



# KELLEY DENISE SCOTT LAW FIRM

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## LEGAL OPINION

**SUBJECT: LEGAL OPINION ON “PRVC” TOKEN UNDER THE LAWS OF THE UNITED STATES**

This is in response and with reference to your request in which you asked us to review the whitepaper of PrivaCoin. We understand that the main objective of PrivaCoin is to create a fully secured and safe platform for its users. We also understand that PrivaCoin focuses on the entire spectrum of the crypto commerce ecosystem. For the said purpose, PrivaCoin has developed a utility token / coin called 'PRVC Token' which will enable users of the PrivaCoin Platform to use cryptocurrency for online commerce transactions at the PrivaCoin Platform.

The PrivaCoin Platform is a completely decentralized and secured platform which consists of an ecosystem of multiple services (discussed in detail below) that PrivaCoin intends to offer to its users. We note that the users can use PRVC Tokens to avail various services currently available on the PrivaCoin Platform under its ecosystem or as may be available from time to time in the future by paying a very small transaction fee and without any other built-in fees or costs. We also note that PRVC Tokens are sold to every participant fairly and the tokens are fully available to everyone for purchase at the same price. Unlike other currencies that only focus on marketing, PRVC Token helps merchants and ordinary people to have their money and investments in their wallet regardless of the amount they want to have in a digital way and with the ambition of being able to have the digital world and the virtual world in one click. Users may access the PrivaCoin web application from <https://prvctoken.com/index.html> and engage with PRVC Tokens. PRVC Token is a BEP20 multi-blockchain token which currently sits on BSC Network. Users may have the option to buy PRVC Tokens directly from PrivaCoin using a Webwallet.

Moreover, it is also understood that the PrivaCoin Platform offers its user the following services, amongst others:

- **Payment Widget:** The payment widget allows websites to easily accept payments in multiple tokens and custom coins on any website. The payment widget may be connected to any Payment Gateways to the PrivaCoin.
- **Native Support:** The Gateway smart contract can be configured to accept all multiple coins or a list of specific token types.
- **Build your own customized Gateway:** As a provider, a customer can implement his/her own desired features, such as web invoices, email/SMS notifications, refunds, and more by building on the open-source code and examples provided in the PRVC Token.

In light of the above background, we have been requested to assess whether the PRVC Token to be issued by PrivaCoin is a Utility or Security under the US securities-related laws and regulations in light of the HOWEY Test of the US Supreme Court. At the outset, it is pertinent to mention that in most countries, the regulations regarding cryptocurrency-based platforms are still underway, and as such there are no black and white rules to determine if a particular kind of coin is a utility or not. It should also be noted that the legal analysis herein may be updated in the future as the law in this area develops. Furthermore, the below analysis is strictly theoretical, as no cases, that we are aware of, which are relevant to the subject matter, have been tested yet in courts to date. We would like to confirm that we have thoroughly reviewed the whitepaper of the PrivaCoin Platform and set out our opinion below.

## **PRIVA COIN PLATFORM, PRVC TOKEN AND THE US SECURITY LAWS AND REGULATIONS**

### **1.1. TYPES OF COINS**

In the context of the US Securities laws, there are generally three types of coins/tokens issued through initial coin offerings (ICOs) namely Equity, Security, and Utility coins/tokens.

1.1.1. **Equity Coins/Tokens:** These coins/tokens represent ownership of an asset, such as debt or company stock. By employing blockchain technology and smart contracts, a startup could forgo a traditional initial public offering (IPO) and instead issue shares and voting rights over the blockchain.

1.1.2. **Security Coins/Tokens:** These coins/tokens on the other hand are promises for future profit. Security Coins/Tokens refer to any kind of tradable asset. These are a form of digital assets, the purchase of which entitles the owner with a number of rights that are similar to securities such as stocks or bonds. There are three major characteristics for an instrument to be deemed as security: Voting rights in a general assembly or pertaining to important decisions of an entity, profit sharing such as distributions, and/or a right to claim against the company to redeem the instrument in exchange for a value.

Therefore, a security coin/token, for example, might offer voting rights in the issuing entity, or rights in the profits of the issuing entity (or both). The issuing entity might also promise to redeem the coin's/token's value when there will be enough capital do to so. These are but examples of rights attached to such coins/tokens, which can be deemed by many jurisdictions throughout the planet to be securities *per se*, which therefore require to be compliant with the securities laws and regulations. In the United States, security coin/token sales and investments are subject to Securities and Exchange Commission (SEC) securities regulations.

