

Virtual-Currency Newsletter (3) S.E.C. v. Ripple: Elucidation of the Howey Test

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Author:

[Shinnosuke Fukuoka](#)
s.fukuoka@nishimura.com

[Scott Alper](#)
s.alper@nishimura.com

I Introduction

On July 13, 2023, the Southern District Court of New York (hereinafter, the “Court”) issued its anticipated ruling in Securities and Exchange Commission v. Ripple Labs, Inc.¹ The Securities and Exchange Commission (hereinafter, “S.E.C.”) had accused Ripple Labs, Inc., (hereinafter, “Ripple”) of having violated the Securities Act of 1933 (hereinafter, the “Securities Act”),² specifically Section 5, by unlawfully offering and selling securities.³ Under American⁴ securities law, any person who offers to sell, offers to purchase, or sells a security, be it directly or indirectly, in interstate commerce must register with the S.E.C.⁵ The S.E.C. alleged that Ripple’s activities surrounding XRP, a token,⁶ constituted the offering and selling of an “investment contract,”⁷ which is a type of security under the Securities Act.⁸ Ripple, denying the allegation, stated that it did not sell XRP as an investment contract.⁹

Ripple, founded in 2012, was a company that sought to “modernize international payments by developing a global payments network for international currency transfers.”¹⁰ Ripple viewed itself as a more-efficient competitor to Bitcoin, which was another type of “blockchain ledger.”¹¹ In this vein, Ripple created the XRP Ledger.¹² The XRP Ledger was an open-source, electronic ledger that any person could use and with respect

¹ No. 20-cv-10832-AT-SN, 2023 WL 450790 (S.D.N.Y. July 13, 2023).

² 15 U.S.C. §§77a–77aa (2018) [hereinafter “Securities Act”].

³ Sec. & Exch. Comm’n v. Ripple Labs, Inc., No. 20-cv-10832-AT-SN, 2023 WL 4507900, at *1 (S.D.N.Y. July 13, 2023).

⁴ Nota bene: “American” here refers to the laws of the federal government of the United States of American, rather than to any particular state’s laws.

⁵ The Securities Act §§ 77e(a), (c), (e) (It is “unlawful for any person, directly or indirectly, . . . to offer to sell, offer to buy or purchase[,] or sell a security” by way of interstate commerce without registering with the Securities and Exchange Commission (hereinafter, the “S.E.C.”)).

⁶ See infra text accompanying notes 10–14 (Discussing Ripple’s activities and explaining XRP).

⁷ See generally, Shinnosuke Fukuoka & Scott Alper, Virtual Currency Newsletter (2): Applicability of Securities Laws to Crypto-Currency, Nishimura & Asahi (June 20, 2023), https://www.nishimura.com/sites/default/files/newsletters/file/north_america_web3_metaverse_230620_en.pdf (Explaining the Howey Test, which is used in determining whether a token constitutes an “investment contract”).

⁸ Securities Act §77b(a); Ripple Labs, Inc., 2023 WL 45079090, at *10 (S.D.N.Y. July 13, 2023).

⁹ Id. at *2, 10–11.

¹⁰ Id. at *2–3.

¹¹ Id. at *2. A “blockchain” is a type of electronic ledger by which each transaction is “recorded as a ‘block’ of data on the digital ledger, which is connected to” each block of data preceding and succeeding it. Id. at *2 n. 3.

¹² Id. at *2.

to which developers could make software utilizing the XRP Ledger.¹³ In addition, the XRP Ledger comprised a fixed supply of one-hundred-billion XRP, which were fungible tokens native to the XRP Ledger.¹⁴ Since Ripple launched the XRP Ledger and XRP in 2013, it engaged in an extensive marketing campaign, which the S.E.C. alleges portrayed XRP as a good investment opportunity.¹⁵ For example, in “Deep Dive for Finance Professionals,” which was one of the brochures that Ripple published, Ripple directly linked the success of the company with that of XRP.¹⁶ This brochure was published on Ripple’s website and circulated to over one-hundred people.¹⁷ In addition, Ripple published quarterly “XRP Market Reports” on its website.¹⁸ These reports not only outlined Ripple’s market activities but also discussed Ripple’s efforts, such as by encouraging more banks to use the XRP Ledger, to increase the value of XRP.¹⁹

