

## **Securities Regulation Daily Wrap Up, TOP STORY—S.D.N.Y.: SEC brings charges for \$100M unregistered ICO, (Jun. 4, 2019)**

Securities Regulation Daily Wrap Up

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By [Anne Sherry, J.D.](#)

Kik Interactive raised more than \$55 million from U.S. investors by selling directly to the general public and through "Simple Agreements for Future Tokens" (SAFTs) that gave a discount to wealthy investors.

The SEC sued Kik Interactive for conducting an unregistered initial coin offering that raised \$100 million from investors in the U.S. and other countries—excepting Canada, where a provincial regulator had told Kik that what it was planning looked like a securities offering. The SEC claims that Kik told investors they would profit from its effort to create a digital ecosystem, a hallmark of a security under the *Howey* test. The tokens, called Kin, recently traded at about half the value public investors paid in the September 2017 offering ([SEC v. Kik Interactive Inc.](#), June 4, 2019).

With its instant messaging product dying off, Kik Interactive decided in 2017 to sell a trillion digital tokens in return for capital to fund company operations and the development of the "Kin ecosystem" where the tokens could be spent in the future. The SEC's complaint alleges that Kik saw this as a "hail Mary pass" and specifically went about crafting an offering that would appeal to "cryptoinvestors" and the growing market for "cryptoassets."

The public offering took place two months after the SEC issued [The DAO report](#) stating its view that digital assets may be securities and, if so, are subject to the federal securities laws and registration requirements. The DAO report focused on the *Howey* test, which had been on Kik's radar for months. Shortly after the report came out, Kik contacted the Ontario Securities Commission, which advised that a sale of Kin to the public would be a securities offering. Kik declined to sell Kin to investors from Canada and certain other countries, as well as certain U.S. states.

According to the complaint, in order to get around *Howey* by inventing a use for the Kin tokens, Kik created a so-called minimum viable product in the form of digital "stickers" that could hypothetically be purchased with Kin tokens. One sticker depicts a cartoon honey badger wearing a Kin baseball cap and holding a boombox, above which appears the phrase "lets JAM." In an internal email, an executive conceded that the stickers were created solely for compliance purposes and would "not be used in any way."

The SEC further alleges that Kik emphasized the opportunity to profit when pitching the offering, saying that the Kin tokens would become more valuable in the future. In public remarks, the CEO noted the similarities between the offering and venture capital investing. Kik did not disclose information that would have been required in a registration statement, namely its financial statements, which would have revealed that its costs far exceeded revenues, or that the company anticipated running out of money if the ICO was unsuccessful. In a [statement](#), Enforcement Co-Director Steven Peikin said that the unregistered offering prevented investors from making informed decisions. He added, "Companies do not face a binary choice between innovation and compliance with the federal securities laws."

The SEC's complaint advances a claim under Securities Act Section 5(a) and (c). Although Kik filed a Form D with respect to the SAFTs, the complaint alleges that neither the public offering nor the SAFTs were eligible for a Regulation D exemption because the SAFTs were part of a single offering of Kin or integrated with the offering, which was not limited to accredited investors.

Attorneys: Stephan J. Schlegelmilch for the SEC.

Companies: Kik Interactive Inc.

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