

## MEMORANDUM ('Memo')

**From:**

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**at**

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**Date:** 28 April, 2020

**To:** KingMoney

**Re:** Evaluation of the following parameters:

- (a) If the KingMoney token ('KIM') would be regarded as a security under United States Laws
- (b) If the KingMoney token ('KIM') would be regarded as a security under Singapore Laws

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**A. BACKGROUND**

KingMoney is a venture (Sweden Invest GE). The developers states that KingMoney is, *‘is a bitcoin-based digital currency attempting to facilitate financial transactions within the network marketing industry.’*<sup>1</sup>

**The Token**

(‘KingMoney aims to issue bitcoin-based KingMoney Tokens (‘KIM

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<sup>1</sup> <https://kingmoney.io/> (frontpage description)

## **B. QUERY:**

The release of ‘Tokens or Coins’ has come under strict scrutiny as many of them are considered as ‘Initial Coin Offerings (ICO’s)’. ICO sector has come under cloud in some countries owing to the release of the Investor Bulletin by the SEC on 25 July, 2017 under which they have sought to inform the investors that certain ICO’s may have characteristics which may be similar to securities and hence they may be regulated as securities by the SEC.

In the present case, the company did not conduct an ICO, but instead launched the sale of its token directly through cryptocurrency exchanges, that is, through the so-called ‘Initial Exchange Offering (IEO’s)’.

Despite the fundamental differences between the two methods of initial issue of tokens, for the purposes of this Memo, the assessment of the risks of ICO and IEO is identical for the following reason:

The SEC’s Office of Investor Education and Advocacy has issued on 14 January, 2020 alert to urge investors to use caution before investing in IEO’s through online trading platforms.

*‘Initial exchange offerings (IEOs) are a recent development in the rapidly evolving digital asset space. IEOs are similar to initial coin offerings (ICOs) in that they are initial offerings of digital assets (e.g., coins or tokens) to raise capital. However, IEOs are being touted as an innovation on ICOs because they are offered directly by online trading platforms on behalf of companies—usually for a fee—to provide immediate trading opportunities for the digital assets. These online trading platforms, which are typically not registered with the SEC and which may improperly refer to themselves as “exchanges,” may also claim to perform due diligence or other quality assessments of the IEOs.’*

In the present scenario, an opinion has been sought on whether KIM (also referred to as ‘Token’) possesses characteristics similar to securities considering its features and mode of distribution.

### **C. ISSUES DEALT WITH IN THE MEMORANDUM:**

In the present Memorandum (‘Memo’) we deal with the following issues:

- (a) Understand whether the KIM which are being sold would be classified as ‘securities’ under the laws of USA
- (b) The rating for KIM under the Howey Test
- (c) Evaluation of KIM under the Risk Capital Test and Reeves Test

### **Limitation**

The evaluation in this Memo does not cover in any manner the following issues:

- (a) The legal validity of the business model followed by the developer, backers, its Platform(s) or Promoters
- (b) The financial status of any of the companies or parties related to KingMoney or KIM
- (c) The status of the Tokens under the legal framework of any country except under the specific situations and for the countries mentioned explicitly in this Memo.
- (d) The functionality or the legal status of the platform where the Token will be used.
- (e) The characteristics or the qualities of other Tokens which may be released by the developers or which may be used on the KingMoney Platforms
- (f) Information about KIM used for this Memo is limited to the public information available at <https://kingmoney.io/> and comments provided to us.

## **D. UNDERSTANDING THE SEC REGULATIONS AND IDENTIFYING IF KIM WOULD BE REGULATED AS A SECURITY**

### **I. United States of America**

The recent Investor Bulletin by the SEC opened the possibilities that Tokens and ‘Coins’ distributed through online trading platforms, through IEO could possibly be regulated as ‘Securities’.

The SEC in its initial Bulletin dated 25 July, 2017 states that *“in certain cases, the tokens or coins will be securities and may not be lawfully sold without registration with the SEC or pursuant to an exemption from registration.”*<sup>2</sup> The determination whether a particular ‘Token’ or a ‘Coin’ is security is done through an evaluation of the features and the rights which are associated with the Token.

