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## MEMORANDUM

**To:** Blockstack PBC

**From:** Robert Rosenblum  
Amy Caiazza  
Johanna Collins-Wood  
  
Wilson Sonsini Goodrich & Rosati, PC

**Date:** November [●], 2020

**Re:** **Summary of Memorandum Regarding the Stacks Tokens**

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The following is a summary<sup>i</sup> (the “**Summary**”) of a more detailed memorandum (the “**Memorandum**”) developed for Blockstack PBC’s (“**PBC**”) board of directors and certain other people and entities. The Memorandum and this Summary reflect the analysis supporting PBC’s conclusion that, upon the adoption of Stacks Blockchain 2.0, as defined below, the digital tokens (the “**Stacks**” or “**Stacks Tokens**”) native to the Stacks Blockchain will no longer be securities. As a result of this conclusion, no registration statement or Form 1-A will be filed or will be in effect with respect to the Stacks Tokens issued to miners on the Stacks Blockchain, as defined below, who may be U.S. persons.<sup>ii</sup> In addition, as a result of its conclusion that Stacks Tokens will no longer be securities, PBC believes that trading platforms whose users include U.S. persons can trade Stacks Tokens, and permit those U.S. persons to trade Stacks Tokens, without the trading platform being required to register as an exchange or an alternative trading system.

This Summary is being released publicly to the Stacks ecosystem to help the members of the Stacks ecosystem understand and evaluate PBC’s determination that, upon the adoption of Stacks Blockchain 2.0, the Stacks Tokens no longer will be securities.<sup>iii</sup>

### I. OVERVIEW

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PBC is a Delaware public benefit corporation that has developed, built and released a decentralized computing network (the “**Stacks Blockchain**”) designed to promote data ownership and privacy for its users. The Stacks Blockchain is, in effect, a new internet that permits developers to create applications (or “**apps**”) that run on that blockchain, and permits users of those apps to safeguard their private information.

As part of its development of the Stacks Blockchain, PBC also developed, sold and issued Stacks Tokens that are used by developers and others on the Stacks Blockchain. The Stacks Tokens serve as digital “fuel” to conduct transactions and to register and execute smart contracts on the Stacks Blockchain.

Out of an abundance of caution, PBC has treated the Stacks Tokens as securities in the United States, and has treated itself as the issuer of those securities, based on the Supreme Court’s decision in *SEC v. Howey*.<sup>iv</sup> In *Howey*, the Court held that a promoter that sold interests in a citrus grove, coupled with an agreement for the promoter to manage those citrus groves, had created an “investment contract” that was a security under the federal securities laws. The *Howey* Court set up a four-part test to determine whether a financial product, business arrangement or the like is an investment contract and a security. One of those factors, and the one that is the primary focus of this Summary, requires that investors look to a promoter’s essential managerial services as the sole or primary factor in generating potential returns to the investors.<sup>v</sup> (The Memorandum discusses that there also are compelling arguments under the other factors set forth in *Howey*.)

For purposes of U.S. securities laws, PBC treated the Stacks Tokens as investment contracts that are securities in part because of the significant role that PBC played in developing, maintaining and marketing the Stacks Blockchain, and the significant role PBC played in developing, issuing, and seeking liquidity for the Stacks Tokens.

PBC anticipates releasing the fully-developed version of the Stacks Blockchain (“**Stacks Blockchain 2.0**”) at the end of 2020 or the beginning of 2021. Once Stacks Blockchain 2.0 is adopted by the Stacks Blockchain mining community, PBC will play a significantly reduced role in the Stacks Blockchain ecosystem, and no longer will have the ability to, among other things, unilaterally make changes to the Stacks Blockchain, issue new Stacks Tokens, or otherwise control or even necessarily influence the development of the Stacks Blockchain and the Stacks Tokens. PBC anticipates that its primary business will be to develop apps and developer tools to

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be used on the Stacks Blockchain, in competition with any other developers who wish to develop apps or developer tools for use on the Stacks Blockchain.

