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legal status
of tobius group
tokens (emot)

06 July 2018

This report sets forth a legal analysis as to whether EMOT would likely constitute securities pursuant to relevant Cayman Islands securities law and U.S. securities laws for the purposes of Section 2(a)(1) of the Securities Act of 1933 (“Securities Act”) and Section 3(a) (10) of the Securities Exchange Act of 1934 (“Exchange Act”), including all material facts and the relevance of applicable case law (Howey Test, Family Resemblance Test, and Risk Capital Test, which are used in the United States to recognize a particular instrument as a security), as well as factors addressed in the SEC’s The DAO report, Munchee Inc. Cease and Desist Order, and other analytical frameworks.

No opinion is expressed with regard to any other body of law or legal construct, including without limitation the franchise laws of any U.S. state. No court or any administrative body has addressed the question of whether any blockchain tokens are “securities” under federal law; as such, the SEC or a court of competent jurisdiction may reach an alternative conclusion to that stated in this opinion letter. No warranties or guarantees of any kind as to the future treatment of EMOT or similar tokens are being made herein.

The below analysis is based on information obtained from a representative of the EMOT issuer, the Tobius Group Company’s (“Tobius Group”), and the law as it exists as of the date hereof. We assume no responsibility for any update of our advice, should there be any changes in legislation, unless we have been specifically engaged to do so.

Please note that in this Legal Opinion we have not revised and analyzed the corporate structure, product and solution ownership.

Executive Summary

Based on our legal analysis, the requirements of the U.S. securities law, the Cayman Islands securities law, as well as considering the legal practice in the given industry, we have arrived at the conclusion that:

- Based on the analysis of the benefits provided to EMOT holders, we assume that EMOT is a utility instrument for computational purposes and access to the platform (application) for which it is used; EMOT holders do not obtain any company rights; EMOT does not constitute a security under applicable federal or state securities laws. The trades of EMOT would not be subject to regulation under any Applicable Laws applicable to the trading of commodities.
- Based on the Howey Test, the EMOT Sale may look like the activity related to the money investments in the Tobius Group Project. EMOT could be used on an already developed platform or product, and the economic benefits for EMOT holders will be dependent on their efforts. Therefore, EMOT Sale campaign does not meet the “common enterprise element”. EMOT has a specific functionality that is only available to token holders; and is more likely to be purchased in order to access that function and less likely to be purchased with an expectation of profit. A token will only be a security if it meets all three requirements. EMOT is unlikely to be considered as a security under the Howey Test.
- Based on the Family Resemblance Test, and based on the legal status of EMOT, we believe that EMOT is less likely to be considered as a security. EMOT buyers are motivated by the functionality of various applications, and the tokens enable them to access innovative platforms, where they can create and publish their own content, share information and news, and discuss it with other Users, and vote on their favorite posts. In terms of distribution for a restricted segment of the population, EMOT tokens are unlikely to be recognized as securities. Furthermore, EMOT holders are not granted the rights similar to the rights of investors or securities holders. Thus, it is quite unlikely that EMOT tokens may be considered securities.
- Based on the Risk Capital Test, depending on the structure of the presale or actual sale, there is some risk that the use of funds to raise capital may be viewed as securities; however, it is mitigated because platforms which could use EMOT should have been successfully launched before the sale of EMOT. Considering the answers, the recognition of EMOT as a security under the Risk capital test is quite unlikely.
- Based on the recent SEC Reports regarding ICO and legal status of tokens, such as SEC Report of Investigation: the DAO¹, Administrative Proceeding In.

¹ See SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (2017).

the Matter of MUNCHEE INC¹ etc., there is also some risk that the use of funds to raise capital may be viewed as securities; however, it is mitigated due to Tobius Group's efforts to eradicate all the aforementioned risks after reviewing the reports from Tobius Group Project.

- According to U.S. securities laws, securities are broadly categorized into debt securities (e.g., banknotes, bonds, and debentures), equity securities (e.g., common stocks), and derivatives (e.g., forwards, futures, options, and swaps). EMOT has no substantial features of any of the aforementioned kinds of securities: it is not a debt security or profit-sharing instrument of any kind because EMOT does not have an obligation to return any funds to any of the token holders; it is not an equity instrument because it does not give any corporate rights to any legal entities whatsoever; finally, it is not a derivative according to the definitions provided in most of the applicable laws.
- Based on the analysis of the licenses and the franchise regulation, we assume EMOT can be characterized as a simple contract, akin to a license agreement or a franchise agreement.
- Based on the securities laws of Cayman Islands, we assume that EMOT does not constitute a security according to the applicable securities laws of Cayman Islands. Thus, EMOT does not provide holders with the right to receive a portion of profit or gains derived from the investment. Moreover, EMOT has a specific functionality that is only available to token holders; and is more likely to be purchased in order to access that function and less likely to be purchased with an expectation of profit.
- Therefore, we assume that Tobius Group Project is unlikely to constitute any financial scheme. The use of the additional services such as Index Graph (gi) “prediction” solely may affect the EMOT sale, and these services do not cause EMOT to be treated as security.