The determination of whether a particular financial instrument is a security can be normally done through an evaluation of the ‘Token’ through

- (a) the definition of ‘Security’ in the Securities Act, 1933 and the Securities Exchange Act, 1934
- (b) the Howey Test
- (c) the Risk Capital Test in certain states
- (d) the Reves test

We make the evaluation under these **four parameters** for KIM in the sections below.

#### ***a) The definition of ‘Security’ prescribed under legislations***

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<sup>2</sup> The Investor Bulletin can be accessed at [https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib\\_coinofferings](https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_coinofferings)

The Securities Act, 1933 and the Securities Exchange Act, 1934 are the two primary regulations governing the definition of a ‘security’.

The Securities Act, 1933 under Section 2(1) (a) defines a ‘security’ as “*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, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, 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.*”

Section 3(a) (10) of Securities Exchange Act, 1934 defines a security as:

*The term “security” means any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a “security”; or any certificate of interest or participation in,*

*temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.*

The definitions, particularly under the Securities Exchange Act, 1934 are very comprehensive and the Token could possibly be covered under it, if it provided rights such as a right of profit or voting rights in the management of a Company. Interestingly, the definitions provide an opportunity for the Courts to expand on the definition of a security.

On a bare reading of the definitions we find that KIM prima facie does fall into the definition of a 'security' and will not be covered under the definitions as it does not provide any benefits to the Token holders beyond the ability to use the Token for payments ('*transport the value*'<sup>3</sup>) between participants of network marketing industry.

Now, KIM may also be subject to certain tests which have been designed by the higher courts.

This makes it essential to review the three major tests provided by the courts.

#### ***b) The Howey Test***

For a better evaluation of the Token as a security, we will have to move to the four step 'Howey Test' which was framed in the famous case- *SEC v. Howey Co.*, 328 U.S. 293 (1946).

In the 'Howey test', a particular instrument called "an investment contract" had to be evaluated, if it could be considered as a 'security.'

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<sup>3</sup> <https://kingmoney.io/about> (WP)

The Howey test laid down that: “... *an investment contract for purposes of the Securities Act means 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.... Such a definition...permits the fulfilment 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.... It 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.*” Broadly, it stated that “*The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.*”

The definition and observations put forward in the case were designed into a four part test which has the following elements:

- (a) An investment of ‘**money**’: The term used here is money, but in later cases, it has been expanded to include any money equivalents and it can be expected that in the future it will also cover virtual currencies as can be seen from the interpretation provided in the FinCEN guidance.<sup>4</sup>
- (b) In a **common enterprise**: A common enterprise has been divided into ‘vertical commonality’ and ‘horizontal commonality.’ “Horizontal commonality” is a process where money or assets from different investors are brought together in a common pool and profits and risks are shared in some proportion. “Vertical commonality” on the other hand *places emphasis on the relationship of the parties and whether one is relying on the efforts of the other. If a commonality of enterprise is found, regardless of the*

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<sup>4</sup> A copy of the Guidance is available for download at <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-persons-administering>



*form it has taken, this factor in the test will be satisfied.* Vertical commonality can further be broken down into “broad vertical commonality” whereby the promoter’s profits are not tied to the investor’s profits and “narrow vertical commonality” whereby the promoter only profits if the investor profits.

In any case, any form of commonality found may be considered sufficient to satisfy the test.

(c) An expectation of ‘**profit**’: Profits can be provided in any form of interest, dividends, rental income, tax benefits, cash return, capital appreciation to name a few. Even Ponzi schemes can be securities if they provide profits and also fulfil other tests.

(d) **Efforts of promoters:** The investors do not have to put in any individual effort to gain benefits and the promoters work to create profits for them. The investors gain the benefits merely by being a part of the contract.

