, while FinCEN says cryptocurrencies. Until recently, few courts have had the opportunity to weigh in on the matter. But on September 11, the United States District Court for the Eastern District of New York, in *United States v. Zaslavskiy*, issued a Memorandum & Order (the “Order”) on the defendant’s motion to dismiss.

The Order

In *Zaslavskiy*, the court was evaluating the defendant’s motion to dismiss in response to the United States’ allegation that the defendant made materially false and fraudulent representations and omissions in connection with two ICOs which violated securities laws. The defendant argued neither of his ICOs involved securities, and therefore, he did not violate securities laws.

The court began its analysis with the *Howey* test^[1], a fact-specific inquiry that has been the dispositive test for determining whether something is a security since 1946. The court rather quickly determined that, when accepting the facts as alleged by the United States,^[2] sufficient facts existed to support the plaintiff’s allegation that value given to the defendant in relation to his ICOs could constitute securities. Ultimately, however, the Court said that determination was up to the jury or other finder of fact.^[3]

This is important for two reasons. First, the Court did not “rule” that cryptocurrencies were securities. Rather, the Court ruled whether sufficient facts existed to allow the finder of fact to determine if value given to defendant in relation to his ICOs constituted “securities” under *Howey*. Second, in any action litigating whether something constitutes a “security,” the matter is not likely to be decided by a court in response to a motion to dismiss or for summary judgment. As this Court determined, the *Howey* test is

fact-specific, which means a judge is unlikely to issue a ruling that decides the case prior to the case going all the way to the finder of fact.

While evaluating the motion to dismiss, the Court made two other noteworthy points:

- Calling something a “cryptocurrency” does not mean that it is a cryptocurrency, nor does it mean that it is not a security. In short, form will not be elevated to substance.[\[4\]](#)
- Under *Howey*, the value given to the enterprise does not have to be cash. Goods or services suffice.[\[5\]](#)

Next Steps

At this juncture, those looking to launch ICOs or token generation events must stay apprised of any court rulings, regulatory guidance, or enforcement actions regarding cryptocurrencies and securities, while continuing to take steps to comply with all such rules and regulations. For those using tokens as part of their business model, i.e., by paying consultants or advisors in tokens, you will want to review Rule 701 and ensure compliance.[\[6\]](#)

If you are planning to launch an ICO or use tokens as part of your business model, please contact [Alan](#) or [Courtney](#), members of the [Blockchain and Digital Currency](#) group at Frost Brown Todd.

[\[1\]](#) An investment contract for purposes of the Securities Act means 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, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed by the enterprise.” *SEC v. W.J. Howey*, 328 U.S. 293, 299 (1946).

[\[2\]](#) See Order at 5.

[\[3\]](#) See Order at 10. For those who saw news headlines that a court “ruled” cryptocurrencies were securities, that was inaccurate.

[\[4\]](#) Order at 16–17.

[\[5\]](#) Order at 11.

[6] For a great article on the recent amendments to Rule 701, see [SEC liberalizes Rules for Private Company Equity Compensation](#).

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.