2020

Shapeshifting Securities

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*By Wendy Gerwick Couture**

This essay demonstrates that, because of the flexible definition of "security," certain interests have the potential to fall in and out of the definition, and thus in and out of securities regulation. This essay coins this potentiality "shapeshifting." The phenomenon of shapeshifting securities can affect the regulation of interests in traditional business entities, like partnerships and limited liability companies, as well as newer asset types, like digital coins and tokens.

In particular, this essay identifies two scenarios in which securities might shapeshift. Under the first scenario, an economically identical interest is sold to multiple owners. Yet, because of different personal attributes of the owners or a differential allocation of power among the owners, the interest is a security in the hands of some but not others. Under the second scenario, an interest's classification as a security changes over time—depending on personal attributes of the owners, the owners' degree of control, or the importance of others' efforts in the success of the venture. Thus, at some points in its lifecycle, an interest is a security; and, at other points, it is not.

And yet, securities regulation—including issuer exemptions, resale exemptions, and regulation of trading platforms—is premised on the assumption that securities do not shapeshift. In other words, securities regulation assumes that an identical interest in the hands of different owners is either a security for all or a security for none and that, if an interest is within the scope of the securities laws, it stays there from issuance through resale and trading. This essay explores this tension.

I. Potential for Shapeshifting Securities

In order for an interest to be governed by the securities laws, it must fall within the definition of "security." This definition includes a laundry list of specific interests, such as stock and notes, as well as the catch-all category of "investment contracts."[1]

As interpreted by the Supreme Court in *S.E.C. v. W.J. Howey Co.* and its progeny, an interest qualifies as an investment contract if the following elements are present (unless the context

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otherwise requires):[2] (1) the investment of money (2) in a common enterprise (3) with the expectation of profits (4) derived primarily from the efforts of others.[3] "The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[4] This flexible test seeks to capture "the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[5]

The "efforts of others" element focuses on whether the "efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[6] This interpretation prevents a wily issuer from evading the securities laws "by adding a requirement that the buyer contribute a modicum of effort."[7] This analysis focuses on how the business actually operates, considering the allocation of power both in the governing documents and in practice.[8] This element gives rise to the potential for shapeshifting securities.

First, the "efforts of others" element can depend on an owner's personal attributes. If an owner is "so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers,"[9] then the element may be satisfied.[10] For example, partnership interests in a wireless cable television system were securities where "investors were targeted for their ignorance of law, accounting, and the wireless cable television industry."[11]

Yet, owners' personal attributes are neither uniform nor immutable. One owner might be knowledgeable and experienced, while another might not. One owner might evolve, becoming more knowledgeable and experienced over time. Upon resale of an interest, the new owner might possess a different degree of knowledge and experience than the prior.

Second, the "efforts of others" element depends on an owner's degree of control.[12] If a partnership or operating agreement "leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership," then the interest may be a security.[13] If interests are sold to "large numbers of the general public," then each owner's power may be "diluted to the level of a single shareholder in a corporation," thus supporting application of the securities laws.[14] If the owners are "geographically dispersed, with no preexisting relationships,"[15] then it may prevent them from effectively exercising power. The owners' "pseudonymity" may render it "difficult for them to join together to effect change or to exercise meaningful control."[16]

Yet, owners' degrees of control are neither uniform nor constant.[17] One owner might have greater power than another, based on the allocation of control in governing documents or on the percentage of ownership. Governing documents, such as partnership or operating agreements, might be amended to provide owners more or less power over time. Likewise, as securities change hands, power might be consolidated or diluted, and pseudonymity might be gained or lost.