For a Token, an evaluation of the characteristics of the Token can provide a broad idea of whether it fulfils the essentials of the Howey Test as stated above. The KIM Token was introduced as a medium for transport of value between network marketing participants which use the KingMoney Platform. The holders of the Token do not have any incentive to receive any profits from the Tokens and are only provided with an opportunity to use the Token as a medium for payment between KingMoney Platform participants.<sup>5</sup> The promoters also do not control the success of KIM and the success of the KingMoney Platform which will ultimately depend on its usage and popularity. The Users are free to purchase and spend the Tokens according to their own convenience. The value of the KIM Token is derived from the utility of the Token in the KingMoney Platform and not due to any other reason.

All these situations indicate that the KIM Token may not satisfy the Howey Test.

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<sup>5</sup> [https://kingmoney.io/kingmoney\\_whitepaper.pdf](https://kingmoney.io/kingmoney_whitepaper.pdf)

c) *The Risk Capital Test in certain states*

The Supreme Court of California in the case of *Silver Hills Country Club v. Sobieski*, 55 Cal.2d 811, designed a test called the 'Risk Capital Test' which was later accepted by a number of states across USA. In the given case, a club in California sold memberships for the purpose of construction of the club. According to the offer, the people who purchased memberships would not secure any direct profits but would secure a right to use the facilities. The court looked into the sale of memberships and determined that:

*'We have here nothing like the ordinary sale of a right to use existing facilities. Petitioners are soliciting the risk capital with which to develop a business for profit. The purchaser's risk is not lessened merely because the interest he purchases is labelled a membership. Only because he risks his capital along with other purchasers can there be any chance that the benefits of club membership will materialize.'*

So although, the memberships might not have come under the coverage of definition securities under the 1933 and 1934, they were covered by the new interpretation of the court based on local state laws and the duty of the courts to protect public from schemes which attract risk capital.

The court through its decision formulated a four part test which is an evaluation of the following parameters:

- (a) The raising of funds for business ventures
- (b) The availability of the offer for general public
- (c) If the investors have any power to determine the success of the venture
- (d) If the money invested is at risk because of inadequate security.

The risk capital test varies from the Howey test mainly on the parameter that it does not require the element of profit and the benefit from the investment does not need to be a material benefit.

From a preliminary evaluation, it can be seen that KIM does not fulfil the Risk Capital test since here the persons who have acquired the Tokens are aware that the Token has no benefits which they can obtain by merely holding the Token. The benefits which the holders of the Token obtain are not related to the Token but its usage as a medium for payment between users which are using KingMoney Platform and accept KIM as a payment medium. The Token holders also do not receive any monetary benefits from the use of the Tokens for any purpose. This means that the Token cannot be a mode for investment and would have minimal value as an object for investment outside the platform.

Finally, the success of the venture is dependent on the growth of the KingMoney Platform as a preferred medium for payment settling between network marketing participants as then the KIM token could be used as a payment medium.

***d) The Reves Test***

The US Supreme Court in the case of *Reves v. Ernst & Young*, 494 U.S. 56 (1990) adopted the *Family Resemblance Test* developed by the Second Circuit Court in *Exchange National Bank v. Touche, Ross & Co.*, 544 F.2d 1126 (2d Cir. 1976) to determine if a 'note' is a security. The court laid down a four point test which we use to evaluate the KIM Tokens below:

- i. Motivation of the buyer and seller:** The motive behind the buyer and the seller behind the transaction are evaluated. If the seller is selling the Tokens for generally raising funds for business and the buyer is buying the Token as an investment, then it may have characteristics similar to a security. In the present case, the buyer is buying the Token so that he can use it as payment medium on the KingMoney

Platform. The motive for investment as required under this first criteria is unlikely as the buyer is aware that the KIM Token has no utility or value beyond the platform and no profits are receivable merely by holding it.

