



THE CRYPTO LAWYERS

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MEMORANDUM

To: MyBit AG
From: The Crypto Lawyers, LLP
Date: June 12, 2018
Re: U.S. Securities and Commodities Laws in re MYB

Introduction

Our firm has been asked to render an opinion as to whether MyBit token (“MYB”) is likely to be deemed a security under U.S. federal securities laws, or subject to regulation as a commodity. No opinion is expressed with regard to any other body of law or legal construct. It is widely recognized that neither an opinion letter nor any particular legal opinion expressed therein is intended to be – or is – a guarantee of a particular outcome.¹ Please be advised that the Security Exchange Commission (“SEC”), a U.S. court of competent jurisdiction, or a cryptocurrency exchange, may reach an alternative conclusion to that stated in this letter.

The analysis in this opinion is based on the information provided to our firm by the MyBit Stiftung, a foundation registered in Zug, Switzerland # CHE-177.186.963, (the “Foundation”), the Foundation’s whitepaper, and related documents until this opinion’s date. If these documents are revised in the future, the relevant analysis may change. While our firm conducts reasonable due diligence to establish the veracity of the factual information provided to us, we do not conduct an audit of computer code to confirm that a particular software or algorithm functions as intended or as described. Further, nothing in this opinion is intended to create an attorney-client relationship with any purchaser of MYB. Purchasers of MYB should seek independent legal counsel regarding the implications of their purchase.

The MyBit Ecosystem

The Foundation was formed in 2017 to oversee the development of MyBit. MyBit is an ecosystem built on top of the Ethereum blockchain that enables decentralized crowd-funding of revenue generating assets (the “Assets”) and automates income distribution in real time.² MyBit has two components. First, the MyBit Platform (the “Platform”), a web-based application interface wherein potential investors can purchase a share of IoT Assets that have been listed by their owner. And second, MYDAX, a decentralized peer-to-peer exchange wherein users can purchase and sell fractional shares of their Assets. MYDAX can operate independently from the MyBit

¹ *Smith v. Lewis*, 13 Cal. 3d 349, 358, 118 Cal. Rptr. 621, 627 (1975). See RESTATEMENT § 52, comment b; ABA Principles § I.D.

² The Assets envisioned for the MyBit ecosystem include Internet-of-Things (“IoT”) devices such as photovoltaic systems, cryptocurrency ATMs, cryptocurrency miners, and vending machines. According to the BSA Foundation, there will be over 50 million connected IoT devices by 2025 generating over \$11 trillion in yearly revenue, available at <https://software.org/press-release/connecting-to-new-opportunities-through-connected-devices>

Platform.

The MyBit Platform is controlled, maintained, and updated through one central autonomous Ethereum smart contract known as the MyBit Hub. A transaction on the Platform consists of three events each handled by a separate smart contract: Asset creation, Asset funding, and Asset distribution. During the Asset creation event, operators can list Assets on the MyBit Platform and determine the funding period for a particular Asset.³ Operators may lock MyBit tokens (MYB) in escrow before starting a funding period for a new asset to increase trust from funders. The amount of escrowed MYB the operator can retrieve depends upon Asset returns.

During the Asset funding event, users are able to send Ether (“ETH”) to a newly created smart contract address associated with the created Asset. The smart contract rewards participants with shares equal to the amount that they contributed. If the Asset successfully meets its funding target the smart contract distributes the ETH fundraised to the operator. The Foundation takes a 1% network transaction fee from the amount of ETH that was raised. If the funding period fails (i.e. the ETH fundraising goal is not met), the smart contract automatically refunds ETH to participants of the funding event. Similarly, operators retrieve their escrowed MYB.

Lastly, the Asset distribution event deals with receiving and distributing the revenue generated by Assets, as well as managing ownership units.