Third, the "efforts of others" element requires that others' efforts be managerial rather than ministerial.[18] For example, where a company "offered silver bars for sale and, by high-pressure sales efforts, touted bar silver as a superior investment" but "the profits to the investor depended upon the fluctuations of the silver market, not the managerial efforts of [the company]," no investment contract was created.[19] Similarly, where the promoter of investments in viatical settlements identified the settlements to purchase and retained record ownership thereof but the investors' rate of return depended almost exclusively on "how long the insured survives," the interests were not investment contracts.[20]

Yet, others' efforts might be managerial at some points and ministerial at others. For example, as explained by William Hinman, the Director of the S.E.C. Division of Corporation Finance, a digital asset (like a coin or token) might be a security at the time of issuance but then fall out of the definition once the network is sufficiently decentralized:

> But this also points the way to when a digital asset transaction may no longer represent a security offering. If the network on which the token or coin is to function is sufficiently decentralized-where purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts-the assets may not represent an investment contract. Moreover, when the efforts of the third party are no longer a key factor for determining the enterprise's success, material information asymmetries recede. As a network becomes truly decentralized, the ability to identify an issuer or promoter to make the requisite disclosures becomes difficult, and less meaningful.[21]

Accordingly, Director Hinman expressed the view that applying the securities laws to trading on the Bitcoin and Ethereum networks "would seem to add little value" because those networks are sufficiently decentralized.[22] The S.E.C. Staff for the Strategic Hub for Innovation and Financial Technology has likewise recognized that digital assets might be sold as securities but later fall out of the definition,[23] depending on the continued role of a third party "active participant" ("AP") like a promoter or sponsor. According to the Staff, key factors include whether "the efforts of an AP, including any successor AP, continue to be important to the value of an investment in a digital asset," whether "the network on which the digital asset is to function operates in such a manner that purchasers would no longer reasonably expect an AP to carry out essential managerial or entrepreneurial efforts," and whether "the efforts of an AP are no longer affecting the enterprise's success."[24]

Moreover, as has been recognized by Professor James J. Park, a network might be decentralized at one point and then revert to being centralized, thus bringing the securities laws back into play:

> Another observation that should be made is that while a token like Ether could cease to become a security, it could also fall back into security status in certain circumstances. Suppose a single individual gains control of more than half of the Ethereum network's processing power and could thus essentially control the platform. If that happened, it would be likely that the success of the platform would depend upon the decisions made by that individual.[25]

Finally, as recognized by Professors Jonathan Rohr and Aaron Wright, as applied to digital assets like "utility tokens,"[26] the stage of development is relevant: "The timing of the sale in relation to functionality (that is, when the token can actually be used for something) is relevant insofar as a token sale that takes place far in advance of anticipated functionality is more likely to be a security because token holders are reliant upon the efforts of the development team for the project to ever reach the point at which the service, platform, or network can actually be used."[27] At a later point in the interest's life cycle, however, such as when a utility token is fully functional, the owners may not longer be reliant on the efforts of others. Thus, as others' efforts shift between managerial and ministerial, an interest might fall in or out of the securities laws.

II. Securities Regulation's Assumption That Securities Do Not Shapeshift

Because the "efforts of others" element is neither uniform nor immutable, securities can shapeshift. At one moment in time, an interest might be a security in the hands of some owners but not others. Over time, an interest might fall in or out of the definition. Yet, the securities laws—including issuer exemptions, resale exemptions, and regulation of trading platforms—assume that status as a security is both uniform and constant.

A. Issuer Exemptions

Upon issuance, if an interest is a security, it cannot be offered or sold unless it is registered with the S.E.C. or exempt from registration.[28] Although there are myriad issuer exemptions, at their core, each attempts to exempt from the registration requirement "securities transactions where there is no practical need for its application or where the public benefits are too remote."[29] In order to achieve this, issuer exemptions sometimes restrict the status of investors, cap the number of investors to whom a security can be sold, limit the aggregate offering price, or restrict the residency of purchasers. Yet, each of these restrictions is premised on the notion that all of the interests offered or sold in a particular offering are securities, regardless of the personal attributes of, or degree of control exercised by, the purchasers.