Legal Disclaimer

This Legal Opinion is drafted on the basis of the information provided with us in written or verbal forms, as well as the information contained all the material facts regarding Tobius Group Project. In drafting this Legal Opinion, we are governed by the legislation and practice that are valid at the date hereof. In case the legislation or practice is changed in the future, the relevant provision hereof shall be updated.

¹ See Administrative Proceeding File No. 3-18304 In the Matter of MUNCHEE INC., Respondent (2017).

The purpose of this Legal Opinion is to provide a legal background for the issuance of tokens through the Token Sale Campaign, and to find out whether the token constitutes securities under the U.S. securities law and the relevant applicable case laws.

Please note that this Legal Opinion does not provide you with a legal due diligence of the legal and corporate structure of Tobius Group Project and its beneficiaries, as well does not analyze the legal background of the technological solutions and intellectual property rights.

Legal Analysis

This Legal Opinion sets forth an analysis as to whether EMOT would likely constitute securities pursuant to:

- U.S. securities laws (Securities Act of 1933 (“Securities Act”), Securities Exchange Act of 1934 (“Exchange Act”));
- Tests, which are used in the United States to recognize a particular instrument as a security (Howey Test, Family Resemblance Test, Risk Capital Test);
- Factors addressed in the SEC’s The DAO report, Munchee Inc. Cease and Desist Order.
- Cayman Islands securities laws The Securities Investment Business Law (the SIBL), and The Mutual Funds Law (the MFL).

1. U.S. Securities Laws

In accordance with Section 2(a)(1) of the Securities Act, “securities” means “*any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement ...investment contract... or, in general, any interest or instrument commonly known as a ‘security’, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing*”.

This definition embodies a “flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.”¹

¹ See *Howey*, 328 U.S. at 299.

For the purpose of determining the criteria for being subject to the definition of “investment contract,” it is necessary to run three tests commonly applicable in the U.S., namely the Howey Test, the Family Resemblance Test, and the Risk Capital Test. Please consider that each of the tests can be interpreted differently, depending on the state, judicial instance and the particular circumstances of the case.

2. The Howey Test

The test was established in the course of the seminal Supreme Court case for determining whether an instrument meets the definition of security (1946 SEC v. Howey, 328 U.S. 293). The Supreme Court has reaffirmed the Howey analysis as recently as in 2004. Howey focuses specifically on the term “investment contract” within the definition of security, noting that it has been used to classify those instruments that are of a “more variable character” that may be considered a form of “contract, transaction, or scheme whereby an investor lays out money in a way intended to secure income or profit from its employment.” Not every contract or agreement is an “investment contract” and thus the Supreme Court has developed a four-part test to determine whether an agreement constitutes an investment contract and is therefore a security.

The test “permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of ‘the many types of instruments that in our commercial world fall within the ordinary concept of a security.’” In analyzing whether something is security, “form should be disregarded for substance,”¹ “and the emphasis should be on economic realities underlying a transaction, and not on the name appended thereto.”²

Today, the Howey Test includes the following definitive prongs all of which have to be present to satisfy the test for securities:

- An **investment of money**, which is broadly defined and includes any consideration with value.
- Into the **common enterprise**, which is further defined by different courts as a vertical and/or horizontal commonality of risks and profits among investors in some proportion.
- With the **expectation of profits**, which is also broadly defined as any form of capital appreciation, cash return on investment or other earnings such as dividends and interest.

¹ See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

² See *Forman*, 421 U.S. at 849.

- **Solely from the efforts of the promoter or a third party**, whose actions must play a significant role in the success of the business.

Sometimes, the last two prongs are combined into one because of their tight connection, which makes the Howey test a three or four-part test depending on the interpretation.

Requirement 1. Investment of Money.

Is there an investment of money?