- ii. Plan of distribution:** The plan of distribution of the Token is evaluated. It can be seen that the Token was distributed through publication of the Whitepaper. The Whitepaper states that it will be a Token which will be a '*transferable value in a network as a replacement for the money of goods or commission of work conducted on the network*'. As such it is highly unlikely that the Token was intended for persons who have no interest in transactions on the KingMoney Platform. The Token was not distributed as an instrument suitable for investment with expected profits to be received without considering any possible use for the Token purchased.
- iii. Reasonable expectations of the public:** The expectation of the public that the Token would be considered as a security may not be considered significant as the Token has been clearly marketed as a token which has no benefit outside the platform.
- iv. Presence of alternative regulatory regime:** The cryptocurrencies and Tokens may also be considered as Commodities as stated by the CFTC in their Primer on virtual currencies.<sup>6</sup> It is however clarified that they may also be regulated as securities. In this situation, it can be seen that a potential alternative regulatory scheme may exist for certain Tokens which can only be considered as Commodities and not as Tokens<sup>7</sup>.

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<sup>6</sup> A copy of the document is available for download at [http://www.cftc.gov/idc/groups/public/documents/file/labcftc\\_primercurrencyes100417.pdf](http://www.cftc.gov/idc/groups/public/documents/file/labcftc_primercurrencyes100417.pdf)

<sup>7</sup> Since the purpose of this Memo is to determine whether a Token can be recognized as a security, we will not evaluate the probability of a token being recognized as commodity

Considering this situation, it may be considered that the KIM Token does not fulfil the Reeves Test to be considered as security.

## II. Singapore

The securities market in Singapore is regulated through the provisions of the Securities and Futures Act, Singapore<sup>8</sup> (Chapter 289) ('MFA'). The regulatory body established for implementing the provisions of this Act and regulating the securities market is the Monetary Authority of Singapore (MAS).

The MAS published three media releases, followed by latest updated version of 'A guide to digital token offerings' dated 19 December, 2019<sup>9</sup>, firstly relating to regulatory position on offer of digital tokens in Singapore on 1 August, 2017 and secondly on investment schemes involving digital tokens (including virtual currencies) on 10 August, 2017. The third media release was made on 19 December, 2017 which cautioned against investment in cryptocurrencies. The Government of Singapore has also released an education portal on cryptocurrencies for its citizens. These releases brought focus on the fact whether Tokens could be considered as securities and if token issuance could be considered as investment schemes. Among these media release, the release dated 1 August, 2017 is significant as it provides clarity on the scope of digital tokens which may be considered as a security. According to the MAS:

*".....digital tokens may represent ownership or a security interest over an issuer's*

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<sup>8</sup> An official copy of the legislation can be accessed at <https://www.mas.gov.sg/~media/MAS/Regulations%20and%20Financial%20Stability/Regulations%20Guidance%20and%20Licensing/Securities%20Futures%20and%20Fund%20Management/Regulations%20Guidance%20and%20Licensing/Guidelines/A%20Guide%20to%20Digital%20Token%20Offerings%20%2014%20Nov%202017.pdf>

<sup>9</sup> <https://www.mas.gov.sg/~media/MAS/Sectors/Guidance/Guide-to-Digital-Tokens-Offering---23-Dec-2019.pdf>

*assets or property. Such tokens may therefore be considered an offer of shares or units in a collective investment scheme under the SFA. Digital tokens may also represent a debt owed by an issuer and be considered a debenture under the SFA.”*

To evaluate this possibility, we look into the definitions of ‘Collective Investment Scheme’ and ‘Securities’ under Section 2(1) of the MFA. The definition of ‘Securities’ on the other hand includes ‘*any unit in a collective investment scheme*’.

Now the definition of “collective investment scheme” requires the fulfilment of the following three characteristics:

*“collective investment scheme” means —*

- (a) *an arrangement in respect of any property —*
  - (i) *under which —*
    - (A) the participants do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions in respect of such management; and
    - (B) the property is managed as a whole by or on behalf of a manager;
  - (ii) *under which the contributions of the participants and the profits or income from which payments are to be made to them are pooled; and*
  - (iii) *the purpose or effect, or purported purpose or effect, of which is to enable the participants (whether by acquiring any right, interest, title or benefit in the property or any part of the property or otherwise)*
    - (A) *to participate in or receive profits, income, or other payments or returns arising from the acquisition, holding, management or disposal of, the exercise of, the redemption of, or the expiry of, any right, interest, title or benefit in the property or any part of the property; or*
    - (B) *to receive sums paid out of such profits, income, or other payments or returns; or*