It is crucial to understand that the Foundation does not manage any money generated from Assets nor makes investment decisions on behalf of MyBit users. It merely provides the Platform that connects Assets’ owners with potential crowdfunding participants and smart contracts that automatically execute agreed upon transaction. MyBit’s whitepaper provides that “MyBit is categorized as an Investment Platform under the Financial Technology sector. This means that MyBit is a toolkit/software application to streamline investing, but is not in the business of managing money nor making decisions on behalf of clients.”⁴

The MYB Token Sale

In furtherance of its mandate, the Foundation decided to conduct a token sale, and to that end, created 5 million MYB ERC20 tokens via an Ethereum smart contract. From July 2017 to August 2017, the Foundation sold approximately 2.8 million MYB and retained approximately 2.2 million MYB tokens, used to fund future development of the MyBit ecosystem. At the time of the token sale, the Foundation had a minimum viable product (“MVP”) that showcased the core functionality of the MyBit Platform and MYDAX exchange.

In May 2018, the Foundation conducted a token swap using an Ethereum smart contract wherein every MYB holders received 36 new MYB tokens for each one MYB they held from the token sale. As a result, the total supply increased 36-fold to approximately 180 million MYB tokens with approximately 101 million MYB available for public swap.

According to a press-release from the Foundation, the newly swapped MYB are also ERC20 compliant tokens, however, each MYB token now has 18 decimal places instead of 8, which renders micro payments easier.⁵

³ To date, the Foundation manually selects the assets to be listed on the MyBit Platform. That process will eventually be decentralized wherein operators and users will interact directly with each other.

⁴ MyBit Whitepaper at 3, available at https://files.mybit.io/files/MyBit_Whitepaper_v3.0.0.pdf

⁵ Joost Toornend, *A new Era for MyBit*, (May 7, 2018), available at <https://medium.com/mybit-dapp/as-we-are-on-the-brink-of-entering-mybits-new-era-we-have-a-very-important-announcement-to-make-a4cda1cd6956>

The MYB Token

MYB acts as an access token to the MYB Platform by using a Proof-of-Burn protocol, which means that each user must burn MYB to access the Platform. Proof-of-Burn is intended to replace Proof-of-Stake and Proof-of-Work protocols while achieving distributed consensus. Proof-of-Burn's significance is largely brought about by "burning tokens" in an unrecoverable manner such that it is easy to verify and extremely hard to undo. This protocol increases security by increasing the cost to attack the Platforms.

MYB incentivize Asset Managers, who are voted-in by participants of the Asset crowdsale, to manage a particular Asset successfully. Asset Managers' duties include, *inter alia*, making sure the Asset functions properly and generates revenue. Asset Managers are required to collateralize their MYB tokens in an escrow smart contract as an assurance that they will perform their duties diligently. If they are removed from their position, the escrowed MYB is forfeited. Asset Managers can withdraw escrowed MYB in proportion to the return-on-interest the asset generates. Once the escrowed MYB is fully withdrawn, only the monthly revenue streams from the Asset will incentivize the Asset Manager to keep the asset functioning. Any MYB holders can also post the required MYB escrow for Asset Managers and in return receive a portion of the revenue stream assigned to the Asset Manager.

To date, MYB are traded in the secondary market including but not limited to the following exchanges: Bancor, LAToken, and ForkDelta.

Although this legal memorandum describes both MYB and the MyBit & MYDAX Platforms, the analysis below under the *Howey* test exclusively covers MYB, and any information provided regarding the MyBit & MYDAX Platforms is included for contextual understanding only. For example, we do not analyze whether particular transactions taking place on the MyBit & MYDAX Platforms may amount to securities offerings.

The Howey Test Applied to MYB

It is illegal to offer or sell securities in the U.S. unless the offer and sale are exempt under the federal securities laws or made pursuant to an effective registration statement filed with the Securities and Exchange Commission (the "*SEC*"). One type of a security under federal law is an "investment contract."⁶ Consistent with the general position of industry professionals, cryptocurrency exchanges, and the SEC, we believe that the "investment contract" analysis is the best fit for analyzing most coin sales under the U.S. federal securities laws.⁷ Since the 1930s, courts have generated significant analysis of what is meant by the term "investment contract" and this opinion will apply this analysis to MYB.