GENERAL STATEMENT: Tokens that are not sold for value do not involve an investment of money, e.g. all tokens are distributed for free, or are only produced through mining. A sale of tokens, at any time, regardless of whether sold for fiat or digital currency, or any other valuable item, effectively constitute an investment of money. Also, an investment of money may include not only the provision of capital, assets, and cash, but also goods, services or a promissory note.¹

EMOT STATEMENT: EMOT has been sold for cryptocurrency to the buyers with the price set per token. Bitcoin (BTC) and Ethereum (ETH) will be acceptable.

RESULT: It is quite likely that Tobius Group's campaign meets the first criterion.

Requirement 2. Common Enterprise.

What is the timing of the sale?

GENERAL STATEMENT: It is essential to clarify what is the stage of the product/platform's development at the moment of the token sale. In general, there are three stages.

The first one is a pre-deployment stage. A sale of tokens before any code has been deployed on a blockchain is more likely to result in a common enterprise where the profits arise from the efforts of others as the buyers are completely dependent on the actions of the developers, and cannot actually participate in the network until later.

The second is a stage when the protocol is operational on a test network. If there is a functioning network, a common enterprise is less likely to arise. The closer the sale is to the launch of the network, the less likely a common enterprise will arise.

¹ See, e.g., *Int'l Bhd. Of Teamsters v. Daniel*, 439 U.S. 551, 560 n.12 (1979); *Hector v. Wiens*, 533 F.2d 429, 432-33 (9th Cir. 1976); *Sandusky Land, Ltd. V. Uniplan Groups, Inc.*, 400 F. Supp. 440, 445 (N.D. Ohio 1975).

The third stage is a fully operational network. If the token is sold after the network using the tokens in question is deployed, or sold immediately before the network goes live, it is again less likely to result in a common enterprise.

EMOT STATEMENT: Based on information provided to us, Tobius Group has a few core functions, including tokenization of industries and businesses, for which they have created EMOT tokens to “power up” business solutions in the computation of the Graph Index. Thus, any decentralized application that relies on the Graph Index, also relies on EMOT, which constitutes utility.

As for testnet or mainnet, it is expected that the client (any business using EMOT) must have launched a prototype or even an MVP on mainnet. EMOT’s only use is dedicated to enabling the computation (fetching) of the Graph Index, a parameter or value that provides actionable insights to its users. Those users can actually use any platform supporting EMOT.

The main goal of the token sale is to proceed with the tokenization of industries and businesses. We have reasonable confidence that the benefits obtained by EMOT holders are not investment-related.

RESULT: For the moment of EMOT Sale, it is expected that the client (any business using EMOT) must have launched a prototype or even an MVP on mainnet, therefore, we believe that the risk of a common enterprise is less likely to arise.

What do token holders have to do in order to get economic benefits from the network?

GENERAL STATEMENT: It is important to define whether the token holder always receive the same returns or the return depends on their participation or use of the network. If returns are paid to all token holders equally (or in proportion to their token holdings) regardless of any action on the part of the token holder, then their interests are more likely aligned in a common enterprise. If token holders’ returns depend on their own efforts, and can vary depending on the amount of effort they each put in, then it is less likely to be a common enterprise.

PROMOTER’S EXPERTISE: This approach considers whether the success of the token holders depends on the promoter’s expertise. The potential purchaser may reasonably believe that they will get economic benefits from the project, based on the developer’s expertise, the team’s competent opinion expressed in the White Paper and other materials, as well as the promoter’s statements on blogs,

podcasts, Facebook and other media. If there is such reliance, then a common enterprise will be deemed to exist.¹

The project team may announce information as to how the token would increase in value, and the ability for token holders to trade the tokens on secondary markets. If any of the project material include such statements, the token as likely to be deemed a security.²

TOBIUS GROUP STATEMENT: Based on the list of benefits granted to EMOT holders, EMOT holder could receive a discount price to purchase of EMOT only during EMOT Sale Campaigns.

EMOT holders may increase their amount by analyzing the sentiment direction of listed hashtags at Emotion Volatility Prediction game (EVP). Therefore, the number of extra tokens to be received proportionally depend on each token holder's efforts and skills.

Regarding the promoter's expertise, the Tobius Group team has made no statements or expressed any expert opinions in any materials and on social networks with the promise of any economic benefits users may expect from the Tobius Group network.

It should be noted that Tobius Group made no promises or statements regarding the possible value increase for EMOT, or the ability of EMOT holders to trade EMOT on secondary markets.