In December 2022, the S.E.C. commenced this action and alleged that Ripple’s activities constituted an unlawful offer and sale of securities.²⁰ In its allegation, the S.E.C. divided Ripple’s activities into three categories: “Institutional Sales,” “Programmatic Sales,” and “Other Distributions.”²¹ With respect to the first category, “Institutional Sales,” the S.E.C. alleged that the XRP that Ripple sold to institutional buyers, hedge funds, and other sophisticated individuals constituted offers and sales of securities.²² Institutional Sales were effectuated by written sales contracts and allegedly resulted in Ripple earning \$728.9 million in profits, which were deposited into a network of non-segregated bank accounts used to fund Ripple’s operations.²³ In contrast, “Programmatic Sales” involved anonymous transactions²⁴ on digital-asset exchanges.²⁵ In these transactions, Ripple did not know who was purchasing XRP, nor did purchasers, buying on digital-asset exchanges, (hereinafter, “Programmatic Buyers”) know from whom they were purchasing XRP.²⁶ The S.E.C. alleged that Ripple received \$757.6 million in profits from the Programmatic Sales, which proceeds Ripple used to fund its operations.²⁷ Unlike the Institutional Sales and the Programmatic Sales, “Other Distributions” involved XRP that Ripple distributed as remuneration for services received.²⁸ For example, Ripple would give

¹³ Id. at *2–3.

¹⁴ Ibid.

¹⁵ Id. at *3–4, 6.

¹⁶ Id. at *6, 19 (Ripple’s “business model is predicated on the belief that demand for XRP will increase . . . if the Ripple protocol becomes widely adopted, and if the Ripple protocol becomes the backbone of global value transfer, Ripple . . . expects the demand for XRP to be considerable) (internal citations and alteration marks omitted).

¹⁷ Id. at *6.

¹⁸ Id. at *6–7.

¹⁹ Id. at *20.

²⁰ Id. at *1, 8.

²¹ Id. at *4, 15–16.

²² Id. at *4, 20.

²³ Id. at *4, 15, 17.

²⁴ The Southern District Court of New York (hereinafter, the “Court”) characterized these anonymous transactions as “blind bid/ask transactions”). Id. at *4.

²⁵ Id. at *4, 15.

²⁶ Id. at *4.

²⁷ Ibid.

²⁸ Id. at *4–5, 15–16. Similar to the Institutional Sales, however, the Other Distributions were based upon written contracts. Id. at *16.

XRP, rather than fiat currency, to employees as payment for services rendered.²⁹ The S.E.C. alleged that these Other Distributions involved \$609-million worth of XRP.³⁰ Notwithstanding their variation in form, the S.E.C. alleged that all three of these categories constituted an unlawful offering of securities.

In order for the S.E.C. to prove that there has been an illegal offering, it must prove that (1) no registration statement was filed with the S.E.C., (2) the defendant “directly or indirectly offered to sell or sold the securities,” and (3) such acts occurred by way of interstate commerce.³¹ As Ripple did not deny that it had not filed a registration statement and that it acted in interstate commerce, the question before the Court was whether Ripple dealt with securities, specifically an “investment contract.” The Howey Test, crafted by the United States Supreme Court in Securities and Exchange Commission v. W.J. Howey Co.,³² defines “investment contract.”³³

II The Howey Test

According to the United States Supreme Court, an “investment contract” is 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, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.”³⁴ In other words, proving the existence of an investment contract requires three elements:³⁵ (1) an investment of money, (2) in a common enterprise, (3) with a reasonable expectation of profits to be derived from the efforts of others. In addition, when conducting that three-pronged analysis, “form should be disregarded for substance and the emphasis should be on economic reality.”³⁶ Therefore, even an ordinary asset, such as a citrus grove³⁷ or gold, can be sold as an investment contract depending upon the totality of the circumstances.³⁸ All that is of moment is that the underlying transaction is indicative of an investment contract.

III The Court’s Analysis and Holding

Applying the Howey Test, the Court’s ruling was mixed with respect to each of the three categories.³⁹ Although the Court held that the Institutional Sales had all three elements of an investment contract, the Court found that

²⁹ Id. at *4–5.

³⁰ Id. at *5.

³¹ Id. at *10.

³² 328 U.S. 293 (1946).

³³ Ripple Labs, Inc., 2023 WL 45079090, at *10 (S.D.N.Y. July 13, 2023). See generally, Fukuoka & Alper, supra note 7 (Explaining the Howey Test and more broadly discussing the application of American securities laws to crypto-currency).