PBC believes that once version 2.0 is released and adopted by the Stacks Blockchain mining community, PBC no longer will play an essential managerial role or provide the essential managerial services that reasonably could be expected to be the primary driver of potential returns to the holders of Stacks Tokens. As a result, PBC believes that, under *Howey*, the Stacks Tokens no longer will be investment contracts that are securities under the federal securities laws.<sup>vi</sup>

## **II. Summary of Analysis**

The Stacks Tokens, by themselves, are essentially computer code. This code is no more a security, standing alone, than is a citrus grove or an orange from that citrus grove. What caused PBC to treat the Stacks Tokens as arguably being securities under *Howey* was PBC's efforts to develop, maintain, market and support the Stacks Tokens and the Stacks Blockchain; these efforts potentially could be viewed as managerial or essential managerial services.

Assuming that PBC, by providing these services, caused the Stacks Tokens to be securities, the Stacks Tokens will cease being securities – and will revert to just being computer code -- once PBC ceases to perform those services. By analogy, if the promoter of the citrus groves in *Howey* had stopped providing management services for the citrus groves, and simply sold citrus groves to buyers to develop and exploit (or not) on their own, the promoter presumably no longer would have been deemed to be selling securities; a citrus grove, by itself, is not a security.<sup>vii</sup> Once the Stacks Tokens cease being securities under *Howey*, the Tokens can be freely sold, resold and transferred without raising any issues under the federal securities laws. This is true for all Stacks Tokens, including those initially sold when the Stacks Tokens were (or could have been deemed to be) securities. Once PBC no longer provides services that can be deemed to be essential managerial services, no holder of Stacks Tokens reasonably can rely principally or significantly on PBC to drive the value of the Stacks Tokens, and from that time forward no Stacks Tokens, *regardless of when those Tokens were issued*, would be securities.

PBC believes that once version 2.0 of the Stacks Blockchain is released and adopted by the Stacks mining community, PBC will no longer, and in fact will not be able to, provide the

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essential managerial role that under *Howey* could cause the Stacks Tokens to be deemed to be securities.<sup>viii</sup> Among other reasons:

- PBC anticipates that its activities will primarily be devoted to: (i) developing apps and smart contracts for use on the Stacks Blockchain (and perhaps for other blockchains), which are intended to ultimately generate profit for PBC; and (ii) building developer tools that will assist it, and perhaps other developers, in developing apps and smart contracts for use on the Stacks Blockchain (and perhaps on other blockchains);
  - For example, as part of its own efforts building developer tools, PBC anticipates further developing a login library and storage system for the Stacks Blockchain, and anticipates further refining the Clarity smart contract language that PBC has already created for use on the Stacks Blockchain;
  - PBC may release open source versions of these programs to the general public, which would be a benefit to the Stacks Blockchain community as a whole, including to PBC. PBC has a business interest in the continuing success, development and broad acceptance of the Stacks Blockchain, because it hopes to monetize apps and developer tools developed for use on the Stacks Blockchain; and
  - In addition, if the programs developed by PBC gain general acceptance in the Stacks Blockchain community (or other blockchain communities), PBC may also directly profit by being able to develop and sell premium or customized versions of these programs to app developers or enterprise customers;
- PBC will rebrand itself under a new name, Hiro Systems PBC, that does not include the words “block” or “stack,” in order to eliminate confusion over its new business focus and new role in the Stacks ecosystem;
- PBC will have substantially completed the coding and implementation of the Stacks Blockchain;