The United States Supreme Court in its 1946 decision in *SEC v. W.J. Howey* provided the seminal definition for the term "investment contract." An investment contract is 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."⁸ Many courts in the succeeding seventy-two years have further expounded on each of the constituent parts of this test, now known as the *Howey* test. Courts often break the *Howey* test into three elements to determine whether an asset is a security. Those elements are: (1) that there is an investment of money, (2) in a common enterprise (3) with the expectation of profits solely from the efforts of others.⁹ If and only if all elements are satisfied, then a contract, scheme, or arrangement passes the *Howey* test and constitutes a security. If any one of the elements is not met, the arrangement fails the *Howey* test and subject of the test is not a security.

⁶ The Securities Act of 1933, as amended, Section 5, 15 U.S.C. § 77e(a), (c); 77d.

⁷ See SEC Release No. 81207, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (July 25, 2017), available at <https://www.sec.gov/litigation/investreport/34-81207.pdf>

⁸ *SEC v. Howey Co.*, 328 U.S. 293 (1946).

⁹ *id.* at 301.

Our analysis is based on two key questions inherent in the flexible *Howey* test that demarcates a securities classification of a given asset: is the coin or token valuable primarily as an investment or as a useful item? And is there an issuer backing up that value or is the value the result of a network of unaffiliated participants in an industry and market? These questions illustrate the difference between coins or tokens that may provide positive returns for holders as a result of the efforts of others, versus assets that increase in value as a reflection of the positive qualities of the network and a natural demand for the coins or tokens that operate within that network. With regard to coins or tokens that function as a utility on a network, these coins or tokens streamline commerce and provide a decentralized and democratized mechanism for equitable prices and efficient transactions between individuals.

Further, as Jay Clayton, Chairman of the SEC, recently highlighted in his speech at Princeton University, "[w]hat we find in the regulatory world, the use of a [utility] token evolves over time. The use can evolve toward or away from a security."¹⁰ This statement is particularly relevant to the analysis of cryptocurrencies because while some may have satisfied elements of the *Howey* test at the time of their inception (assuming there was a token sale), these outcomes can realistically change over time. For example, an incomplete platform conducting a token sale can quickly become a completely decentralized platform that can only be joined via the secondary market or individual effort (e.g. mining). Given the regulatory uncertainty over the last few years, we find the most relevant time period for assessing whether a token or coin is a security is the current time. While we will analyze the historical development of the coin or token as well, our ultimate conclusions reflect the current status of the asset as it stands at the date of this opinion.

1. Investment of Money

"The first component of the *Howey* test focuses on the investment of money. The determining factor is whether an investor 'chose to give up a specific consideration in return for a separable financial interest with the characteristics of a security.'"¹¹ Therefore, coins or tokens that are not sold for consideration do not satisfy the investment of money element. For example, if all coins are distributed for free, then there is no consideration. Coins or tokens which are sold in a crowdsale, regardless of whether sold for fiat or digital currency (or goods, services, or promissory notes) almost definitely involve an investment of money.¹²

With regard to the first element, it is likely that purchasers of MYB made an "investment of money" because MYB tokens were purchased in exchange for ETH during the MYB token sale. As discussed above, an investment of money can take virtually any form. In addition, in the SEC's Investigative Report, the SEC opined that payment of cryptocurrency like ETH or BTC would likely satisfy the "money" portion of this element.¹³ Therefore, it is likely that MYB satisfies the investment of money element of the *Howey* test.

2. Common Enterprise

Federal circuit courts have used varying tests to analyze whether a common enterprise exists. Three approaches predominate: (i) horizontal; (ii) narrow vertical and (iii) broad vertical. However, the United States Supreme Court has not explicitly adopted any of the above definitions thus far.

Horizontal Common Enterprise

Under the horizontal approach, a common enterprise exists if there is a pooling of assets from multiple

¹⁰ Nikhilesh De and Mahishan Gnanaseharan, *SEC Chief Touts Benefits of Crypto Regulation*, (May 12, 2018) available at <https://www.coindesk.com/sec-chief-not-icos-bad>

¹¹ *SEC v. SG Ltd.*, 265 F.3d 42, 46 (1st Cir. 2001) (quoting *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 559 (1979)).

¹² *Useton v. Comm. Lovelace Motor Freight, Inc.*, 940 F.2d 564, 574 (10th Cir. 1991) (In determining whether an investment contract exists, the investment of "money" need not take the form of cash.)