*(b) an arrangement which is an arrangement, or is of a class or description of arrangements, specified by the Authority as a collective investment scheme by notice published in the Gazette,*

Now, considering this definition we clearly find that the Tokens do not provide or allow the participants to

*(A) participate in or receive profits, income, or other payments or returns arising from the acquisition, holding, management or disposal of, the exercise of, the redemption of, or the expiry of, any right, interest, title or benefit in the property or any part of the property; or*

*(B) to receive sums paid out of such profits, income, or other payments or returns;.*

The benefits which are accrued to the participants result from the use of the Token on the KingMoney Platform and they are not related to the success of the Token sale process and the venture. These benefits are not related to any profits distributed by the enterprise. In line with the MAS Media release and Guideline the Tokens also do not “*represent ownership or a security interest over an issuer’s assets or property*” since the Tokens do not entitle the holders to any assets. It can also not be considered as “*a debt owed by an issuer*” as the Token sellers do not owe any payments to the Token holders and they may merely derive utility of their Tokens by using the Token on the platform. This situation can be distinguished from situations where a potential Token provides a share in the profits generated by the token issuers in a particular period merely on the basis of Token holders holding their Tokens in the wallets. The KIM does not guarantee any such benefits or share in profits to the Token holders owing to the use of funds collected from the Token holders but only provides an opportunity to use the Tokens within KingMoney Platform as the medium for payment.

Keeping in mind this situation, on the basis of the information provided to us, we are of the opinion that KIM may not be considered as a security in Singapore.

**E. EVALUATION OF CHAIRMAN JAY CLAYTON’S PUBLIC STATEMENT  
OF DECEMBER 11, 2017**

The crux of the statement by Chairman Jay Clayton can be divided into two main issues:

- (a) Evaluation of the use of ICO’s and Token sales for sale of securities
- (b) Use of cryptocurrency for transactions and trading in cryptocurrencies

On the first issue, the general assertion that “*cryptocurrencies are not securities and that the offer and sale of cryptocurrencies are beyond the SEC’s jurisdiction*”, has found mention in the SEC Chairman Jay Clayton’s Public Statement of December 11, 2017.<sup>10</sup> Although, no opinion has been expressed on the validity of the assertion, but he has clarified that “*Whether that assertion proves correct with respect to any digital asset that is labelled as a cryptocurrency will depend on the characteristics and use of that particular asset.*”

In this regard, Chairman Clayton referred to the Dow investigation report and why DAO Tokens were considered as securities, it was stated that: “*we concluded that the token offering represented an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.*”

The explanation to this statement as to what are the characteristics of a ‘security’ was provided in the same public statement where he clarified that “*Tokens and offerings that incorporate features and marketing efforts that emphasize the potential for profits based on the entrepreneurial or managerial efforts of others continue to contain the hallmarks of a security under U.S. law.*”

Now, when we put the above observations into play in case of KIM Tokens, and from our understanding of the Whitepaper and assessments laid down before in this Memorandum, the

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<sup>10</sup>A copy of the public statement by SEC Chairman Jay Clayton on December 11, 2017  
<https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11>



success of the KIM venture is not dependent upon entrepreneurial or managerial efforts of others, but the parties or users participating in the network marketing which use the KingMoney Platform. The incentive that they receive is the ability to use the Tokens as medium for payment within KingMoney Platform. In this situation, the assessment that the Token is not prima facie a security does not change.

Regarding the second issue, it is pertinent to clarify here, that Chairman Clayton had stated :*“As I have stated previously, these market participants should treat payments and other transactions made in cryptocurrency as if cash were being handed from one party to the other.”*

The KingMoney platform is expected to comply with the Know your Customer (KYC) and Anti-Money Laundering (AML) Requirements while supporting transactions on the platform which involve transfer of funds from one person to another (from any token holder (ex. sales agent) to another). So, the Token itself is not broadly affected by the statements by Chairman Clayton, but it is expected that adequate measures will be taken to comply with the legal requirements for using cryptocurrencies or for transfer of any funds when transactions are conducted on the KingMoney Platform for payments and donations of any kind.