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- Any substantial subsequent changes to the Stacks Blockchain proposed by PBC will need to be approved (or rejected) by the same approval process described below, will not be under PBC’s control and will be applicable to all proposals (including proposals not made by PBC) to substantially change the Stacks Blockchain.<sup>ix</sup> In addition, PBC intends to propose substantial changes to the Stacks Blockchain only if it believes those changes will enhance its business operations or prospects;
- Any significant changes to the Stacks Blockchain that PBC, or any other person or entity, may propose will need to be approved by a majority of the voting power<sup>x</sup> of the miners providing mining services to the Stacks Blockchain, and then be accepted by a significant portion of the Stacks Blockchain community. That is, even if a majority of the miners (measured by voting power) approve a particular proposal, the broader Stacks community may decide that they prefer to continue using the version of the Stacks blockchain that did not incorporate that proposal. If so, it is likely that the version of the Stacks blockchain that does not incorporate that proposal will become the dominant (and perhaps sole) version of the Stacks blockchain<sup>xi</sup>;
- PBC will not be a miner, will not provide mining services, and will have no ability to approve or prevent changes to the Stacks Blockchain;
- PBC will not have any continuing role in marketing or promoting the Stacks Tokens or the Stacks Blockchain. For example, PBC will have no ability to cause the network to issue new Stacks Tokens, and PBC will not enter into agreements with exchanges or trading platforms that might list or trade the Stacks Tokens;
- PBC will limit its holdings of Stacks Tokens. Among other things, PBC will own less than 10% of all unlocked Tokens for the first two years after the adoption of Stacks Blockchain 2.0, and less than 15% of all unlocked Stacks Tokens thereafter;<sup>xii</sup>
- PBC has ended, and does not anticipate resuming, its “App Mining program,” pursuant to which it rewarded developers of potentially useful apps for the Stacks Blockchain and programmers who might make beneficial changes to the Stacks Blockchain;<sup>xiii</sup>

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- PBC has created and has provided an initial grant to fund a foundation (the “**Stacks Foundation**”) focused on supporting the Stacks Blockchain and the related Stacks ecosystem. One of PBC’s key blockchain developers has joined the Stacks Foundation, and is no longer affiliated with PBC. PBC does not control, and is not represented on the board of, the Stacks Foundation;
- The Stacks ecosystem is a thriving and developed community of people and entities that are involved in and dedicated to the Stacks Blockchain. At the time of the adoption of Stacks Blockchain 2.0 or shortly thereafter, the Stacks ecosystem is anticipated to include:
  - at least 20 miners (a requirement for the Stacks 2.0 upgrade to occur);
  - hundreds of developers;
  - multiple service providers offering nodes-as-a-service;
  - multiple wallet providers;
  - multiple custody providers;
  - at least six independent entities devoted solely or primarily to the Stacks ecosystem;
  - over 300,000 Stacks Tokens holders;
  - tens of thousands of people in Telegram groups dedicated to the Stacks ecosystem;
  - thousands of people participating in Stacking (which is a feature of Stacks Blockchain 2.0 that algorithmically pays rewards in Bitcoin to certain active members of the Stacks community; the Bitcoin used to pay the Stacking rewards are derived from Bitcoin contributed by miners);
  - a majority of the over 400 apps currently running on the Stacks Blockchain having upgraded to the Stacks 2.0 blockchain; and

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- the trading of Stacks Tokens on several well-known non-U.S. trading platforms.

As a result of the significant outside involvement with the Stacks Blockchain, PBC believes the Stacks ecosystem is self-sufficient and fully functioning; and

- PBC has publicly announced its planned activities regarding the Stacks Blockchain following the release and adoption of the Stacks Blockchain 2.0, so the public and users of the Stacks Blockchain are aware that they no longer will be able to rely on PBC's essential managerial efforts to support the Stacks Blockchain or Stacks Tokens.<sup>xiv</sup>

These and other facts support two related but distinct rationales for PBC's determination that the Stacks Tokens no longer will be securities. The first rationale is that, following the adoption of Stacks Blockchain 2.0, PBC will play such a reduced and ultimately minor role in the Stacks Blockchain ecosystem that it should not be deemed to be providing, or to be able to provide, the types of essential managerial services that would satisfy the *Howey* test.<sup>xv</sup> PBC will be one among many developers on the Stacks Blockchain, and PBC will have no unique power or influence over the future development, operations or changes to that Blockchain (in fact, PBC will not even be a miner, and therefore will have no ability to even vote on future changes to the Blockchain). Stated differently, PBC will engage in software development and similar activities that would not reasonably be expected to uniquely drive an increase in the value of the Stacks Tokens, even if PBC had the power to do so (which it does not).