¹³ See *supra* note 7.

investors so that all share in the profits and risks of the enterprise.¹⁴ Whether funds are pooled is the key question, and thus, in cases where there is no pooling of funds or sharing of profits, a common enterprise may not be deemed to exist.¹⁵

Here, a pooling of assets took place because purchasers of MYB commingled their funds during the token sale by depositing ETH into a wallet address controlled by the Foundation. However, that pooling of assets was not for the purpose of purchasing an interest or a share for future profits within a common enterprise such as the Foundation itself, but rather for interested parties to purchase MYB tokens, which are required to use the MyBit ecosystem. As explained above, users must burn MYB tokens by sending them to a smart contract address in order to use the MyBit Platform and MYDAX. Moreover, the MYB token is indispensable to MyBit decentralized crowdfunding model because it acts as an incentive for Asset Managers to perform their duties diligently. Lastly, purchasers of MYB do not share in the risks of the offering entity, except in the universal manner that purchasers of a product assume some degree of risk that the selling entity will fall short with respect to maintenance and support of the product.

Accordingly, we conclude that the horizontal approach to “common enterprise” element of the *Howey* test is likely not met.

Narrow Vertical Common Enterprise

Under the narrow vertical approach, it is not necessary that the funds of investors are pooled, there must be a direct correlation between success or failure of the investment and success or failure of the promoter(s)’ efforts.¹⁶

Here, the Foundation functions most closely to a promoter because it oversees the development of the MyBit ecosystem. To date, the MyBit ecosystem is not yet *fully* functional, and thus, still relies, to some degree, on the Foundation’s manual off-blockchain efforts of a typical promoter.¹⁷ These efforts include, *inter alia*, marketing, the front-end development of various segments of the MyBit and MYDAX Platforms, and the optimization of already existing smart contracts.

Accordingly, we conclude that, to date, the narrow vertical approach is likely met because, to date, the utility, and thus, success of MYB tokens is correlated to the success of the Foundation’s aforementioned efforts. However, once the MyBit Ecosystem is fully operational, the reliance that future MYB tokens holders place on the Foundation, as a promoter will decrease, leading to the possibility of the end of the common enterprise.

Broad Vertical Common Enterprise

The broad vertical approach considers whether the success of coin or token holders depends on the promoter’s expertise.¹⁸ If there is such reliance, then a common enterprise will be deemed to exist.

As noted in the discussion of narrow vertical commonality, the success of MYB tokens is partly related to the success of the Foundation’s aforementioned off-blockchain efforts. Similarly, we believe that the success of MYB tokens depends, to some degree, on the Foundation’s expertise related to its off-blockchain efforts. For

¹⁴ *SG Ltd.*, 265 F.3d at 49.

¹⁵ See e.g., *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 101 (finding discretionary future trading account was not investment contract because there was no pooling of funds); *Wals v. Fox Hills Dev. Corp.*, 24 F.3d 1016 (7th Cir. 1994) (promoter of condominium timeshare did not pool profits and thus no common enterprise existed).

¹⁶ See *SEC v. Eurobond Exchange Ltd.*, 13 F.3d 1334 (9th Cir. 1994) (imposition of profit limitations on investors through requiring promoter to receive excess return rate tied promoter’s fortunes to investors).

¹⁷ We note, as mentioned above, that MyBit Platform and MYDAX had MVPs prior to MYB token sale.

¹⁸ See *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir. 1974).

this reason, it is likely that the common enterprise element is satisfied under the broad vertical approach for the MYB token.¹⁹

Various commentators have argued that if a sale of coins or tokens is made before any code has been deployed on a blockchain, this is more likely to result in a common enterprise where the profits arise from the efforts of others. This is because the buyers are completely dependent on the actions of the developers, and the buyers cannot actually participate in the network until a later time. In contrast, when there is a functioning network, reliance on developers (aka promoters)'s actions are less likely. In short, the closer the sale is to launch of the network, the less likely there is to be a common enterprise.²⁰ Here, the Foundation already had a functional minimum viable product and invited users to review the essential components of the MyBit and MYDAX Platforms *prior* to its token sale. This weigh in favor of MYB not be considered a “common enterprise” as compared with a platform that is entirely undeveloped at the time of the sale.