Some issuer exemptions require that all purchasers qualify as "accredited"[30] or limit the number of nonaccredited purchasers.[31] The rationale is to limit these exempt offerings to "those persons whose financial sophistication and ability to sustain the risk of loss of investment or fend for themselves render the protections of the Securities Act's registration process unnecessary."[32] The S.E.C. recently expanded the definition of "accredited investor" to include, not only various institutional investors and individuals meeting certain net worth or income requirements, but also individuals "holding in good standing one or more professional certifications or designations or credentials from an accredited educational institution that the Commission has designated."[33] Yet, even post-amendment, it is conceivable for a nonaccredited investor to possess a sufficient degree of knowledge, experience, and control over the venture to exempt the interests sold to that investor from the securities laws. For example, an individual investor might not satisfy the net worth, income, or education requirements and yet nonetheless be sufficiently involved in managing the business that he or she is not relying primarily on the efforts of others. In that circumstance, if an issuer exemption requires all purchasers to be accredited, should sale of non-security interests to this nonaccredited investor destroy the exemption? If an issuer exemption limits the number of nonaccredited purchasers, should the nonaccredited investor to whom non-security interests are sold count toward that limit?

Some issuer exemptions, like Rule 504[34] and Regulation CF,[35] include a cap on the aggregate offering price of securities sold pursuant to an exemption. Rule 504 is intended to be a "clear and workable exemption for small offerings by small issuers;"[36] similarly, Regulation CF is "intended to help provide startups and small businesses with capital by making relatively low dollar offerings of securities, featuring relatively low dollar investments by the 'crowd,' less costly."[37] Yet, it is possible that interests sold to a particular investor in an offering might not qualify as securities, although interests sold to other investors in the same offering do so qualify. In that circumstance, should the amount raised from the sale of the non-security interests be included when calculating the aggregate offering price?

Some issuer exemptions, like Rules 147[38] and 147A,[39] require that all purchasers reside in a particular state. These instrastate offering exemptions are intended to defer to states' "flexibility to adopt requirements that are consistent with their respective interests in facilitating capital formation and protecting their resident investors."[40] Yet, it conceivable that the interests sold to a particular nonresident do not qualify as securities. In that scenario, should the sale of the non-security interests to the nonresident destroy the exemption?

B. Resale Exemptions

Post-issuance, if an interest is a security, it cannot be resold unless it is registered with the S.E.C. or exempt from registration.[41] Resale exemptions often dovetail with issuer exemptions, premised on the assumption that an interest is a security at both the time of issuance and the time of resale. In addition, like issuer exemptions, resale exemptions assume that all resold interests are securities, regardless of the personal attributes of, or degree of control exercised by, the purchasers.

For example, the Rule 144 resale exemption depends on the status of the reseller as an "affiliate" or as a "non-affiliate" and the status of the securities to be resold as "restricted" or "unrestricted."[42] "The purpose of Rule 144 is to provide objective criteria for determining that the person selling securities to the public has not acquired the securities from the issuer for distribution."[43] It is conceivable that a reseller might possess sufficient knowledge, experience, and control that the interest is not a security in his or her hands, but the purchaser(s) might not, thus resulting in the acquisition of securities. In that scenario, the reseller would likely qualify as an "affiliate" of the issuer due to his or her control.[44] However, the interests to be sold would likely not qualify as "restricted securities" because they are not securities in the hands of the reseller.[45] Accordingly, should the resale satisfy the Rule 144 exemption even if only the less onerous requirements for "unrestricted" securities are met, including the absence of a holding period?

In addition, some resale exemptions, like Section 4(a)(7), require that all purchasers qualify as "accredited."[46] Yet, as in the context of issuer exemptions, it is possible that some purchasers, albeit nonaccredited, might possess the degree of knowledge, experience, and control to render their purchased interests nonsecurities. In that context, should the sale of the non-security interests to those nonaccredited investors destroy the resale exemption?

C. Regulation of Trading Platforms

It is unlawful for an exchange to effect any securities transaction unless the exchange is registered with the S.E.C. or exempt from registration.[47] "Exchange" is broadly defined to include "any organization, association, or group of persons" that "constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities."[48] As explained by the S.E.C., the "regulation of markets should both accommodate traditional market structures and provide sufficient flexibility to ensure that new markets promote fairness, efficiency, and transparency."[49] By definition, if the interests traded on a platform do not qualify as securities, then the platform is not an exchange within the ambit of the securities laws.[50] And, as recognized by Director Hinman, it is conceivable for interests to be securities when issued but not during later trading, such as digital assets that have become sufficiently decentralized.