In addition, following the adoption of Stacks Blockchain 2.0, PBC believes that it will have no material information about the Stacks Tokens, the Stacks Blockchain, or the operations of the Stacks Blockchain that is not generally available to all other participants in the Stacks Blockchain ecosystem. As discussed above, the code for the Stacks Blockchain is open source and available to anyone, and the decentralized operations of the Stacks Blockchain mean that neither PBC nor any other person or entity has any unilateral ability to significantly affect the Stacks Blockchain and its operations, and therefore neither PBC nor any other person should have knowledge of material information about the Stacks Tokens or the Stacks Blockchain that is not also widely known.

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The second rationale is that, following the adoption of Stacks Blockchain 2.0, the operation and governance of the blockchain will be so diffuse – or decentralized – that no one should be deemed to be providing, or to be able to provide, the types of essential managerial services that would satisfy the *Howey* test. For example, following the adoption of Stacks Blockchain 2.0, the functioning of the Stacks Blockchain will rely significantly on the decentralized activities of miners, node operators, wallet creators, app developers and others, and no changes to the Blockchain can be made unless the changes are approved by a majority of the miners (measured by voting power) and unless the changes are widely accepted by the Stacks Blockchain users.

In this regard, following the adoption of Stacks Blockchain 2.0, that blockchain will have many of the same attributes and characteristics as the Bitcoin and Ethereum blockchains, and the SEC and its Staff have suggested that those blockchains are sufficiently decentralized so that the tokens native to each of them are not securities.<sup>xvi</sup> Similarly, Stacks Blockchain 2.0 bears some similarity to the EOS blockchain, and the SEC’s recent enforcement action against Block.one, the sponsor of the EOS blockchain, reasonably can be read to suggest that the EOS token may not be a security.<sup>xvii</sup>

In addition to the arguments summarized above that utilize the *Howey* test, PBC also analyzed the Stacks Tokens under the “Framework for ‘Investment Contract’ Analysis of Digital Assets,” published by the Staff of the SEC in April 2019 (the “**Staff Framework**”).<sup>xviii</sup> The Staff Framework lists a number of non-exclusive factors that the Staff believes are useful in analyzing whether a crypto asset is a security under the *Howey* test. The factors listed in the Staff Framework are not exhaustive, and “no one factor is necessarily dispositive as to whether or not an investment contract exists.” In addition, the Staff Framework represents only the views of the Staff of the SEC and not the views of the SEC itself, and it cannot replace or supersede case law such as the *Howey* test. Following its analysis of the Stacks Tokens using the Staff Framework, PBC determined that the overwhelming number of these factors support PBC’s conclusion that, upon the adoption of Stacks Blockchain 2.0, the Stacks Tokens will not be securities.

For these and similar reasons, PBC has concluded that, following the adoption of Stacks Blockchain 2.0, the Stacks Tokens no longer will be securities.