However, based on the foregoing analysis under the narrow vertical and broad approaches, we conclude that MYB tokens are likely to meet the second element of the *Howey* test and be deemed common enterprise under the narrow vertical and broad vertical approaches. This is largely due to the fact that, to date, the success of MYB tokens depends, to some degree, on the Foundation's expertise and off-blockchain efforts. When the MyBit ecosystem is fully operational and/or MyBit transitions into a decentralized autonomous organization, the reliance upon the Foundation's efforts and expertise will likely end.

3. Expectation of Profits Solely From the Efforts of Others

The final element of the *Howey* test requires that a person “is led to expect profits solely from the efforts of the promoters or a third party.”²¹ This is a two-part element. First, that the purchaser has an expectation of profit, and second that the expectation of profit arises solely or predominantly from the efforts of others.

First, an expectation of profit generally requires expected capital appreciation resulting from the development of the initial investment or expected participation in earnings resulting from the use of investor funds.²² There is no expectation of profit where a purchaser is motivated primarily by the desire to use or consume the item purchased.²³ Even purchasing an asset for consumption and profit is not enough, to satisfy the first part of this element, the purchaser's expectation of profit must *predominate* the expectation of using the item purchased.²⁴

Here, we believe that purchasers of MYB are motivated primarily by the desire to consume their tokens within the MyBit ecosystem rather than by an expectation of future profits. We reach that conclusion based on the clear stated and demonstrated utility that MYB tokens have within the MyBit Ecosystem. Indeed, MYB (a) allows its purchasers to access the MyBit and MYDAX Platform by requiring them to burn MYB tokens in a specific smart contract and (b) ensures that Asset Managers perform their managerial duties diligently by requiring them to post a collateral in the form of MYB in an escrow smart contract.

To the extent that token holders view their purchase as an investment with potential risks and rewards,

¹⁹ Commentators have similarly argued that decentralized peer-to-peer digital currencies like Bitcoin are not securities under the broad vertical approach based on the fact there is no common promoter. See *Is Bitcoin a Security?* JEFFREY E. ALBERTS & BERTRAND FRY, B.U. J. SCI. & TECH. L. (April 27, 2018) available at https://www.bu.edu/jostl/files/2016/01/21.1_Alberts_Final_web.pdf

²⁰ A securities Law Framework for Block Token, An initiative of Coinbase, Coin Center, Union Square Ventures and Consensys, (April 27, 2018) available at <https://www.coinbase.com/legal/securities-law-framework.pdf>

²¹ *Howey* 328 U.S. at 293, 298-99

²² *United Hous. Found. v Forman*, 421 U.S. 837, 854-55 (1975).

²³ *id.* at 852-53.

²⁴ *id.* at 858 (“What distinguishes a security transaction . . . is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption . . .”). (Emphasis added.)

their “investment” is based on secondary market factors such as supply and demand based upon the attractiveness of the utility of the network to other users, rather than the sole efforts of the Foundation as a promoter. In our view, secondary market trading for MYB tokens, whether for speculation or otherwise, does not change the fundamental point that acquiring and holding MYB does not give rise to an expectation of profit solely from the efforts of others. Support for this view exists in *Howey*, where the Supreme Court bases its holding on the fact that investor sought to profit from the efforts of the contracting party and promoter of the underlying enterprise rather than the extent to which the arrangement gave rise to profit-driven secondary trading.²⁵

Second, assuming, *arguendo*, that the expectation of profit predominates the consumptive use, the “solely from the efforts of others” portion of the element asks “whether 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.”²⁶

Several federal courts have held, and we agree, that the mere possibility of an increase in value on a secondary market is not from the “efforts of others.” For example, in *Noa v. Key Futures*, a case involving a forward contract for silver bars, the Ninth Circuit found no expectation of profits from the efforts of others because once the purchase of silver bars was made, the profits to the investor depended primarily upon the fluctuations of the silver market, not the managerial efforts of Key Futures.²⁷ In another case involving a futures contract for sugar, a federal court in New York held the presence of a speculative motive on the part of the purchaser or seller did not, on its own, evidence the existence of an investment contract.²⁸

Although analogies are often made between Bitcoin and gold, these tangible precious metals and similar commodities are different from cryptocurrencies.²⁹ For example, a development team may continue to improve the network and the secondary market price of the token may appreciate as a result. This characteristic is not shared by other commodities. In the case of a utility token, the secondary market price is driven exclusively by supply and demand. Supply and demand can fluctuate to a variety of factors. One of those factors could be the efforts of the development team creating the token’s functionality; but once that functionality is created, any essential efforts have by definition already been applied. It would be difficult to argue that any improvement on an already-functional token is an “essential” managerial effort.