RESULT: We assume that the risk of common enterprise is less likely to arise in Tobius Group Project taking into consideration the decentralized nature of Tobius Group, where EMOT holders shall conduct additional activities to get economic benefits from the network.

Requirement 3 / Requirement 4: Expectation of profits predominantly from the efforts of others.

What function does the token have?

GENERAL STATEMENT: It is important to define the function of the token here. There are three levels of functions. On the first level, tokens function

1 See e.g., SEC v. Continental Commodities Corp., 497 F.2d 516 (5th Cir. 1974) (promoter's recommendations regarding certain futures contracts demonstrated investor reliance on promoter's expertise).

2 See Administrative Proceeding File No. 3-18304 In the Matter of MUNCHEE INC., Respondent (2017).

as securities. The second level provides no function other than mere existence of the token. And on the third one, there is the specific functionality available to token holders only.

The first level. If the token has the features below, it will be recognized as a security:

1. Ownership or equity interest in a legal entity, including a general partnership.
2. Entitlement to a share of profits and/or losses, or assets and/or liabilities.
3. Gives holder status as a creditor or lender.
4. A claim in bankruptcy as equity interest holder or creditor.
5. A right to repayment of purchase price and/or payment of interest.

Determining whether a transaction involves a security does not depend on the labelling — such as characterizing an ICO as involving a “utility token” — but instead requires an assessment of “the economic realities underlying a transaction.”¹

The second level. No function other than mere existence. A token which does not have any real function, or is used in a network with no real function, is very likely to be bought with an expectation of profit from the efforts of others, because no real use or participation by token holders is in fact possible. Voting rights alone do not constitute any real functionality.

The third level. Specific functionality that is only available to token holders. 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.

TOBIUS GROUP STATEMENT: Based on the list of benefits granted to EMOT holders, EMOT provides its holders with additional functions that are not available for the users that do not have EMOT. We believe that users buying EMOT are motivated with its specific functionality.

First of all, EMOT holders may access the innovative platform by computing the graph index of a hashtag. To fetch the “*gi*” of a hashtag, the user needs EMOT tokens as well. Thus, EMOT acts as fuel for the system to analyze and generate the indices and plot them on charts. Furthermore, EMOT holders may examine the sentiment direction of listed hashtags at the Emotion Volatility Prediction game (EVP), which depends on each token holder’s efforts and skills put in via any platform (network).

¹ See Forman, 421 U.S. at 849.

RESULT: We assume that EMOT does not constitute rights that can be recognized as securities and has real specific functionality.

Does the holder rely on manual, off-blockchain action to realize the benefit of the token?

GENERAL STATEMENT: Here, it's important to define whether the user purchases the token for use rather than with the expectation of profit from the efforts of others.

Manual action is required outside of the network (e.g. off-blockchain) in order for the holder to get the benefit of the token. A token whose value depends on someone taking specific manual action outside of the network means that the token is not functional in and of itself. Instead, the token relies on a level of trust in a third party taking action off-blockchain. This sort of token is more likely to be bought for speculation, hence the expectation of profits.

All functionality is inherent in the token and occurs programmatically. A token which is built with all the necessary technical permissions means that the token holder does not rely on manual actions of any third party. This means that the buyers are more likely to purchase the token for use rather than with the expectation of profit from the efforts of others.

TOBIUS GROUP STATEMENT: With regard to EMOT, all functionality is inherent in the token and occurs programmatically. It means that a token is built with all the necessary technical permissions and the token holder does not rely on manual actions of any third party. Any incentives are derived through token holders' own efforts, rather than through a passive investment.

RESULT: We assume that the user purchases EMOT for use rather than with the expectation of profit from the efforts of others and the token holder does not rely on manual, off-blockchain action to realize the benefit of EMOT.

Can the token holders exercise real and significant control via voting?

GENERAL STATEMENT: There are two essential points depending on the extent of control over the development team's access to funds or voting on important decisions for the ecosystem.

Token holders as a whole are able to control the development team's access to funds. If the collective approval of token holders is required in order for the development team to access the funds raised in the crowdsale, then any value realized

by the token holders is more closely tied to their own decisions, and less reliant on the efforts of others.

Token holders as a whole are able to vote on significant decisions for the protocol. If the collective approval of token holders is required in order to make significant changes to the protocol, then any value realized by the token holders is more closely tied to their own decisions, and less reliant on the efforts of others.