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**Appendix A**

1. Wilson Sonsini Goodrich and Rosati (“**WSGR**”) has assisted Blockstack in preparing the Memorandum and this Summary (together, the “**Documents**”). WSGR has relied solely and exclusively on Blockstack and its officers and employees for all factual information presented in the Documents. WSGR has not conducted its own review or diligence to determine if the information is accurate and complete. WSGR, however, has no information suggesting that any of the information contained in the Documents is inaccurate or incomplete.
2. Changes to the factual information contained in the Documents might adversely affect or change the analysis and conclusions presented in the Documents. Not every factual deviation, however, will affect the analysis or conclusions. In addition, some changes to the factual information contained in the Documents might bolster the analysis and conclusions presented in the Documents. The effect of any changes to factual information on the analysis and conclusions presented in the Documents must be considered on a case-by-case basis.
3. Some of the factual information on which the Documents are based involves future events and expectations. If those expectations are wrong, that might (or might not) affect the analysis and conclusions in the Documents.
4. This is a Summary of a Memorandum summarizing Blockstack’s position. Neither this Summary, nor the Memorandum, is an opinion of WSGR. The Documents discuss Blockstack’s conclusion that, under the facts and circumstances discussed in the Documents, the Stacks Tokens should not be deemed to be securities under the test set forth in *SEC v. Howey*, and the Documents summarize some of the key arguments and analysis supporting that conclusion. While WSGR has advised Blockstack and assisted Blockstack in drafting the Documents, the conclusion presented in the Documents is Blockstack’s. WSGR, however, is not aware of any facts or legal precedent that materially undercuts Blockstack’s conclusion, except as discussed in the Documents.
5. Each Document speaks solely as of the date of that Document. Future factual changes or developments, and future court cases or SEC decisions, could affect the analysis or conclusions presented in the Documents. Neither Blockstack nor WSGR are under any obligation to update the Documents to reflect future events or factual changes, or for any other reason.

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6. The Documents present a thoughtful and well-reasoned analysis of why the Stacks Tokens should not be deemed to be securities under *Howey*. There is, however, no court case or other precedent directly on point, and it is possible that a court, the SEC or others could disagree with some or all of the analysis or conclusions presented in the Documents.

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<sup>i</sup> This Summary is subject to the analysis, assumptions and limitations discussed in this Summary and more fully in the Memorandum, including the assumptions and limitations set forth in Appendix A to this Summary.

<sup>ii</sup> PBC has previously disclosed its intention to cause the Stacks Tokens to no longer be securities as soon as reasonably possible by causing the operation of the Stacks Blockchain and the Stacks ecosystem to become sufficiently “decentralized” – that is, sufficiently dependent on the efforts of a large number of miners, node operators, wallet providers, app developers and others that neither PBC nor any other person or entity could be deemed to be providing the essential managerial services that could cause the Stacks Tokens to be securities under *Howey*. Among other places, PBC publicly disclosed this intention in its offering statement qualified on July 10, 2019 by the U.S. Securities and Exchange Commission under Regulation A.

<sup>iii</sup> The fact that PBC previously qualified the Stacks Tokens under Regulation A is not relevant to this analysis or conclusion. As discussed below, PBC has *previously* treated the Stacks Tokens as securities, and in order to publicly offer those Tokens in the United States, it chose to qualify those Tokens for sale under Regulation A. That Regulation A offering has ended. The existence of the Regulation A offering was evidence of the fact that the Stacks Tokens, *at the time they were being offered and sold pursuant to the Regulation A offering*, were or could be deemed to be securities. This is equally true for all the tokens and digital assets that other blockchain projects offered and sold in the United States pursuant to Regulation D under the Securities Act of 1933, or in any other transaction subject to or exempt from the federal securities laws; *at the time blockchain projects sold those tokens*, those tokens were or could be deemed to be securities.

The question addressed in this Summary (and in the Memorandum) is whether the Stacks Tokens will *continue to be* securities, in light of the substantial upcoming changes to the Stacks Blockchain that will prevent PBC and any other single person or entity from exercising significant influence or control over that Blockchain and over the value of the Stacks Tokens. The manner in which PBC *previously* sold Stacks Tokens, and the securities law provisions that governed those *prior* sales, is irrelevant as to the question as to whether the upcoming changes to the Stacks Blockchain will cause the Stacks Tokens to no longer be securities at a *future* time.

