

SUPX *Howey* Analysis

The U.S. Supreme Court provided the seminal definition of an “investment contract” as a “security” in *SEC v. W.J. Howey Co.*¹ An investment contract was 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 third party.”²

Courts typically break the *Howey* test into four prongs to determine: (i) whether there exists an investment of money; (ii) whether there exists a common enterprise; (iii) whether there exists an expectation of profits; and (iv) whether the expectation of profits is solely from the efforts of others. This test requires that all four factors be satisfied in order for the contract to qualify as an “investment contract” and “security.” A failure to meet one prong of the *Howey* test disqualifies the contract accordingly.

SUPX analysis under *Howey* prongs

Prong 1: Investment of Money

The SUPX token sale requires a purchaser to deliver government currency (USD) or another digital asset (BTC, ETH, or LTC) in order to receive the tokens in exchange. Thus, the first prong of the *Howey* test is satisfied by the SUPX sale.

Prong 2: Common Enterprise

A direct token presale typically is evidence of a common enterprise. Under the predominant horizontal commonality test, it exists when multiple investors pool assets and share together in the profits and risks of the enterprise. Horizontal commonality can be met with the following: (1) the SUPX tokens are fungible; (2) the entity pools all the money raised from selling the tokens; and (3) the entity uses the pooled funds to build the network.

With the SUPX token sale, the token will be completed prior to purchase. The funds raised from the SUPX sale will be pooled and used to complete the blockchain programming as well as covering related costs. Therefore, the second prong of the *Howey* test is satisfied.

Prong 3: Expectation of Profits

An expectation of profit normally means expected capital appreciation resulting from the development of the initial investment or expected participation in earnings resulting from the use of investor funds.³ There is no expectation of profit where a purchaser is motivated primarily by the desire to use or consume the item purchased.⁴

¹ 328 U.S. 293 (1946).

² *Id.* at 298-99.

³ *United Hous. Found. v. Forman*, 421 U.S. 837, 854-55 (1975).

⁴ *Id.* at 852-53.

It is logical to assume that a purchaser would not make a purchase at all if he expected to lose money or only break even. To satisfy this third prong, the purchaser's expectation of profit must *predominate* the expectation of using the thing purchased.⁵

In regard to the SUPX token, it seems unlikely that this prong would be met. While a purchaser is likely motivated by profit, that motivation is subordinate to an expectation of use. The utility of the SUPX token is not as a cryptocurrency, but rather as an element of the SUPX blockchain technology as it is integrated with supply-chain management and ecommerce usage. Ownership of SUPX allows the holder to utilize features in the SUPX blockchain. Additionally, the SUPX blockchain can be integrated into ecommerce via a simple API.

The SUPX token confers no ownership, rights to dividends, voting, equity, or any other attributes typically associated with a security. The SUPX token is not backed by real assets. The White Paper and the Asset Token Purchase Agreement for the SUPX token sale (the "Documents") affirm the utility nature of the SUPX token, provide ample forward-looking statements, and also specifically disavow any feature or attribute synonymous with a security, including the potential for profit. Further, these Documents repeatedly advise potential purchasers of the risks involved with their purchase and the non-security nature of the SUPX token.

Additionally, the promotion and marketing of the SUPX token specifically omit any reference to "investment," "returns," or "profits." This would also limit the expectation of profits any potential SUPX purchaser would have.

Due to the overwhelming utility nature of the SUPX token and the lack of any resemblance to a security, the third prong of the *Howey* test is not met. Thus, the SUPX token is not a security as established by U.S. law.

Prong 4: From the Efforts of Others

Assuming arguendo that Prong 3 was met, the fourth and final prong in the *Howey* test considers the source of the expectation for the purchaser's motive. This prong 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."⁶

As stated above, the SUPX token does *not* provide any rights to profits, dividends, or other investment interests. Any profits or financial incentives derived from the SUPX token would be due to the efforts of the holder, rather than a passive investment like a true security.

In sum, because the SUPX token bestows no rights to financial incentives or profits except through the efforts of the SUPX holder himself, the SUPX token fails to meet the fourth prong of the *Howey* test.

⁵ *Id.* at 858.

⁶ *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476, 482 (9th Cir. 1973).

Conclusion

As established above, the SUPX token fails to meet the third and fourth prongs of the *Howey* test and is thus not a security.