On the other hand, tokens which give, or purport to give, traditional equity, debt or other investor rights almost certainly satisfy the “efforts of others” query. For example, a token which does not have any current function is likely to be bought with an expectation of profit from the efforts of others, because no real use or participation by coin holders is possible. In contrast, a token which has a specific function that is only available to token holders is more likely to be purchased in order to access that function and less likely to be purchased with an expectation of profit that predominates the interest in consumption.

Here, assuming that MYB purchasers were motivated by an expectation of profit, they would not be relying solely or predominantly on the efforts of the Foundation or third-parties but their own active participation, and thus efforts, in the MyBit Ecosystem. This is because the only way to earn a profit holding the MYB token is to act as an asset manager or to place MYB tokens in escrow to vouch for an asset manager. In exchange for these individual efforts, a user could potentially earn a profit.

²⁵ See *Howey* 328 U.S. at 300 (finding that land sale contracts were “investment contracts” because investors in contracts “have no desire to occupy the land or develop it themselves; they are attracted solely by the prospects of a return on their investment); see also *Foreman*, 421 U.S. at 855-56.

²⁶ *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476, 482 (9th Cir. 1973) (*emphasis added*)

²⁷ *Noa v. Key Futures* 638 F.2d 77, 79 (9th Cir.1980).

²⁸ *Sinva v. Merrill Lynch*, 253 F. Supp. 359, 367 (S.D.N.Y. 1966).

²⁹ Interestingly, Commodity Futures Trading Commission (CFTC) Chairman J. Christopher Giancarlo recently said that Bitcoin bears several similarities to gold, although it has elements of many different asset classes.

Moreover, as demonstrated by several of the SEC enforcement actions with regards to token sales, (and as applicable here to MYB), the type of activities and behavior that the SEC considers unregistered securities offerings include: tokens backed by real estate where money is pooled for investment³⁰, where tokens represent a share of an interest in a company that invests in diamonds to achieve high returns³¹, and where promoters represent to investors that the tokens would yield “a 1354 percent profit in less than 29 days.”³² Here, the Foundation made no representations that the tokens would generate returns, that the tokens are “backed by” any tangible items, or that the funds would be used to invest in business ventures.

We note, however, that because the Foundation uses a Proof-of-burn protocol to allow access to the Platform, this bears a prima facie resemblance to *Munchee*, who “burned” MUN coins. However, as described above, Proof-of-Burn represents a marginal number of tokens burned (destroyed) in order to access the platform for the purpose of making the platform too expensive to attack. In contrast, *Munchee* burned tokens specifically to increase their value.³³ Thus, we believe this burning is distinguishable from *Munchee* in that the Proof-of-Burn protocol does not significantly affect the circulating supply of MYB, is not done with the intention of manipulating secondary market prices, and has a necessary security justification.

Based on the foregoing, we conclude that MYB likely does not satisfy either the “expectations of profits” or “solely from the efforts of others” portions of this element of the *Howey* Test.

Commodity Analysis

In 2015, and in the context of an enforcement action, the CFTC first asserted that “Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities,” citing Section 1a(9) of the Commodity Exchange Act (“CEA”) (“commodity” defined to include, among other things, “all services, rights and interests in which contracts for future delivery are presently or in the future dealt in.”).³⁴

In January 2018, the CFTC filed an unrelated action in the U.S. District Court for the Southern District of New York against an individual and corporate entity alleging, *inter alia*, that defendants operated a deceptive and fraudulent virtual currency scheme that induced customers to send money and virtual currencies to defendants in exchange for purported trading advice concerning the trading of virtual currencies, including Bitcoin and Litecoin. Alleging that the customers had lost substantial sums and that others were at risk of likewise suffering such losses, the CFTC sought to enjoin such acts and practices, to compel compliance with the CEA, and to recover civil monetary penalties and remedial ancillary relief, including but not limited to trading bans, restitution, disgorgement, rescission, and pre- and post-judgment interest.³⁵