TOBIUS GROUP STATEMENT: There will be an opportunity to participate in BETA tests of the services and products of the Tobius Group. As we have been notified, the participation in BETA testing will not entitle an EMOT holder to control the services and products of the Tobius Group. It is just a mere testing for the purposes of future development, bug fixing etc. Hence, EMOT holders are able to assist in the decision-making process related to the implementation of new functions and/or features. However, based on clarification provided by Tobius Group, all final decisions are to be made by the team. Any possibility of EMOT holders to assist, vote or advise are therefore limited.

RESULT: We assume that EMOT Holders have a consultative or advisory voice rather than real significant control via any potential applications. Tobius Group does not provide EMOT holders with significant managerial control, e.g., the ability to participate in making the decisions that will affect the success of the enterprise; the ability to possess the resources and expertise to make a meaningful contribution; or, in fact, participate in management decisions whatsoever.

How is the token sale marketed?

GENERAL STATEMENT: Within this point, there are three types of token sale marketing: ICO, token sale, and one without economic return.

Marketed as an 'Initial Coin Offering' or similar. It is not possible to prevent some buyers from buying a token purely for speculation. However, marketing the token as an investment leads buyers to believe they can profit from holding or trading the token, rather than from using the token in the network. Using terms like 'Initial Coin Offering' or 'ICO', and investment-related language like 'returns' and 'profits' encourages buyers to buy a token for speculation, rather than use.

Marketed as a Token Sale. Marketed as a sale of tokens which give the right to access and use the network.

There is no economic return possible from using the network. If there is genuinely no economic return possible for the token holders, then there is unlikely to be a common enterprise. This will be rare.

TOBIUS GROUP STATEMENT: EMOT Sale Campaigns will be marketed as Token Sale events.

RESULT: We assume that the EMOT sale did not constitute any offering to buy securities or other investment instruments for the moment of EMOT Sale Campaigns.

THE HOWEY TEST RESULTS: Thus, EMOT Sale may look like the activity related to the money investments in Tobius Group Project (Element 1 is very likely). EMOT could be used on an already developed platform or products, and the economic benefits of EMOT holders are dependent on their efforts. Thus, EMOT Sale campaign does not meet the “common enterprise element” (Element 2 is very unlikely). EMOT has a specific functionality that is only available to token holders; and is therefore more likely to be purchased in order to access that functionality and less likely to be purchased with an expectation of profit (Requirement 3). A token will only be a security if it meets all the requirements at the same time. EMOT tokens are unlikely to be considered as securities according to the Howey Test.

3. Family Resemblance Test

A separate securities test is the “family resemblance” test from the U.S. Supreme Court decision in *Reves v. Ernst and Young* (1990) to determine whether a bill should be classified as a security.

The test starts with the default presumption that a bill is a security, but this presumption could be rebutted if it bears a “family resemblance” to one of the enumerated categories on a judicially developed list of exceptions. The Family resemblance test considers:

- 1) the parties’ motivation;
- 2) the plan of instrument distribution;
- 3) the expectation of the investing public; and
- 4) the presence of alternative regulatory regime.

It should be noted that, unlike the previous test, there is no rule for all the factors to be applied, but the “strong resemblance” should be proved in this case.

Factor 1: The Parties' Motivation

GENERAL STATEMENT: The first factor is described as the motivation that prompts “a reasonable seller and buyer to enter into” the transaction. If the seller’s motivation is to raise money for his/her business and the buyer’s motivation is to earn profits, then the instrument is likely to be deemed a security. This may also apply when the instrument has not necessarily characteristic of a security, but the investors reasonably expected that they were buying a security, and would be protected by the accompanying securities laws.

TOBIUS GROUP STATEMENT: The Buyers are motivated to use the functionality of decentralized platforms or other applications that use EMOT tokens, in particular, to access the innovative platform, whether to compute the graph index of a hashtag, to fetch the “g” of a hashtag or to examine the sentiment direction of listed hashtags at Emotion Volatility Prediction game (EVP). Therefore, the nature of EMOT does not constitute a security as it acts as fuel for the system to analyze and generate the indices and plot them on charts. It is likely that now buyers are motivated by any particular platform’s functionality rather than earning profits.

RESULT: Based on the current nature of EMOT, we assume that buyers are motivated to purchase EMOT in order to use the functionality of any particular platform, the ability to safely store, use and spend its digital assets, and get other benefits.

Factor 2: The Plan of Instrument Distribution

GENERAL STATEMENT: The second factor determines whether the instrument is being distributed for investment or speculation. If the instrument is being offered and sold to a broad segment or the general public for investment purposes, it is a security.