<sup>iv</sup> *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

<sup>v</sup> Courts have deviated in the language used to express this factor. For consistency within this memorandum, we have chosen to use the phrase “essential managerial services that could be deemed to be the primary driver of value” for the security in question. However, at least for purposes of the analysis in this Summary and the Memorandum, PBC believes there is not an important distinction between the ways that the courts have expressed the promoter’s managerial or entrepreneurial expertise. *See, e.g., United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852-54 (1975) (“derived from the entrepreneurial efforts of others”); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 483 (5th Cir. 1974) (“this court sees the distributor’s efforts...as fundamental and essential”); *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F. 2d 476, 482 (9th Cir.), cert. denied, 414 U.S. 821, 94 S. Ct. 117, 38 L. Ed. 2d 53 (1973) (“[T]he test is ‘whether the efforts made by those other than the investor are the undeniably significant ones, those essential

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managerial efforts which affect the failure or success of the enterprise.”); *Gary Plastic Packaging Corporation v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et al.*, 756 F.2d 230, 240 (2d Cir. 1985) (the Court found that “a significant portion of the customer’s investment” was dependent on Merrill Lynch’s “managerial and financial expertise.”); *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981) (adopting the test from *Glenn Turner*, “...whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts...”).

<sup>vi</sup> It is possible that the Stacks Tokens could be deemed to no longer be securities, and that PBC could be deemed to no longer be the issuer of the Stacks Tokens, even in the absence of the adoption of version 2.0. This Summary, however, assumes that version 2.0 will be adopted and implemented, as described below.

<sup>vii</sup> See William Hinman, Director, SEC Div. of Corp. Fin., Remarks at the Yahoo Finance All Markets Summit: Crypto, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018) (a digital token “all by itself is not a security, just as the orange groves in *Howey* were not”).

<sup>viii</sup> The fact that the adoption of Stacks Blockchain 2.0 has not yet occurred is not a reason to delay making the determination of whether the Stacks Tokens will be securities until after that adoption has occurred. The operation of that Blockchain, the role of PBC, and many other significant factors are known prior to the adoption of Stacks Blockchain 2.0, and PBC has an adequate basis to make the determination now that the Stacks Tokens will not be securities at the time of the adoption of the Stacks Blockchain 2.0.

<sup>ix</sup> PBC, like any other Node Operator may at any time perform minor “maintenance” on the Stacks Blockchain, without any third-party approval. . This type of “maintenance” work is characterized as being an effort to correct flaws or bugs in the Stacks open source code, and is intended to permit that code to continue to function as previously intended and understood to function by the Stacks Blockchain community. Maintenance work is distinguished from more significant changes to the open source code, which would create two (or more) different rules applicable to creating “blocks” of transactions, and which would result in a “fork” that would create two (or more) different blockchains. PBC does not commit to performing maintenance on the Stacks Blockchain, but anticipates performing maintenance that is consistent with enhancing its business objectives through the Stacks Blockchain.

<sup>x</sup> Voting power is defined as the measurement of the amount of bitcoin distributed through the system by miners during a relevant period.

<sup>xi</sup> In addition, proposals to change the Stacks Blockchain may, but are not required to be, submitted to a new group called the Stacks Improvement Protocol Committee, or “SIP Committee”. A person or entity seeking to make changes to the Stacks Blockchain may submit the proposal to the SIP Committee, which may review the proposal, may comment on the proposal, and may provide its feedback to the person who made the proposal about whether the Committee agrees or disagrees with the proposal. Regardless of whether the SIP Committee has reviewed a proposal, and regardless of the views of the SIP Committee with respect to any proposal it does review, it is the obligation of the person or entity making the proposal – and not the obligation of the SIP Committee – to present the proposal for approval to the miners and to the broader Stacks community. The SIP Committee, therefore, is best understood as an advisory

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committee that is intended to provide expert assistance and input to developers and others who are contemplating developing and proposing changes to the Stacks Blockchain.

The SIP Committee initially will be comprised of five members who are knowledgeable about the Stacks Blockchain and the Stacks ecosystem. The SIP Committee is responsible for its own governance, including the replacement of the members on the Committee. PBC has no role in the SIP Committee.