The US Supreme Court in *SEC v. Howey*<sup>1</sup> established the guidelines for whether a financial arrangement involved an investment contract and was subject to securities regulations. According to the Howey Test, an arrangement is a security if it involves

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<sup>1</sup> SEC v. Howey Co., 328 U.S. 293 (1946)

*“an investment of money and a common enterprise with the expectation of profit, primarily from the efforts of others.”* Some simple guidelines to determine if a token/coin is a security are as follows:

- i) Ownership interest in a legal entity
- ii) Equity interest
- iii) Share of profits and assets
- iv) Status as a creditor or lender
- v) A coin/token that can be converted into a security coin/token

1.1.3. **Utility Coins/Tokens** do not meet any of the requirements of the Howey test. Utility Coins/Tokens provide users with access to a product or service or both. This kind of coin/token is basically a contract for the provision of goods or services, to be redeemed by the coin/token holder, once or continuously. The utility coin/token has an actual underlying contractual right. Therefore, its value is determined by the value of the underlying right attached to it.

Following are some of the factors to determine if a coin/token is not a security:

- i) Develops features for a blockchain or to mine
- ii) Use the blockchain and its outputs
- iii) Contribute efforts to the blockchain
- iv) Sell the products of the blockchain
- v) Vote on features and functionality of blockchain

## **1.2. THE US SUPREME COURT’S HOWEY TEST TO ASSESS AN INVESTMENT CONTRACT**

The HOWEY Test is used as a benchmark to determine whether or not an investment (in the form of a coin/token) is a security. For instance, if an investment meets all four conditions of the HOWEY Test it will be considered as a security. However, in case a particular investment fails to pass the HOWEY Test, the investment (coin/token) will be considered as a Utility coin/token.

The Howey test is used to determine whether an instrument qualifies as an "investment contract" for the purposes of the Securities Act: *"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."*

In other words, 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, 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.

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. An instrument will be treated as a security if all the following are present:

- i) Investment of Money
- ii) Common Enterprise
- iii) Expectation of Profit
- iv) Through the Efforts of the Promotors

### **1.3. ANALYSIS OF THE US SECURITY LAWS AND THE HOWEY TEST**

In the U.S, issuing, offering, or selling unregistered securities will be a violation of Section 5 of the Securities Act of 1933, and the issuer can face 5 years of prison. Furthermore, investors may initiate lawsuits under Section 5 and Section 12(a)(1) of the Securities Act of 1933 (or 15 U.S. Code § 77e and § 771 (a)(1)) for damages of selling non-exempted security without registering it. Moreover, the Securities Exchange Act of 1934 gives powers in section 10(b) to federally regulate fraudulent security practices, wherein regulation 17 C.F.R. 240.10b-5 (c) gives investors the right to sue any issuer for fraud or deceit. It should be noted that similar laws apply in many other jurisdictions.

The Securities and Exchange Commission (hereinafter, the “SEC”), has issued the “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO” (Release No. 81207 / July 25, 2017) wherein a few fundamentals were promulgated. Firstly, SEC has stated that the existing federal securities laws are sufficient to tackle the coin/token issuance.

Secondly, and more importantly, the SEC has pointed out that not all coins/tokens are securities, and that such classification shall be determined on a case-by-case basis. In order to define a coin/token as a security, the SEC has stated that the “Howey Test” shall be applied, which indeed was applied by the SEC in that particular DAO project coin/token issuance SEC investigation on which its report was written. Finally, the SEC has treated DAO, an unincorporated, non-resident, virtual organization, definitely not situated in the U.S, as an entity for which the Securities laws also apply to, and by reference applying the U.S laws to whoever offers or sells securities to U.S persons, no matter in which jurisdiction the issuing entity is incorporated and/or located.

In order to determine whether a transaction involves a security one must not turn on labeling; if we say a particular coin/token is a utility coin/token, it does not make the issued coin/token a utility coin/token. Secondly, even if a coin/token has a practical utility use, it does not necessarily preclude the coin/token from being a security – but instead requires an assessment of “*the economic realities underlying a transaction.*” (**United Housing Found., Inc. v. Forman, 421 U.S. 837, 849 (1975) (the “Forman” Case).**)

*The “test . . . is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect” (SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 352-53 (1943))*

#### **1.4. WHETHER PRVC TOKEN IS A UTILITY OR SECURITY INSTRUMENT UNDER THE US SECURITIES LAWS AND REGULATIONS?**

Securities must be registered per Section 5 of the Securities Act of 1933 as stated hereinabove. Of course, an instrument that is not security needs not to be registered. Therefore, one must first examine the definition of Security:

*“(a) Definitions - When used in this subchapter, unless the context otherwise requires— (1) The term “security” 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, 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.” 15 U.S. Code § 77b*

Similarly, the Securities Exchange Act of 1934 defines a security, in the following fashion:

*“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.” Section 3(a)(10) of the Securities Exchange Act of 1934.*

The U.S Supreme Court has stated that the term “investment contract” in these two definitions is treated as being the same (SEC v. Edwards, 540 U.S. 398 (2004)). So, we can see that the

U.S term “security” includes also an “investment contract”. An investment contract is 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." (see SEC v. Edwards, 540 U.S. 389, 393 (2004); SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946); see also the Forman case, at 852-853) (in this work, the “Howey Test”).