And yet, there is insufficient guidance about that tipping point. When enforcing Section 5 of the Securities Act and Section 5 of the Exchange Act in the context of digital assets, the S.E.C. has often conflated status as a security upon issuance and status as a security in later trading.[51] Indeed, for this reason, Professor Kristin L. Johnson has critiqued the S.E.C.'s Cease-and-Desist Order against Zachary Coburn based on his role establishing EtherDelta for the trading of ERC20 tokens:

> Without a clear explanation regarding the attributes of the tokens that establish that they are securities, it is not clear specifically which tokens Coburn should have assumed were securities that triggered liability under Section 5 of the Securities Act. While the discussion of the application of Section 5 of the Securities Act is weak and muddled, the discussion regarding the application of Section 5 of the Exchange Act is almost entirely absent.[52]

Accordingly, scholars, including Professor Johnson, have recognized the need to "create new rules that recognize the distinctions between centralized and decentralized exchanges and distinguish these types of exchanges from traditional securities and commodities exchanges."[53]

III. A Path Forward

The potential for shapeshifting securities, in the context of both traditional business entities and innovative digital assets, should inspire a reexamination of the scope of securities regulation and the assumptions underlying it. Just as the definition of "security" is flexible in recognition that "substance must govern over form,"[54] so too should the regulation of offerings, resales, and trading platforms. Each of these regulatory schemes should explicitly account for the potential for interests to be securities in the hands of some investors and not others and for interests to be securities at some, but not all, stages in their lifecycle. Only then can securities regulation achieve its tripartite goal of furthering investor protection, capital formation, and market efficiency.

NOTES:

[1]15 U.S.C.A. §§ 77b(1), 78c(a)(10).

[2]*Marine Bank v. Weaver*, 455 U.S. 551, 558–59 (1982) ("The definition of 'security' in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires."); see Wendy Gerwick Couture, *The Risk of Regulatory Arbitrage: A Response to Securities Regulation in Virtual Space*, 74 Wash. & Lee L. Rev. Online 234, 242 (2018) (arguing that "the context clause should apply only to those situations in which the definition of investment contract reaches too broadly and sweeps in transactions that do not pose a risk of regulatory arbitrage").

[3]*S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946).

[4]See also *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975).

[5]*S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

[6]*S.E.C. v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973); see also *S.E.C. v. SG Ltd.*, 265 F.3d 42, 55 (1st Cir. 2001) ("The courts of appeals have been unanimous in declining to give literal meaning to the word "solely" in this context, instead holding the requirement satisfied as long as 'the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.' ") (citations omitted).

[7]*S.E.C. v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973).

[8]See *S.E.C. v. Friendly Power Co. LLC*, 49 F. Supp. 2d 1363, 1370 (S.D. Fla. 1999) ("In deciding whether the investors-partners have control over the partnership, courts considered the partnership agreement, but focus primarily on how the partnership actually operates. As such, this Court first will consider the Partnership Agreement signed by the investors, and then analyze the manner in which the partnerships actually were to operate.").

[9]*Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981).

[10]E.g., *S.E.C. v. Parkersburg Wireless Liab. Co.*, 991 F. Supp. 6, 8 (D.D.C. 1997) (finding that LLC interests were securities where "many of the investors in the company were unemployed or retired, and many were over 60 years old").

[11]*S.E.C. v. Telecom Mktg., Inc.*, 888 F. Supp. 1160, 1166 (N.D. Ga. 1995).