TOBIUS GROUP STATEMENT: While EMOT Sale was conducted, the participation was limited by the geographical location and citizenship of the participants. The Sale was closed for the citizen, resident (tax or otherwise) or Green card holder of the United States of America (or one acting on behalf of a citizen, resident or Green card holder of the United States of America). We have not been informed about any other restrictions.

RESULT: We assume that within this factor EMOT is unlikely to be deemed a security as it was offered and sold to a restricted segment of the population. Also, considering the fact that EMOT holders did not submit claims, we believe that

EMOT holders are interested in that functionality more than in the profitability, as it was announced within the EMOT Sale Campaign.

Factor 3: The Expectation of the Investing Public

GENERAL STATEMENT: An instrument will be deemed a security where the reasonable expectation of the investing public is that the securities laws (and accompanying anti-fraud provisions) apply to the investment.

TOBIUS GROUP STATEMENT: According to the Tobius Group, EMOT tokens do not provide the holders with the rights that can be recognized as an investment instrument. Therefore, all persons and parties involved in the purchase of EMOT act at their own perils and risks. Consequently, there is no legal basis for the securities laws to apply to this case.

RESULT: We assume that EMOT holders are not granted the rights similar to those obtained by securities holders.

Factor 4: The Presence of Alternative Regulatory Regime

GENERAL STATEMENT: The fourth and final factor is a determination of whether any other regulatory scheme “significantly reduces the risk of the instrument, thereby rendering the application of the Securities Act unnecessary”.

TOBIUS GROUP STATEMENT: While the Securities Act and the Securities Exchange Act seem to apply to token sales in the U.S., an alternative to it in the Tobius Group case may be laws of Cayman Islands. Unfortunately, securities laws of Cayman Islands are properly developed and, therefore, may not be considered as an appropriate alternative regime.

RESULT: We assume that it is less likely that for EMOT sale alternative regulatory regime with poorly developed legislation is applied. Therefore, the fourth factor is very unlikely to be met.

FAMILY RESEMBLANCE TEST RESULTS: In accordance with the Family Resemblance Test, and based on the legal status of EMOT, we believe that EMOT is less likely to be considered a security. EMOT buyers are motivated by the functionality of any particular platform as described above. In terms of distribution for a restricted segment of the population, it is unlikely to be recognized a security. Still, in terms of distribution for a broad segment of the population, it can. EMOT holders are not granted the rights similar to those of investors or securities holders. EMOT Sale company

has been incorporated under the legislation of Cayman Islands, so the token may be deemed a security with quite a low possibility.

4. Risk Capital Test

In 1959 the California Supreme Court (Silver Hills v. Sobieski case) has adopted an additional securities test, which is applied in 16 states. States may use different frameworks to judge what constitutes a security. In California, the risk capital test considers whether there is attempt by an issuer to:

- 1) raise funds for a business venture or enterprise;
- 2) through an indiscriminate offering to the public at large;
- 3) where the investor is in a passive position to affect the success of the enterprise; and
- 4) the investor's money is substantially at risk because it is inadequately secured.

Question 1: Funds for a Business Venture or Enterprise

Whether funds are being raised for a business venture or enterprise?

Yes. The funds were raised for the purposes of Tobius Group Project future development and marketing purposes.

Question 2: Public Offering

Whether the transaction is offered indiscriminately to the public at large?

No. This criterion is only partly met. The issuance and sale of EMOT was publicly restricted to citizens, residents (tax or otherwise) or Green card holders of the United States of America (or those acting on behalf of a citizen, resident or Green card holder of the United States of America).

Question 3: Position of the Investor

Whether the investors are substantially powerless to effect the success of any particular platform?

Yes. This criterion is not applicable in the Tobius Group case because any decentralized platforms that use EMOT tokens are to be successfully launched before the sale of EMOT. However, the EMOT holders may participate in the test decision-making process. But this participation, as we have been informed, does not have an essential influence on the future development of a specific

product. It can be recognized as consultative or advisory support rather than a real significant control.

Question 4: Risk for the Investor's Money

Is the investor's money is substantially at risk?

Quite a low risk. As any decentralized platforms that use EMOT tokens are to be developed by the time of the Token Sale, the risk for the investor's money is quite low.