³⁴ W.J. Howey Co., 328 U.S. at 298–99.

³⁵ Nota bene: In Nishimura & Asahi’s previous article, Fukuoka & Alper, supra note 7, at 3, we characterized the Howey Test as involving four prongs, separating “reasonable expectation of profits” and “derived from the efforts of others”; however, as the Court characterized the Howey Test as involving only three prongs, we follow that same three prong characterization in this Article.

³⁶ Techerepnin v. Knight, 389 U.S. 332, 336 (1967); W.J. Howey Co., 328 U.S. at 298.

³⁷ See id. (Discussing a transaction involving citrus groves constituted an investment contract).

³⁸ See Fedance v. Harris, 1 F.4th 1278, 1288–89 (11th Cir. 2021) (“Plenty of items that can be consumed or used . . . have been the subject of transactions determined to be securities because they had the attributes of an investment.”) (internal citations omitted).

³⁹ Ripple Labs, Inc., No. 20-cv-10832-AT-SN, 2023 WL 45079090, at *22, 25, 27 (S.D.N.Y. July 13, 2023).

neither the Programmatic Sales nor the Other Distributions contained all of said elements.⁴⁰ This section will discuss the Court's application of the Howey Test to each of the three categories of activities.

1. Institutional Sales

The Court found that the Institutional Sales constituted an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others and that they, therefore, constituted the offering and sale of an investment contract.⁴¹ As Ripple had not filed a registration statement with the S.E.C., yet had acted in interstate commerce, Ripple's offering and sale of an investment contract constituted a violation of Section 5 of the Securities Act.⁴²

(1) Investment of Money

The Court held that Ripple's sale of XRP to sophisticated individuals and entities (hereinafter, "Institutional Buyers") constituted an investment of money because the Institutional Buyers paid currency in exchange for XRP.⁴³ Ripple had attempted to argue that, because the Institutional Buyers paid currency in order to purchase XRP, rather than to invest in XRP, the first prong of the Howey Test had not been met.⁴⁴ In other words, Ripple argued that the first prong of the Howey Test required both a payment of money and an intent to invest that money.⁴⁵ The Court, however, rejected that analysis.⁴⁶ Citing to three precedent cases, the Court held that the only requirement of the first prong of the Howey Test was that capital be provided; the pertinent analysis did not involve speculation as to the intent behind why the capital was provided.⁴⁷ Therefore, given that the Institutional Buyers provided capital, the first prong of the Howey Test was met.⁴⁸

(2) In a Common Enterprise

The second prong of the Howey Test, investment in a common enterprise, may be met by showing that there is "horizontal commonality."⁴⁹ The Court defined "horizontal commonality" as existing when "investors' assets are pooled and the fortunes of each investor are tied to the fortunes of other investors, as well as to the success of the overall enterprise."⁵⁰ In other words, in a common enterprise, when the value of one investor's assets

⁴⁰ Ibid.

⁴¹ Id. at *16–22.

⁴² Ibid.

⁴³ Id. at *16.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid. (Citing Sec. & Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293, 300 (1946) ("provide[d] the capital"); Glen-Arden Commodities, Inc. v. Constantino, 493 F.2d 1027, 1034 (2d Cir. 1974) ("put up their money"); and Sec. & Exch. Comm'n v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 368–69 (S.D.N.Y. 2020) ("provided cash") (internal quotations omitted)).

⁴⁸ Ripple Labs, Inc., 2023 WL 45079090, at *16 (S.D.N.Y. July 13, 2023).

⁴⁹ Revak v. SEC Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994).

⁵⁰ Ripple Labs, Inc., 2023 WL 45079090, at *17 (S.D.N.Y. July 13, 2023).

rise, so too does the value of other investors' assets, as well as of the business enterprise, for all parties "share in the profits and risks of the enterprise."⁵¹ By extension, the converse is also true in that a decrease in the value of one investor's assets coincides with a decrease in the value of other investors' assets, as well as of the business enterprise.

Here, the Court found that the Institutional Buyers' assets were "pooled" because the proceeds from the sale of XRP were deposited into a network of bank accounts.⁵² Although the network comprised multiple bank accounts, the bank accounts were not segregated or separately managed.⁵³ Therefore, the Court found that the proceeds, not "remain[ing] independent," were pooled.