#### **F. SEC ACTIONS ON ICO AND IMPACT ON KIM**

The SEC Action on ICO’s undertaken in case of Munchee Inc., PlexCorps, RECoin Group Foundation, DRC World and TON Issuer Inc. (TON) should generally not affect the KIM Token as the characteristics for the KIM Token and the situations where the SEC has acted are radically different.

In case of Munchee Inc, the SEC has highlighted the fact that *“the company and other promoters emphasized that investors could expect that efforts by the company and others*

*would lead to an increase in value of the tokens. The company also emphasized it would take steps to create and support a secondary market for the tokens. Because of these and other company activities, investors would have had a reasonable belief that their investment in tokens could generate a return on their investment.”*<sup>11</sup>

However, in case of the KIM Tokens, the situation is completely different as the value of the Tokens is created because of the ability to use the Tokens to acquire services and goods offered by participants of KingMoney Platform and use it as a medium for payment. The KIM Tokens can be used to pay to network marketing participants which use the KingMoney platform, but no returns or profits can be accepted from such support. A secondary market may be created for the Tokens in compliance with laws, but such a market would not exist because of efforts of the company to create a secondary market, but because of the inherent value of the tokens and the ability to use the Tokens in the KingMoney Platform.

In case of PlexCorps, the SEC had acted because the company had *“raised up to \$15 million from thousands of investors since August by falsely promising a 13-fold profit in less than a month.”*<sup>12</sup> Further, in case of ReCoin and DRC world, the SEC stated that *“alleged misstatements to REcoin investors included that the company had a “team of lawyers, professionals, brokers, and accountants” that would invest REcoin's ICO proceeds into real estate when in fact none had been hired or even consulted. Zaslavskiy and REcoin allegedly misrepresented they had raised between \$2 million and \$4 million from investors when the actual amount is approximately \$300,000.”*

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<sup>11</sup> SEC Press Release: Company Halts ICO After SEC Raises Registration Concerns, Washington D.C., Dec. 11, 2017.

<sup>12</sup> Press Release: Company Halts ICO After SEC Raises Registration Concerns, Washington D.C., Dec. 11, 2017.

In case of Diamond Reserve Club, *“the SEC alleges that Zaslavskiy and Diamond have not purchased any diamonds nor engaged in any business operations. Yet they allegedly continue to solicit investors and raise funds as though they have.”*<sup>13</sup>

In case of TON Issuer Inc. court has agreed with SEC that *“First, the initial purchasers bought Grams in dollars and euros in 2018, which satisfied the “investment of money” prong under Howey. Second, Telegram pooled the money received from the initial purchasers to develop the TON Blockchain. The financial investment of the initial purchasers was directly tied to the success of the TON Blockchain as a whole because each initial purchaser’s investment would be affected if the TON Blockchain failed.*

*Third, the Court found that the initial purchasers had an expectation that their Grams would increase in value upon their resale to the public via the TON Blockchain. Since the sales to initial purchasers in 2018 were at prices significantly lower than the future advertised and expected price of the Grams after the launch of the TON Blockchain, the Court believed the initial purchasers had a substantial opportunity to profit on resale and that the initial purchasers acquired Grams with investment intent. Finally, the TON Blockchain was to be developed, launched and maintained by Telegram. At the time the initial purchasers made their investments, the TON Blockchain was not developed, so the purchasers were reliant on Telegram to develop the network. Once the TON Blockchain was launched, its success depended on the mass adoption by users of the Telegram Messenger application as a result of Telegram’s continued marketing and integration efforts. The Court found these facts gave the SEC a substantial likelihood of success in satisfying the final prongs under Howey.*<sup>14</sup>

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<sup>13</sup> SEC Press Release: SEC Exposes Two Initial Coin Offerings Purportedly Backed by Real Estate and Diamonds

<sup>14</sup> SEC Press Release: SEC Halts Alleged \$1.7 Billion Unregistered Digital Token Offering

These situations are different from KIM Tokens, since neither a profit has been promised, nor have we been made aware of any false representation regarding involvement of professionals or linkage to purchase of assets linked to the business. The KIM Token is to our knowledge

- (a) dependent upon its utility for the value attributed to it by potential buyers who may purchase it
- (b) has no linkages with commodities
- (c) No profit has been promised to the holders for purchase or on receipt of the Token.