[12]See, e.g., Wendy Gerwick Couture, *Warning: Your LLC Interest Might Be A Security*, 54 Advocate 31 (2011) ("[C]ourts have considered the following additional factors when analyzing whether an LLC interest is a security: (1) whether the members have the right to manage the business; (2) whether the members have the power to participate in the authorization of distributions; (3) whether the members have the right to call meetings; (4) whether the members' power is diluted; and (5) whether the members have the power to remove the manager for cause.") (citations omitted).

[13]*Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981).

[14]*Williamson v. Tucker*, 645 F.2d 404, 423 (5th Cir. 1981); see, e.g., *S.E.C. v. Telecom Mktg., Inc.*, 888 F. Supp. 1160, 1166 (N.D. Ga. 1995) ("Further, the number of partnership units sold so dilutes each partner's power that in actuality it appears none could exercise any meaningful partnership control.").

[15]*S.E.C. v. Merchant Capital, LLC*, 483 F.3d 747, 758 (11th Cir. 2007).

[16]S.E.C. Release No. 81207, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 at 11 (July 25, 2017) ("Second, the

pseudonymity and dispersion of the DAO Token holders made it difficult for them to join together to effect change or to exercise meaningful control. Investments in The DAO were made pseudonymously (such that the real-world identities of investors are not apparent), and there was great dispersion among those individuals and/or entities who were invested in The DAO and thousands of individuals and/or entities that traded DAO Tokens in the secondary market—an arrangement that bears little resemblance to that of a genuine general partnership.").

[17]See Comment, *Application of Investment Contract Analysis to Partnership Interest and Duel Regulation Under Federal and Kansas Securities Laws*, 45 U. Kan. L. Rev. 1275, 1296 (1997) ("It is conceivable that a partnership interest that is not a security may become one under Kansas law without a transfer if its owner initially participates actively in the management, then later becomes passive. This should not, however, impact whether the interest was a security at the time of purchase.").

[18]See Couture, Securities Regulation of Alternative Litigation Finance, 42:1 Sec. Reg. L.J. 5, 11 (2014) ("Several courts have distinguished between managerial efforts and ministerial efforts, holding that if an investment's profitability depends merely on the exercise of ministerial efforts 'of the promoter or a third party,' the investment does not qualify as an investment contract, regardless of who exercises those ministerial efforts.").

[19]*Noa v. Key Futures, Inc.*, 638 F.2d 77, 79 (9th Cir. 1980).

[20]*S.E.C. v. Life Partners, Inc.*, 87 F.3d 536, 545 (D.C. Cir. 1996).

[21]Speech: William Hinman, Remarks at the Yahoo Finance All Markets Summit, CryptoDigital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018), at https://www.sec.gov/news/speech/speech-hinman-061418#_ftnref10.

[22]*Id*.

[23]S.E.C. FinHub Staff Guidance, Framework for "Investment Contract" Analysis of Digital Assets (April 3, 2019), at https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (providing guidance about how to evaluate "whether a digital asset previously sold as a security should be reevaluated at the time of later offers or sales").

[24]*Id*.

[25]James J. Park, *When Are Tokens Securities? Some Questions from the Perplexed* (Dec. 10, 2018), Lowell Milken Institute Policy Report (Dec. 2018), available at https://ssrn.com/abstract=3298965.

[26]Rohr & Wright, Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets, 70 Hastings L.J. 463, 475–76 (2019) (distinguishing between "utility tokens," which "grant holders the right to access, use, and enjoy a given technology or participate in an online organization," and "investment tokens," which "are not only functional in nature but provide holders with economic rights, such as a share of profits generated by a project or organization").

[27]Rohr & Wright, Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets, 70 Hastings L.J. 463, 518 (2019).

[28]15 U.S.C.A. § 77c(a), (c).

[29]H.R. Rep. No. 85, 73rd Cong, 1st Sess. 5 (1933).

[30]17 C.F.R. § 230.506(c)(2)(i); 15 U.S.C.A. § 77d(a)(7), (d)(1).

[31]17 C.F.R. § 230.506(b)(2)(i).

[32]S.E.C. Release No. 33-6683, Regulation D Revisions; Exemptions for Certain Employee Benefit Plans (Jan. 16, 1987).