Similarly, the Court also found that the fortunes of the Institutional Buyers were tied together.⁵⁴ Given that each Institutional Buyer purchased the "same fungible XRP," the proceeds of which Ripple used in furtherance of increasing the value of XRP, an increase or decrease in value of XRP affected all Institutional Buyers equally.⁵⁵ Therefore, the fortunes of one Institutional Buyer were tied both to the fortunes of the other Institutional Buyers and to Ripple's business enterprise, and the common-enterprise prong of the Howey Test was met. Notably, however, the Court explained, in dictum that it only held that a common enterprise existed as between Ripple, through its work to increase the value of XRP, and the Institutional Buyers, who invested their money in Ripple.⁵⁶ The Court stated that its opinion did not address whether the common enterprise extended to XRP holders apart from the Institutional Investors.⁵⁷

(3) With Reasonable Expectation of Profits to Be Derived from the Efforts of Others

Referencing Ripple's extensive marketing activities, the Court found that the third prong of the Howey Test, that the investment in a common enterprise be done with an expectation of profits to be derived from others, had been met.⁵⁸ The Court held that this prong can be met merely by a reasonable expectation of profits derived from the efforts of others; that expectation need not be the sole reason that a person purchases an investment.⁵⁹ In other words, merely having a reasonable expectation in the "increase[in] value of the investment," pursuant to an objective inquiry,⁶⁰ is sufficient to meet this prong.⁶¹

Given Ripple's marketing activities and the inherent characteristics of the Institutional Buyers, the Court held that a reasonable investor would believe that giving money to Ripple in exchange for XRP would result in an

⁵¹ Balestra v. ATBCOIN LLC, 380 F. Supp. 3d 340, 353 (S.D.N.Y. 2019).

⁵² Ripple Labs, Inc., 2023 WL 45079090, at *17 (S.D.N.Y. July 13, 2023).

⁵³ Ibid.

⁵⁴ Id. at *17–18.

⁵⁵ Ibid.

⁵⁶ Id. at *18 n.13.

⁵⁷ Ibid.

⁵⁸ Id. at *18–22.

⁵⁹ Id. at *18–19.

⁶⁰ Id. at *19 (quoting Sec. & Exch. Comm'n v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 368–69 (S.D.N.Y. 2020) ("The inquiry is an objective one focusing on the promises and offers made to investors; it is not a search for the precise motivation of each individual participant.") (internal citations omitted)).

⁶¹ Id. at *18 (quoting Sec. & Exch. Comm'n v. Edwards, 540 U.S. 389, 394 (2004) (holding that "profit" refers to an "income or return, to include, for example, dividends, other period payments, or the increased value of the investment.")).

increase in the value of his investment.⁶² Citing the “Deep Dive for Finance Professionals” brochure as an example,⁶³ the Court explained that the marketing material would lead prospective and existing investors to believe that Ripple would use the capital that it received in exchange for XRP in order to increase XRP’s market potential and, therefore, the value of XRP.⁶⁴ In addition, the Court cited Ripple’s publication of quarterly “XRP Market Reports,” which outlined Ripple’s market activities and work to increase the value of XRP,⁶⁵ as another example of Ripple’s marketing activities that would cause a reasonable investor to believe that he would see increased profits due to the efforts of others, namely Ripple.⁶⁶ Moreover, the Court cited statements made by senior leaders of Ripple on various platforms, such as Reddit, where one senior leader wrote, “Ripple can justify spending \$100 million on a project if it could reasonably be expected to increase the price of XRP by one penny over the long term.”⁶⁷ That statement, along with the other aforementioned activities, indicated that Ripple, working by itself, to wit, without the efforts of the Institutional Buyers, would increase the value of XRP. Given that the Institutional Buyers are sophisticated investors and, therefore, possess the attributes of a reasonable investor, the Court found that the third prong of the Howey Test had been met.⁶⁸

(4) Summary of Courts Rules of Decision with Respect to Institutional Sales

In its finding that the Institutional Sales constituted an investment contract, the Court formulated three main rules. First, the investment of money is all that is required to meet the first prong of the Howey Test; there is no requirement that the intent of providing the capital be for investment purposes.⁶⁹ Second, a common enterprise can be shown by demonstrating horizontal commonality, to wit, that the investors’ assets are pooled and that the fortunes of all investors are tied to the enterprise.⁷⁰ In other words, the second prong of the Howey Test can be met by showing that the investors “share in the profits and risks of the enterprise.”⁷¹ Finally, the Court held that the third prong of the Howey Test involves an objective analysis and does not require a subjective inquiry into the precise motivation of each investor.⁷² The Court explained that reasonably expecting profits to be derived from the work of others need not be the only reason that one purchases an investment.⁷³ As all of Ripple’s actions in conducting the Institutional Sales met each element of the Howey Test, Ripple had dealt with an investment contract. Having failed to register with the S.E.C. yet dealing with an investment contract in interstate commerce, Ripple violated Section 5 of the Securities Act.

