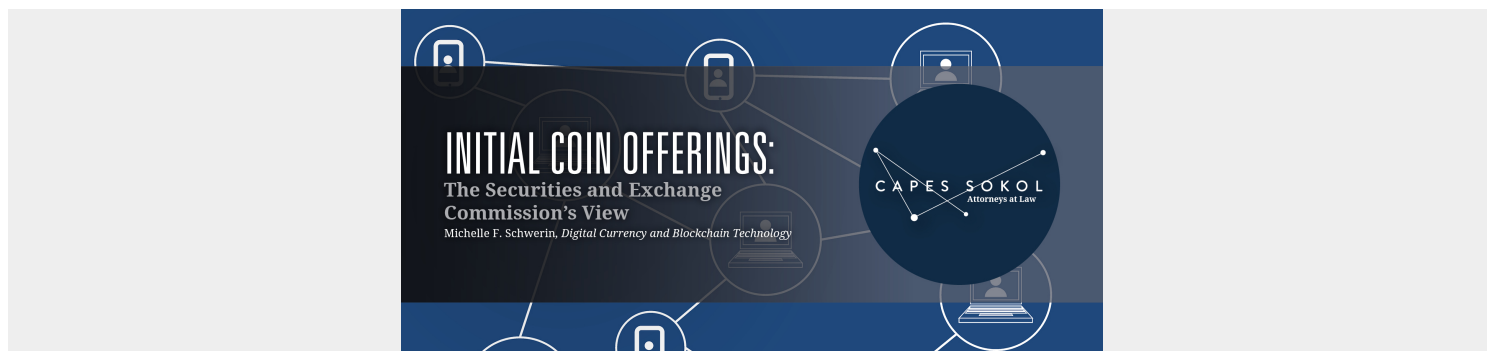


INITIAL COIN OFFERINGS: THE SECURITIES AND EXCHANGE COMMISSION'S VIEW

Posted on March 6, 2018 by Michelle F. Schwerin



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Part Two of Three: *In my prior blog post in this series, I described generally how an Initial Coin Offering (ICO) operates. In this post, I discuss how the coins or tokens generated from an ICO are viewed by the Securities and Exchange Commission.*

- **PART ONE:** [Initial Coin Offerings: A Primer and Suggestion of Impending Issues](#)
- **PART TWO:** [Initial Coin Offerings: The Securities and Exchange Commission's View](#)
- **PART THREE:** [Initial Coin Offerings: Uncertain Tax Consequences](#)

The Securities and Exchange Commission's View

In considering how these coins or tokens fit within the current regulatory scheme, the SEC has identified many questions with no clear answers. The SEC's words and actions clearly indicate a desire on the part of that agency to regulate the coins or tokens as a security.

In the past year, the Securities and Exchange Commission identified and scrutinized the structure of certain ICOs and determined that the coin or token sold was actually a security, concluding that the purchasers stood to profit from the entrepreneurial and managerial efforts of the developers (supporting the legal definition of "security").

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See, for example, [Report of Investigation Pursuant to Section 21\(a\) of the Securities Exchange Act of 1934](#): The DAO (Securities Exchange Act of 1934 Rel. No. 81207) (July 25, 2017) I and in the [Matter of Munchee, Inc.](#) (Securities Exchange Act of 1933 Rel. No. 10445) (Dec. 11, 2017)].

For other ICOs, the purchase of the coin or token is not a right against the to-be-operational network, but simply a right to transact on the to-be-built network. Many argue that these coins or tokens would not, theoretically, fall under the definition of “security”. Even if not a “security”, it is possible that the SEC might characterize the entire structure of collecting money and issuing coins or tokens under an ICO an “investment contract”.

The fact that these coins and tokens are, in some situations, sold on the secondary market and/or bundled together and valued – arguably similar to a mutual fund or mortgage-backed security – only complicates the analysis.

Just last week, Securities and Exchange Commission chairman Jay Clayton reported in a United States Senate Hearing:

“I believe every ICO I’ve seen is a security” and that “not one” ICO has been subject to SEC registration.

For additional information, check out: [Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission](#)

Whether the transaction is considered a sale of securities – in line with raising capital – or the sale of something else, will generate different regulatory consequences. Buyers and sellers must ask themselves: Am I buying or selling a security, commodity, or something else entirely?

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