In order to become a security coin/token, there are four conditions that PRVC Token needs to meet. If PRVC Token doesn't meet any of these conditions, it will fall under the category of a Utility Coin. To be accurate, the Howey Test requires that the profits will be made solely from the efforts of others:

*“... 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 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.... 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.” (SEC v. W.J. Howey Co., 328 U.S. 293 (1946))*

Below is the application of HOWEY TEST on PRVC Tokens:

**i) Investment of Money**

The PRVC Tokens are purchased by the public with actual money or cryptocurrency such as Bitcoin or other cryptocurrencies. The cryptocurrency based Bitcoin is not money per se, but on August 6th 2013, the U.S. District Court for the Eastern District of Texas held that Bitcoin is within the definition of “money” for purposes of the rules governing investment contracts – Bitcoin can purchase goods or services, and can be exchanged for conventional government-backed currencies (SEC v. Shavers, No. 4:13-CV-416, 2013 WL 4028182, (E.D. Tex. 2013), reconsideration aff'd, No. 4:13-CV-416, 2014 WL 12622292 (E.D. Tex. 2014).

The members of the PrivaCoin Platform will be investing their money (fiat and cryptocurrencies) to purchase the PRVC Tokens, therefore, the first condition of a Security Token/Coin is fulfilled.

**ii) Common Enterprise**

There are two sub-tests for the “Common Enterprise” prong – the horizontal commonality test, and the vertical commonality test. The vertical commonality is in turn divided into the narrow vertical and the broad vertical. The U.S courts have applied these two tests alternately. The horizontal commonality test, which is the more common test, requires the pooling of assets from multiple investors so that all will share in the profits and risks of the enterprise. i.e., the profits of each investor are similar to those of the other investors.

Both vertical commonality tests require that the investor's fortunes will be tied to the issuer/promoter's success, rather than to the fortunes of its fellow investors; the broad vertical commonality test requires that the well-being of all investors be dependent upon the issuer/promoter's expertise. On the other hand, the narrow vertical commonality test requires that the investors' fortunes be "*interwoven with and dependent upon the efforts and success of those seeking the investment ... of third parties*" (SEC v. SG Ltd., 265 F.3d 42, sec. 31-35 (1st Cir. 2001)).

As for the horizontal commonality test, the PRVC Tokens are being used to exchange certain services on the PrivaCoin Platform, which have been highlighted at the start of this Opinion. However, there is no requirement for a mutual share in the profits and risks of the enterprise. The second condition of Security Token/Coin under the Howey test has therefore not been met.

### iii) **Expectation of Profit**

This prong does not merely require the coin holders to expect profit, because it seems unreasonable that someone will purchase a service or a good without taking into account the probability that the purchased coin will increase in value. The expectation of profits from a purchase of any kind of valuable is almost always present. Therefore, it seems that the prong requires not only that there will be an expectation of profit, which is trivial, but also that the purchase of that valuable will be primarily motivated by making profits (upon resale for example), rather than by consuming or using that which was purchased.

Personal consumption is a vital part of considering whether this prong is met or not, wherein it should be examined if the primary motivation of purchasing the coin/token is to profit upon resale or to use the underlying rights of the coin/token. There are several court cases where this differentiation was stipulated, for example, see the Forman Case. Per Forman, it "*is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use*".

Upon reviewing this matter, we note that PRVC Token holders would not be automatically expecting profit merely by holding the PRVC Tokens. In fact, they would need to use these tokens for the services offered by the PrivaCoin Platform. Like any kind of valuable, the PRVC Token holder may hold it to a time where the value of the token in the market will increase, wherein the holder may sell the coin with profit. Nevertheless, since the PRVC Token provides a real consideration and functionality, it only seems reasonable (and the token is designed so) that the holders will use the token's rights for consumption. Therefore, this prong's requirement of Security Token/Coin does not seem to have been met.

### iv) **Through the Efforts of the Promoters**

This prong is based on the fulfillment of the requirement of the previous prong – the expectation of profits. This prong “from the efforts of others” is examining the source of the profits -

*"whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."* (the Forman Case; SEC v. Glenn W. Turner Enters., 474 F.2d 476, sec. 28 (Feb. 1, 1973)).

In this case, PRVC Token is not a tool used to expect profits through the efforts of the promoters, rather it is a tool to get various services on the PrivaCoin Platform. Additionally, the holders of PRVC Tokens would not get anything from the efforts of promoters as they would be using their PRVC Tokens on various aforementioned services. Therefore, the last condition of Security Token/Coin – profit must be through the efforts of the promoters – has also not been fulfilled.

## 2. CONCLUSION

In light of the above, it may be concluded that the PRVC Token appears to be a Utility Token by its very nature as discussed in view of the Securities regulations of the United States. Therefore, the PRVC Tokens may be treated as utility coins as opposed to security coins/tokens for the purposes of listing or trading within the US.

Yours Sincerely,



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