[33]S.E.C. Release No. 33-10824, Amending the "Accredited Investor" Definition (Aug. 26, 2020).

[34]17 C.F.R. § 230.504(b)(2).

[35]17 C.F.R. § 227.100(a)(1).

[36]S.E.C. Release No. 33-6389, Revision of Certain Exemptions From Registration for Transactions Involving Limited Offers and Sales (March 16, 1982).

[37]S.E.C. Release No. 33-9974, Crowdfunding (Nov. 16, 2015).

[38]17 C.F.R. § 230.147.

[39]17 C.F.R. § 230.147A.

[40]S.E.C. Release No. 33-10238, Exemptions To Facilitate Intrastate and Regional Securities Offerings (Nov. 21, 2016).

[41]15 U.S.C.A. § 77c(a), (c).

[42]17 C.F.R. § 230.144.

[43]S.E.C. Release No. 33-8869, Revisions to Rules 144 and 145 (Dec. 6, 2007).

[44]17 C.F.R. § 230.144(a)(1) ("An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.").

[45]17 C.F.R. § 230.144(a)(3) ("The term restricted securities means 'Securities acquired' . . .").

[46]15 U.S.C.A. § 77d(a)(7), (d)(1).

[47]15 U.S.C.A. § 78e.

[48]15 U.S.C.A. § 78c(a)(1); see also 17 C.F.R. § 240.3b-16.

[49]S.E.C. Release No. 34-40760, Regulation of Exchanges and Alternative Trading Systems (Dec. 22, 1998).

[50]Johnson, Regulating Cryptocurrency Secondary Market Trading Platforms, 1/8/2020 U. Chi. L. Rev. Online 1, 10 (2020) ("Pursuant to the proposed 'sufficiently decentralized' standard, if a coin or token is decentralized and, therefore, not a security, creating a trading venue for counterparties to exchange the security may introduce obligations to comply with a regulatory regime instituted by, for example, state or federal banking or money transmission statutes but not federal securities laws.").

[51]E.g., S.E.C. Release No. 84553, In the Matter of Zachary Coburn, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order at 9 (Nov. 8, 2018) ("During the Relevant Period, EtherDelta operated as a market place for bringing together the orders of multiple buyers and sellers in tokens that included securities as defined by Section 3(a)(10) of the Exchange Act. The purchasers of such digital tokens invested money with a reasonable expectation of profits, including through the increased value of their investments in secondary trading, based on the managerial efforts of others."); S.E.C. Release No. 81207, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 at 16 & 17 (July 25, 2017) ("During the Offering Period, The DAO sold approximately 1.15 billion DAO Tokens in exchange for a total of approximately 12 million ETH, which was valued in USD, at the time, at approximately $150 million. Because DAO Tokens were securities, The

DAO was required to register the offer and sale of DAO Tokens, unless a valid exemption from such registration applied . . . The Platforms that traded DAO Tokens appear to have satisfied the criteria of Rule 3b-16(a) and do not appear to have been excluded from Rule 3b-16(b). As described above, the Platforms provided users with an electronic system that matched orders from multiple parties to buy and sell DAO Tokens for execution based on non-discretionary methods.").

[52]Johnson, Regulating Cryptocurrency Secondary Market Trading Platforms, 1/8/2020 U. Chi. L. Rev. Online 1, 9 (2020).

[53]Johnson, Regulating Cryptocurrency Secondary Market Trading Platforms, 1/8/2020 U. Chi. L. Rev. Online 1, 13 (2020); see also Rohr & Wright, Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets, 70 Hastings L.J. 463, 521 (2019) (arguing for the creation of a safe harbor for platforms facilitating the trading of non-security tokens) ("The safe-harbor should be designed in a fairly straightforward manner, insulating compliant exchanges from liability for facilitating the sale of unregistered securities, provided they took certain steps prior to listing the token and take immediate steps to delist if it is subsequently found to be a security.").

[54]*Long v. Shultz Cattle Co.*, 881 F.2d 129, 133 (5th Cir. 1989).