Keeping these parameters in mind, the KIM Token cannot be considered similar to the actions where the SEC has acted as shown above.

#### **G. UNDERSTANDING IF KIM MAY BE CONSIDERED AS A ‘MONEY SERVICES BUSINESS’ BY FINCEN**

The Financial Crimes Enforcement Network or ‘FINCEN’ of the US Department of Treasury released a ‘Guidance’ on March 18, 2013 “*to clarify the applicability of the regulations implementing the Bank Secrecy Act (“BSA”) to persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies.*”<sup>15</sup>

Crucially, it must be noted that the Guidance covered ‘Convertible Virtual Currency’ which have been defined as ‘*virtual currency*’ which ‘*either has an equivalent value in real currency, or acts as a substitute for real currency.*’ KIM owing to its utility as a medium for payments and to complete the transfer of value between participants of network marketing industry which use KingMoney Platform may be considered under this category.

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<sup>15</sup> A copy of the Guidance No. FIN-2013-G001 can be downloaded from <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>

The FINCEN in this guidance defined an ‘exchanger’ as *‘a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency’* and an ‘administrator’ as *‘a person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency.’*

The Department of Treasury in its letter of February, 2018 has also clarified that all virtual currency exchangers will now be required to register as a Money Services Business (MSB). So KingMoney may be required to register as a MSB in the United States in the states and also with the FinCEN if it desires to issue Tokens directly to citizens and residents of the United States.

Keeping in view this situation even if it is not offering the Tokens for sale to citizens of the USA, it is recommended that KingMoney complies with all necessary provisions of the Bank Secrecy Act (‘BSA’) and required Know your Customer (KYC) and Anti- Money Laundering (AML) guidelines while conducting future sale of the Tokens or while operating the platform for network marketing.

### **Executive Summary:**

On the basis of the information provided by KingMoney on the KIM token through their Whitepaper and official website, we understand that the KIM token may not be considered as a security under the Securities Act, 1933 and the Securities Exchange Act, 1934 as it does not fall within any of the instruments defined as a ‘security’ under the given legislations. The KIM token in our opinion also may not fulfil the conditions of the tests laid down in *SEC v. Howey Co.*, 328 U.S. 293 (*Howey Test*), *Silver Hills Country Club v. Sobieski*, 55 Cal.2d 811 (*Risk Capital Test*) and *Reves v. Ernst & Young*, 494 U.S. 56 (1990) (*Reves Test*) and hence may not be considered as a security as determined by these tests. As per our understanding, the KIM

Token may not be covered under the definition of a ‘Collective Investment Scheme’ or ‘Securities’ under Section 2(1) of the MFA, Singapore. From our perusal of the Whitepaper, we have also not found any false representation regarding involvement of professionals or linkage to any commodities for the KIM token.

We however recommend that the Token issuers comply with all Know your Customer (KYC) and Anti- Money Laundering (AML) guidelines issued by the FinCEN and the provisions of the Bank Secrecy Act, USA. The KYC and AML procedures should be conducted diligently for every person who may receive a Token anywhere in the world. In case the KIM token is issued to any citizens or residents of the USA, a registration as an MSB is required as per guidelines of the FinCEN. The KYC and AML procedures should also be completed for all users who may potentially use any platform which uses the KIM token for a transfer of value or when any person changes any other fiat currency or cryptocurrency to KIM tokens.

Disclaimer: Please note that the information here is based on our assessment of the existing legislations and the information provided to us by the client and should not be used for any business decisions. It should not be considered as investment or financial advice under any situation. We will not be responsible for any losses arising out of the use of this information for any investments or any other business decisions. Our maximum liability under all circumstances and in all jurisdictions is limited to the fee paid for this information only and no additional liability is accepted for any situation arising directly or indirectly from the use of this information.