<sup>xii</sup> PBC includes its limited holdings of Stacks Tokens as part of its analysis because it appears that the SEC Staff may take the position that if an entity owns a significant number or percentage of a particular type of digital asset, other holders of that digital asset may assume that the entity has an interest in taking steps to increase the value of that digital asset, and that those other holders therefore may rely on that entity to take steps to drive an increase in the value of that digital asset. PBC believes that the limited number of Stacks Tokens it holds will not give rise to such a perception or expectation, and in any event, because the Stacks Tokens give the holder no voting, control or other governance rights, the number of Stacks Tokens PBC holds is irrelevant to whether PBC (or anyone else) has the power to drive an increase in the value of the Stacks Tokens. For the reasons summarized in this Summary, neither PBC nor any other person or entity will have that power following the adoption of Stacks Blockchain 2.0.

In addition, PBC believes that the Staff's focus on token ownership as a factor in the *Howey* analysis is at best overstated. PBC is not aware of any cases in which ownership of an asset by a single person or entity, by itself, has caused a court to determine that the asset thereby becomes a security. As a few examples, the Hunt brothers' attempts to corner the silver market in the 1970s and 1980s did not cause silver to be deemed a security, OPEC's control of much of the global oil supply in the 1970s did not cause oil to be deemed a security, and Amaranth Advisors LLC's attempt to corner the natural gas markets in 2006 and 2007 did not cause natural gas to be deemed a security.

<sup>xiii</sup> The App Mining program was a program that awarded Stacks Tokens on a monthly basis to developers of well-reviewed apps on the Blockstack network. The program was designed to incentivize developers to build apps on the Blockstack network, and participating app developers were selected for awards by a panel of reviewers. On February 10, 2020, PBC decided to pause the App Mining program and announced on a blog post that any new version of the App Mining program would be undertaken, if at all, by a third-party entity that is not PBC. PBC will not maintain or undertake any new form of the App Mining program, although PBC may, as part of its app development business, hire individual third-party contractors to assist PBC in building its own apps.

<sup>xiv</sup> While the court in *SEC v. Telegram* found that a blockchain developer's public statements that they would have no control over the TON blockchain and that purchasers should not expect any profits based on their purchases were not enough to negate evidence that a reasonable purchaser expected to profit based on their efforts, Telegram's announcements can be distinguished from PBC's because the court emphasized that Telegram posted these public statements after legal proceedings commenced, and while simultaneously continuing efforts to develop the TON blockchain. *See SEC v. Telegram Group Inc. et al.*, No. 19-cv-9439 (PKC) at 30-31, (S.D.N.Y. March 24, 2020) Here, the relevance of the public announcements include: (a) PBC has public reporting obligations following its Regulation A offering; (b) PBC therefore believes it has an obligation (regardless of whether it is technically legally required to do so) to

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advise the public of the changes in the Stacks Blockchain, and PBC's greatly reduced role regarding that Blockchain; and (c) in part as a result of this disclosure, Stacks Token holders should not reasonably rely on PBC as having a significant role in potentially increasing the value of the Stacks Tokens.

<sup>xv</sup> While PBC has had and will have significant control and influence over the design and operation of the Stacks Blockchain until the adoption of Stacks Blockchain 2.0, that is not particularly relevant to the *Howey* analysis of whether the Stacks Tokens will continue to be securities following the adoption of Stacks Blockchain 2.0. PBC's efforts regarding the development of the Stacks Blockchain prior to the adoption of Stacks Blockchain 2.0 is irrelevant to whether holders of Stacks Tokens reasonably will continue to rely on PBC's efforts following the adoption of Stacks Blockchain 2.0. PBC believes that this is the only relevant consideration for whether the Stacks Tokens will continue to be securities under the *Howey* test. This is supported by, among other things, Director Hinman's apparent conclusion, discussed below, that Ether was once a security but no longer is, and serves to demonstrate that a digital asset can stop being a security, and that the prior significant efforts of the digital asset's sponsor (such as perhaps the significant early efforts of the Ethereum Foundation) do not forever cause the digital asset to continue to be a security.