The risk capital test applies to a limited number of jurisdictions, and has been typically applied in the context of original “start-up” capitalization — particularly where membership is nothing more than a sale of right to use the existing facilities — i.e., where “the benefits of the membership have materialized and have been realized by other members prior to any capital raised by the sale of [the memberships].”¹

RISK CAPITAL TEST RESULTS: In accordance with the Risk Capital test, depending on the structure of the presale or actual sale, there is some risk that the use of funds to raise capital may be viewed as securities; however, it is mitigated as any decentralized platforms that use EMOT tokens are to be successfully launched before the sale of EMOT. Taking into consideration the answers, the recognition of EMOT as a security is quite unlikely under the Risk capital test.

5. Other Analytical Frameworks

System License

Another potential framework under which it is worthy to consider EMOT is by using the analogy of a software license, where the rights associated with EMOT could be considered in line with the contractual contours of such a license.

Software licenses are typically governed by contract law, and one of the ways to categorize the software may be through focusing on the legal rights of the licensor and what rights may be granted to the licensee. For example, the licensor's rights would include the ability to grant or distribute all, some or none of the rights attached to the use of the software code (originally the licensor's intellectual property), as well as the right to exclude certain parties from using any of those rights. Thus, the licensee would receive either all of these rights or a portion of these rights, depending on what the licensor grants.

¹ See *Jet Set Travels Club v. Corporation Com'r*, 21 Or. App. 362 (1975).

For the purposes of EMOT, this structure would be applicable in the following manner:

- Tobius Group acts as the licensor of the system, which includes the underlying protocol, as well as the associated rights;
- EMOT holder acts as the licensee, who receives those rights (or a portion of those rights) in order to use the underlying protocol and the overall system; and
- any associated rights provided to each token holder are accomplished through the initial issuance of the tokens (akin to negotiating a software licensing contract between two parties).

RESULTS: Based on the aforementioned, we believe that EMOT that consists of rights and does not include any investment interests should not be deemed a security, subject to the specific facts, circumstances and characteristics of EMOT itself. Rather, given our analysis, it should be characterized as a simple contract, akin to a license agreement.

Franchise License

Although we do not suggest that EMOT falls under federal or state franchise law requirements, thinking about the rights that might be included in a EMOT, we drew an analogy to franchise law.

1. Under the franchise structure, a franchisor operates as the overarching organization that owns the intellectual property of the franchise (and business plan) and has the authority to sell the franchise right to a potential franchisee. The franchisee is the person to whom these rights are granted.
2. In receiving these rights, the franchisee pays money to the franchisor, which can be an initial fee, an ongoing royalty or both.
3. Typically, state and federal laws governing franchises require franchisors to provide to prospective franchisees detailed information about the franchise. The disclosure obligations under the various federal and state franchise laws are primarily to mitigate the risk of loss to franchisees that make a capital contribution to the franchise.
 - The Federal Trade Commission (“FTC”) rules require a franchisor to provide a prospective franchisee with disclosures related to the trademark being used, the total investment needed to begin operations, the provisions of the franchise agreement and other related disclosure items related to receiving the franchise rights. 16 C.F.R. pt. 436.
 - New York franchise law has detailed disclosure requirements for the prospectus that the franchisor must provide to the prospective franchisee. N.Y. Gen. Bus. Law § 683, et seq.
 - California state law requires that a franchise agreement include certain protective rights for the franchisee should the franchisor terminate the franchise prior

to its expiration date. The purpose of these provisions is to mitigate the loss of investment in the case of unlawful termination by a franchisor. Cal. Bus. & Prof. Code § 20020–22.

4. In a franchise, the franchisee puts forth the effort and work directly to build up the business in his/her location and the control or management of the franchisor is more remote. Thus, courts have held that a franchise interest should not be considered an investment security.¹

5. We view the holder of EMOT as being similar to a franchisee in that the rights granted by EMOT allow the holder to contribute to a system in a manner remote from the issuer of EMOT. In essence, the issuer provides EMOT holder with rights in the system by virtue of the associated EMOT, rather than through a passive investment interest.

- We believe that, despite the more decentralized framework of EMOT, the franchise analogy is still useful based on how the initial issuer grants its intellectual property – i.e., the system and its underlying protocol – to each individual token holder. Under the franchise model, a franchisor grants its intellectual property (which may also include a business plan) to a franchisee. While a franchise results in a more uniform application of the intellectual property or business plan by each franchisee, in EMOT context, analogously, the token holder is granted access to a system, which is the baseline framework under which the token holder operates.
- Further, we believe it is useful to consider whether the use of disclosures – both to inform token holders of their rights (e.g., voting rights and other systems rights) and to demonstrate the nature of EMOT – may be useful to incorporate at the time of the issuance of the tokens.