Following the defendant’s motion to dismiss, on March 6, 2018, Judge Weinstein concluded that the CFTC has concurrent authority, along with other state and federal administrative agencies, and civil and criminal courts, over dealings in virtual currency. That said, the court recognized that Congress has yet to authorize an agency to regulate virtual currency.³⁶

While plenty of regulatory uncertainty remains, these CFTC’s actions as described above are not incongruent with their previous statements regarding CFTC jurisdiction. In particular, the CFTC stated as

³⁰ <https://www.sec.gov/news/press-release/2017-185-0> (May 17, 2018).

³¹ <https://www.sec.gov/news/press-release/2017-219> (May 17, 2018).

³² See *supra* note 31.

³³ See SEC Release No. 10445, Order Instituting Cease-And-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-And-Desist Order (Dec. 11, 2017), available at <https://www.sec.gov/litigation/admin/2017/33-10445.pdf>.

³⁴ *In the Matter of: Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan*. CFTC Docket No. 15-29, September 17, 2015.

³⁵ *CFTC v. Coindrop Markets*, E.D.N.Y., Case 1:18-cv-00361, (January 18, 2018.)

³⁶ *CFTC v. Coindrop Markets*, E.D.N.Y., 18-CV-361 at 9, (March 6, 2018.)

follows:

The CFTC’s jurisdiction is implicated when a virtual currency is used in a derivatives contract, or if there is fraud or manipulation involving a virtual currency traded in interstate commerce. – Beyond instances of fraud or manipulation, the CFTC generally does not oversee “spot” or cash market exchanges and transactions involving virtual currencies that do not utilize margin, leverage, or financing.³⁷

Based on this statement, absent the existence of fraud, market manipulation, derivative products, or margin trading, the CFTC’s jurisdiction does not relate to the exchange of MYB in the context of a cryptocurrency exchange.

Conclusion

Whether a coin or token is a security is based on the facts and circumstances of each coin or token.³⁸ In accordance with our analysis above, we conclude that the “investment of money” element of the *Howey* test is satisfied because MYB tokens were acquired in exchange for ETH and BTC during the Foundation’s token sale.

With regards to the second element of the *Howey* test, applying the conservative horizontal approach, we conclude that there is no common enterprise. We reach that conclusion because, although there was a pooling of assets (Ether) into a smart contract system to obtain MYB tokens, that pooling of assets was not for the purpose of sharing profits within a common enterprise, but rather for interested parties to secure their rights to access and transact on the MyBit and MYDAX Platforms.

On the other hand, applying the narrow and broad vertical approaches, we conclude that MYB is likely to meet the second element of the *Howey* test and be deemed common enterprise. This largely due to the fact that, to date, the MyBit Platform and MYDAX are still in development, and thus, that purchasers and holders of MYB partly rely on the Foundation’s efforts and expertise for the utility, and thus, success of the MYB token until the MyBit ecosystem is fully functional.

Third, we believe it is unlikely that holders of MYB are expecting a profit “solely based on the efforts of others” because, as represented by the Foundation, the sole and intended function of MYB token is to be consumed within the MyBit ecosystem.

Based on our review of *Howey*, other relevant case law, SEC guidance, albeit limited, on the subject of cryptocurrencies, and based on information provided and representations made to us by the Foundation, we are of the opinion that it is likely that MYB does not satisfy the “expectation of profits solely based on the efforts of others” element of the *Howey* test. And if one element of the *Howey* Test is not satisfied, no security exists. **Therefore, we conclude that MYB is not likely to be deemed a security.** Further, given the CFTC’s relatively clear position regarding its jurisdiction over cryptocurrency exchanges in the spot markets, MYB trading should not be subject to commodity regulation.

³⁷ A CFTC Primer on Virtual Currencies, LabCFTC, October 17, 2017 (May 13, 2018.) available at https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcftc_primercryptocurrencies100417.pdf

³⁸ SEC Release No. 81207 at 10.