⁶² Id. at *19.

⁶³ See supra note 16 and accompanying text.

⁶⁴ Ripple Labs, Inc., 2023 WL 45079090, at *19 (S.D.N.Y. July 13, 2023).

⁶⁵ See supra note 18–19 and accompanying text.

⁶⁶ Ripple Labs, Inc., 2023 WL 45079090, at *20 (S.D.N.Y. July 13, 2023).

⁶⁷ Id. at *21 (internal citations omitted).

⁶⁸ Id. at *19, 21–22.

⁶⁹ See supra Section III.1.(1).

⁷⁰ See supra Section III.1.(2).

⁷¹ Balestra v. ATBCOIN LLC, 380 F. Supp. 3d 340, 353 (S.D.N.Y. 2019).

⁷² See supra Section III.1.(3).

⁷³ See supra Section III.1.(3).

2. Programmatic Sales

With respect to Programmatic Sales, the Court solely analyzed the third prong of the Howey Test.⁷⁴ Largely due to the level of anonymity involved in the Programmatic Sales, the Court found that the Programmatic Sales did not meet this prong of the Howey Test and, consequently, the Howey Test as a whole.⁷⁵ The Programmatic Buyers purchased their XRP on digital-asset exchanges whereby the identity of both the seller and the buyer of XRP was unknown.⁷⁶ To wit, the Programmatic Buyers did not know whether the money paid in exchange for XRP would go to Ripple or to a different seller.⁷⁷ In contrast, the Institutional Buyers purchased XRP directly from Ripple pursuant to a sales contract.⁷⁸ As such, whereas the Institutional Buyers, knowing the identity of the seller of XRP, viz. Ripple, could reasonably expect Ripple to increase the value of XRP, the Programmatic Buyers, not knowing from whom they purchased XRP, could not expect the same.⁷⁹ The foregoing does not, however, contradict the Programmatic Buyers' speculative motive, a point that the Court addressed. The Court stated that it was not of any moment that some of the Programmatic Buyers had a "speculative motive," to wit, that they hoped that they would receive a return on their investment, when purchasing XRP. Most people have a speculative motivation when purchasing long-term assets.⁸⁰ For example, when a person purchases a piece of real property, he hopes that it will increase in value over time so that when, if he so chooses, he sells it, he will make profit. However, the Court noted that what the Howey Test requires is not merely a "speculative motive" but a "speculative motive 'derived from the entrepreneurial or managerial efforts of others.'"⁸¹ As applied to the case at bar, given that the Programmatic Buyers did not know⁸² from whom they were purchasing XRP, they could not expect that someone else's efforts would increase the value of XRP.⁸³ Akin to purchasers of real property, the Programmatic Buyers generally⁸⁴ were expecting a profit due to market trends and other such factors. Because the Programmatic Buyers had no reasonable expectation that profits were to be derived from the efforts of others, the Court held that the third prong of that Howey Test was not met and that, therefore, the Programmatic Sales did not involve an investment contract.⁸⁵ As such, there was no violation of Section 5 of the Securities Act.

⁷⁴ Ripple Labs, Inc., No. 20-cv-10832-AT-SN, 2023 WL 45079090, at *22–25 (S.D.N.Y. July 13, 2023).

⁷⁵ Ibid.

⁷⁶ Id. at *4, 22.

⁷⁷ Id. at *23.

⁷⁸ Ibid.

⁷⁹ Ibid. ("Programmatic Buyer[s] stood in the same shoes as a secondary market purchaser who did not know to whom or what it was paying its money.").

⁸⁰ Id. at *23–24 ("[A]nyone who buys or sells, for example, a horse or an automobile hopes to realize a profitable 'investment.' But the expected return is not contingent upon the continuing efforts of another." (quoting Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 253 F. Supp. 359, 367 (S.D.N.Y. 1966)).

⁸¹ Id. at *24 (quoting United States Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975)).

