

SEC Sues Kik for ICO



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On June 4, 2019, the U.S. Securities and Exchange Commission (the “SEC”) filed a [complaint](#) in the Southern District of New York against Kik Interactive Inc. (“Kik”) alleging violations of Section 5 of the Securities Act of 1933 (the “Securities Act”).

The complaint arises from Kik’s offer and sale of \$100 million worth of blockchain-based digital assets known as “Kin Tokens” from May to September 2017.

In that time period, Kik sold Kin Tokens both (1) to accredited investors pursuant to Simple Agreements for Future Tokens (or “SAFTs”) and (2) in a general public sale to purchasers in select jurisdictions, including the United States.

The SEC claims that Kik thereby offered and sold unregistered, non-exempt “investment contracts” – a form of securities – in violation of Sections 5(a) and 5(c) of the Securities Act.

(According to the SEC, although Kik attempted to sell discounted Kin Tokens under the SAFTs in satisfaction of the exemption from registration provided by Rule 506(c) under Regulation D, the subsequent delivery of Kin Tokens to SAFT purchasers in September 2017 constituted an offer and sale of securities that was either part of the same offering as the general public sale or alternatively, should be integrated with that offering. And, because Kik did not take reasonable (*i.e.*, any) measures to verify that purchasers in the general public sale were accredited investors, the offering as a whole failed to satisfy the requirements of Rule 506(c) and thus was required to be registered with the SEC.)

Kik has been vocal in their opposition to the enforcement action and commitment to litigate.

In January 2019, Kik made its [Wells Response](#) publically available in a [blog post](#) entitled, “Four Commissioners at the SEC are About to Vote on the Future of Crypto in the U.S. You Need to Know Why We’re Fighting Back.”

More recently, Kik teamed up with other market participants to launch Defend Crypto, a donation platform that has raised over \$4.4 million worth of digital assets to fund Kik’s litigation war chest.

Finally, in response to the SEC’s complaint, Kik’s General Counsel reportedly [stated](#) that:

For the reasons set forth in our Wells Submission, the SEC’s complaint against Kik is based on a flawed legal theory. Among other things, the complaint assumes, incorrectly, that any discussion of a potential increase in value of an asset is the same as offering or promising profits solely from the efforts of another; that having aligned incentives is the same as creating a “common enterprise”; and that any contributions by a seller or promoter are necessarily the “essential” managerial or entrepreneurial efforts required to create an investment contract. These legal assumptions stretch the *Howey* test [the four-pronged test for determining whether a transaction, contract or scheme constitutes an investment contract] well beyond its definition, and we do not believe they will withstand judicial scrutiny.

If Kik does indeed proceed to trial, its outcome will, one way or the other, reverberate throughout the industry. Stay tuned.

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