RESULTS: Based on the aforementioned, we believe that EMOT that consists of rights and does not include any investment interests should not be deemed a security, subject to the specific facts, circumstances, and characteristics of EMOT itself. Rather, given our analysis the aforementioned, it should be characterized as a simple contract, akin to a franchise agreement.

Financial Pyramid

Finally, we assume that bonuses provided by the Tobius Group over the course of EMOT Sale Campaigns by means of any discount program do not influence on the aforementioned results, considering the fact a discount is not a guarantee of any profit in future, and at large, may be compared to the discount on any product sold on-line or land-based.

¹ See *Koscot Interplanetary*, 497 F.2d at 485; *Lino v. City Investing*, 487 F.2d 689 (3d. Cir. 1973).

In general, the financial pyramid exists if the participants attempt to make money solely by recruiting new participants into the program. The hallmark of such schemes is the promise of sky-high returns in a short period of time for doing nothing other than handing over the project's money and involving others to do the same.¹

The SEC has reported as to so-called Ponzi schemes (by virtue — financial pyramids) in regard to virtual currencies and stipulated that the previously mentioned scheme shall exist if it involves the payment of purported returns to existing investors from funds contributed by new investors.²

Thus, the discount offered by the Tobius Group over the course of the Token Sale are unlikely to be creating the financial pyramid by any means, since:

- 1) they will not immediately or later anyhow “pay” or distribute, EMOT will be simply bought on a discount and no money of “other investors” for creating the possibility of such discount provision will be involved;
- 2) vice versa, the discounts will be provided at the early stages, where little or no money would be raised and there will be no collection of funds to provide for any such discounts.

In other words, there is no expectation of profit from the efforts of others, since the purchaser can gain the profit exclusively by personally and on at his own discretion and effort participating in the Token Sale early and sparing a reward by getting a discount for the price of the token.

RESULTS: Based on the above, we assume that Tobius Group Project is unlikely to constitute any financial scheme, as well as the use of the discounts solely may affect EMOT sale and these discounts do not cause EMOT to be treated as security.

6. Cayman Islands Law

This section contains a legal analysis as to whether EMOT would likely constitute securities pursuant to relevant Cayman Islands laws, namely the Securities Investment Business Law (the SIBL) and The Mutual Funds Law (the MFL).

In Cayman Islands, securities business is governed by the SIBL. In accordance with this SIBL securities means shares and stock of any kind in the share capital of a company in Cayman Islands or elsewhere; shares or other units of participation in a mutual fund as defined in the MFL; instruments creating or acknowledging indebtedness

1 See SEC. Pyramid Schemes https://www.sec.gov/oiea/investor-alerts-bulletins/investor-alerts-ia_pyramidhtm.html and <https://www.sec.gov/fast-answers/answerspyramidhtm.html>

2 See SEC. Ponzi Schemes Using Virtual Currencies https://www.sec.gov/investor/alerts/ia_virtualcurrencies.pdf

(debentures; debenture stock; loan stock; bonds; certificates of deposit and any other instruments creating or acknowledging indebtedness); certificates or other instruments which confer contractual or proprietary rights; options; futures; contracts for differences.

Based on the security legislation of Cayman Islands we assume that ownership of EMOT carries no rights, expressed or implied, other than the right to use EMOT as a means to enable usage of and interaction with the service. In particular, EMOT does not represent or confer any ownership right or stake, share, equity or security or equivalent rights, or any right to receive future revenue shares, intellectual property rights or any other form of participation or governance in or relating to the service and/or Tobius Group and its corporate affiliates, other than rights relating to the potential future provision and receipt of services, subject to limitations and conditions defined by Tobius Group in the terms of use. EMOT is not intended to be a representation of money (including electronic money), security, commodity, bond, debt instrument or any other kind of financial instrument or investment. Protections offered by Cayman Islands law in relation to the purchase and sale of the aforementioned financial instruments and/or investments do not apply to the purchase and sale of EMOT. The marketing documents of the Tobius Group's token sale do not constitute an offer to sell, nor the solicitation or an offer to buy any investment or financial instrument in any jurisdiction with EMOT.

EMOT does not constitute a security according to the applicable securities laws of Cayman Islands. Thus, EMOT does not provide holders with the right to receive a portion of profit or gains derived from the investment. Moreover, EMOT has a specific functionality that is only available to token holders; and is more likely to be purchased in order to access that function and less likely to be purchased with an expectation of profit.