⁸² The Court explained that, although Ripple had disseminated marketing materials to Institutional Buyers, there was no evidence that the marketing materials were widely circulated to the general public, nor was there evidence that Ripple marketed to the Programmatic Buyers, especially given that Ripple did not know the identity of the Programmatic Buyers. Id. at *24–25.

⁸³ Id. at *24.

⁸⁴ See supra Section III.1.(3). (Explaining that the Howey Test does not require a subjective inquiry into the precise motivation of each individual investor and that the third prong of the Howey Test involves merely an objective inquiry).

⁸⁵ Ripple Labs, Inc., 2023 WL 45079090, at *25 (S.D.N.Y. July 13, 2023).

3. Other Distributions

As with the Programmatic Sales, with respect to the Other Distributions, the Court only analyzed one prong of the Howey Test, specifically, in this instance, the first prong.⁸⁶ The Court found that the Other Distributions did not meet the Howey Test's requirement that there be an investment of money.⁸⁷ Here, the recipients of the Other Distributions received XRP in exchange for services that they provided to Ripple.⁸⁸ Although, as with the Institutional Sales, there were written contracts, here Ripple did not receive any money from the employees in exchange for the XRP given, whereas Ripple did receive money in exchange for XRP under the written contracts underlying the Institutional Sales.⁸⁹ Therefore, as there was no investment of money, the first prong of the Howey Test was not met, and the Court found that the Other Distributions did not constitute the sale of an investment contract.⁹⁰

IV Conclusion

Using the Howey Test, the Court analyzed Ripple's activities surrounding the XRP token under three categories: "Institutional Sales," "Programmatic Sales," and "Other Distributions."⁹¹ The Court found that whereas the Institutional Sales contained all of the necessary elements constituting an investment contract under the Howey Test, the Programmatic Sales and the Other Distributions did not meet all of the prongs.⁹² Significantly, in formulating its ruling, the Court crafted several new rules that elaborated upon the Howey Test. First, the Court explained that the first prong of the Howey Test requires an investment of money and does not consider the intent behind providing that money.⁹³ In addition, that "investment of money" includes only capital—it does not include services.⁹⁴ Second, the Court expounded that the second prong of the Howey Test can be met by showing that investors' assets were pooled and by showing that the investors shared in the profits and the risks of the enterprise.⁹⁵ Importantly, the Court noted that investors' assets are still considered "pooled," despite the receiving entity using multiple bank accounts, if the multiple bank accounts are not segregated or separately managed.⁹⁶ Finally, the Court elucidated the third prong of the Howey Test.⁹⁷ An investor's reasonable expectation of profits need not be the only reason that he invests money.⁹⁸ For example, when the average

⁸⁶ Id. at *26–27.

⁸⁷ Id. at *26.

⁸⁸ Ibid.

⁸⁹ Id. at *16, 26.

⁹⁰ Id. at *26–27.

⁹¹ See supra Section III.

⁹² See supra Section III.

⁹³ See supra Section III.1.(1).

⁹⁴ See supra Section III.3.

⁹⁵ See supra Section III.1.(2).

⁹⁶ See supra Section III.1.(2).

⁹⁷ See supra Sections III.1.(3), III.2.

⁹⁸ See supra Section III.1.(3).

person purchases a house, he purchases it primarily to live in it, although he does have some modicum of a reasonable expectation that the house will increase in value over time. That reasonable expectation, albeit not the main reason that said person purchased the house, is sufficient for part of this prong of the Howey Test.⁹⁹ However, merely having that speculative motivation does not fulfill the whole of the third prong of the Howey Test, for there also must be an expectation that the increase in value is to be derived from the efforts of others.¹⁰⁰ Using the previous example, merely expecting that market trends and other factors will increase the value of the house is insufficient to meet the third prong of the Howey Test.¹⁰¹ In short, despite not being the main reason, a mere reasonable expectation of an increase in the value of one's purchase is sufficient to satisfy the third prong of the Howey Test, as long as it is coupled with a reasonable expectation that that increase in value is due to the efforts of others.

In light of this latest ruling, when conducting activities regarding crypto-currency and tokens, companies and their attorneys should be aware of the nuances formulated by the Southern District Court of New York's ruling in the case of Ripple. Companies and their attorneys should add these nuances to their Howey-Test analysis when considering whether it is necessary to register with the S.E.C.

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Public Relations Section, Nishimura & Asahi newsletter@nishimura.com

⁹⁹ See supra Section III.1.(3).

¹⁰⁰ See supra Section III.2.

¹⁰¹ See supra Section III.2.