The same conclusions should apply to the Stacks Tokens once PBC no longer is able to exercise significant control or influence over the Stacks Blockchain. The court in *SEC v. Telegram* recently made this point in what it referred to as the "Bahamas Test." *SEC v. Telegram Group Inc. et al.*, No. 19-cv-9439 (PKC) at 32, (S.D.N.Y. March 24, 2020) (citing M. Todd Henderson & Max Raskin, *A Regulatory Classification of Digital Assets: Toward an Operational Howey Test for Cryptocurrencies, ICOs, and Other Digital Assets*, 2 Colum. Bus. L. Rev. 443, 461 (2019)). As applicable to PBC, that test supposes that PBC, after launching Stacks Blockchain 2.0, decamps for the Bahamas and ceases all efforts to support the Stacks Blockchain. The test asks, would there still be a reasonable expectation that the Stacks Blockchain and the Stacks Tokens would thrive, in the absence of PBC. For the reasons outlined above in this Summary, the answer to that question is yes.

<sup>xvi</sup> See William Hinman, Director, SEC Div. of Corp. Fin., Remarks at the Yahoo Finance All Markets Summit: Crypto, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018). Mr. Hinman specifically noted that "the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions." Mr. Hinman also noted that the Bitcoin network was decentralized and that applying the securities laws to Bitcoin would "seem to add little value."

<sup>xvii</sup> Although the Staff has informally cautioned PBC that the Staff does not necessarily agree with the following discussion, it is arguably reasonable to conclude that the SEC has decided that EOS (issued by Block.one) is sufficiently decentralized to no longer be a security. The SEC announced a settlement with Block.one on September 30, 2019 in which the SEC imposed a relatively minor financial penalty (a fine of \$24 million, which is less than 0.6% of the total amount of over \$4 billion that Block.one raised), did not require Block.one to make a rescission offer to investors, did not require Block.one to register its tokens under the Securities Exchange Act of 1934 ("**Exchange Act**"), and did not impose bad actor disqualification under Regulation A and Regulation D. In fact, U.S. investors were provided no relief under the settlement, and the SEC permitted Block.one to neither admit nor deny the factual allegations in the settlement order, rendering the order of limited value to potentially aggrieved investors in litigation. *See In*

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the Matter of Block.one, Securities Act Release No. 10714 (Sept. 30, 2019), <https://www.sec.gov/litigation/admin/2019/33-10714.pdf> (Order imposing a cease and desist order and fining Block.one \$24 million) (the “**C&D Order**”), and In The Matter of Block.one, Securities Act Release No. 10717 (Sept. 30, 2019) (Granting a waiver of Regulation A and Regulation D disqualification provisions) (the “**Waiver Order**” and together with the C&D Order, the “**Block.one Settlement Order**”).

The settlement sharply contrasted with prior enforcement actions in which relatively higher fines, rescission orders, and registration requirements were imposed. In addition, the SEC did not provide key factual information to support its position that Block.one’s initial tokens, referred to as the “ERC-20 tokens,” were securities, nor did it address at all whether the new EOS tokens issued by Block.one in exchange for the ERC-20 tokens are securities, even though the EOS tokens appear to be held by U.S. persons and are actively traded.

The absence of any discussion of the securities-law status of EOS token, and the lack of any action by the SEC to prevent US persons from holding, selling and purchasing EOS tokens, has allowed market participants and gatekeepers to reasonably conclude that the SEC considers EOS tokens to be sufficiently widely held, and the EOS platform sufficiently decentralized, so that EOS tokens are not securities. Despite these widely-held market views, which again the Staff has informally advised PBC that it may not agree with, the SEC has not publicly discussed its analysis of EOS tokens since the order was published, has not stated whether it believes EOS is or is not a security, and has taken no public actions of which PBC is aware to prevent US persons and US trading platforms from trading EOS tokens.

<sup>xviii</sup> *Framework for “Investment Contract” Analysis of Digital Assets*, SEC Strategic Hub for Innovation and Financial Technology (April 3, 2019), available at <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>.