

Remme Legal Opinion

Remme Token

Token Legal Design

REMME Token (“REM”; “Token”) is designed to perform a function of a pre-order access key that enables access to the software programme once it is developed. REM Token enables pre-order by functioning as a key enabling access.

Software Pre-Order Business & Legal Model

Software Pre-Order is a common business model in the sphere of software development. The idea behind this business model is to allow individuals pre-order popular, not yet released, items or products and has been often used by well known companies like Amazon and Apple. This model is extensively used in the gaming industry yet the business model is flexible and, thus, can be easily applied across various industries including cybersecurity; the industry in which Remme Company primarily operates.

Software Pre-Order business model functions the following way - a new software product is going to be released soon, cybersecurity software as in the case with the Remme Token, and one can get a pre-order of the new product by entering into a pre-order agreement and paying a certain fee.

In terms of the legal mechanism, it is common practice to define ‘pre-order’ in the legal documents as the buyer’s offer to enter into the contract with the seller. At the final stage of the product development, the seller sends the buyer an acceptance of the offer and if the product has not been developed, seller returns the funds to the buyer.¹

Token Utility

REM Token can be used as a pre-order access key. We find this type of token’s functionality being of utility nature since Token is essentially a key unlocking the software programme when it is developed, and has no other use. This is a pure utility function and has no profit sharing qualities that signals a low risk of REMME Token being considered a security (*however, please see below for a more thorough analysis of REMME Token versus securities on the basis of the most applicable securities regulation*).

US Securities Laws

Background

By way of a background, U.S. Securities and Exchange Commission (“SEC”) has a three-part mission: protection of investors, maintenance of fair, orderly and efficient markets and facilitation of capital formation. In order to implement its mission SEC has quite a wide mandate on reviews and enforcement actions it may undertake in upholding its mission.

On 25 July 2017, it was announced that SEC issues investigative report concluding that DAO tokens were, in fact, securities.² The idea behind DAO was to create a decentralized autonomous venture fund. The SEC came

¹ <https://www.threadrobe.com/terms-for-preordering/>

² “Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The Dao,” SEC Release No. 34-81207 (July 25, 2017), (<https://www.sec.gov/litigation/investreport/34-81207.pdf>).

to a conclusion that DAO tokens were securities that are regulated as a matter of the U.S. securities regulation because the enterprise was essentially a pooled investment vehicle. The reason being the nature of the DAO token that gave investors a right to vote on the projects that should be funded and receive profits from those projects as a return on their investments.

It is important to note, that U.S. securities regulation does not regulate the investment instrument as such, but the transactions that relate to it, which is why it is crucial to analyze whether a transaction may involve a security by way of applying the *Howey Test*³ described below. If that is the case, then the transaction has to be registered subject to the available securities exemption. Registration, in turn, entails disclosure of certain information including description of security being offered and information about company's management.

Violation of registration requirements can lead to holding the person, who offers or sale securities without any registration, liable in respect of the person purchasing such security from. The security purchaser may then sue to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security (*Sec. 12 of Securities Act of 1933 of the USA*).

Is Remme Token a Security?

In the context of tokens and ICO, the relevant test applied by the U.S. Courts is the *Howey Test*. It is used to determine whether an instrument qualifies as an 'investment contract' as defined by federal and state securities laws.

In the case of *United Housing Foundation, Inc. v Forman (1975)*, The U.S. Supreme court summarized the test the following way:

“the basic test for distinguishing the transaction from other commercial dealings is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. . . . This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, . . . or a participation in earnings resulting from the use of investors' funds, . . . In such cases, the investor is "attracted solely by the prospects of a return" on his investment. . . . By contrast, when a purchaser is motivated by a desire to use or consume the item purchased. . . - the securities laws do not apply.”

Based on the above and later cases, that have expanded the term “money” to include investments of assets other than money, we can deduce 3 key parts to the *Howey* test:

1. It is an investment of money or other tangible or definable consideration
2. The investment of money is in a common enterprise
3. There is an expectation of profits from the investment, which comes solely from the efforts of others

Applying the test above to REM tokens, we find the following:

³ Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946) case.

1. It is an investment of money or other tangible or definable consideration

REM Tokens can be exchanged for several cryptocurrencies in the equivalent of Ethereum (BTC, ETH, DASH). We therefore consider this factor to be satisfied.

2. The investment of money is in a common enterprise

The law on the “common enterprise” element is somewhat unclear and not easily susceptible to analysis.

However, there are three approaches to define whether common enterprise exists:

- under the horizontal approach, a common enterprise is deemed to exist where multiple investors pool funds into an investment and the profits of each investor correlate with those of the other investors;
- under the narrow vertical approach, a common enterprise exists, if the profits of investor are tied to the promoter;
- under the broad vertical approach, a common enterprise exists, if the success of investor depends on the promoter’s expertise.

We do not consider this factor to be satisfied, as the profits or rights of investors do not depend on the investments of the other investor in any way. REM Token, as defined above, has a utility function of a key enabling access to the software programme once it has been fully developed. There is, therefore, no investment interest involved due to a Token being of a utility nature.

3. There is an expectation of profits from the investment, which comes solely from the efforts of others

Present Software Pre-Order business model as applied to REMME Tokens has no direct or indirect interrelation between investing into Tokens and expectation of profits from such an investment because there is no investment per se - the individual/company interested in the REMME Token can exchange it for cryptocurrency in return for a right to access the software programme developed by Remme Company upon its development. We find that the fact that a) REM Token has a utility function of a pre-order access key; b) can only be used within and in relation to Remme Software Programme within its platform negates the possibility of them being considered as money or measure of value. The REM tokens grant their holders the right to utilize certain function attached to the Token, pre-order access key as in the case with the Remme Token, and, thus, token holders can be seen simply as users. Based on that, we therefore do not consider this factor to be satisfied.

Summary

As we see in the case with the Remme Token, the only one factor of the *Howey* test that is satisfied, in our opinion, is “the investment of money or other tangible or definable consideration”. Other two factors we consider not to be satisfied. For a token to be considered a security all three elements have to be present, thus, there is a low risk that the REM Tokens will fall under the definition of securities according to the U.S. federal and state laws.

Legal Risks Associated with Remme Token

Generally, if tokens are listed by crypto exchanges, there is a risk of speculating on them and using them merely for getting the profit. There may arise an expectation of the increase in value of tokens, due to their secondary trading.

However, the said does not contain risks for Tokens to be considered as securities since:

1. there still will be no common enterprise;
2. increase in the value of Tokens is not excluded but it will be only due to the secondary trading by token holders themselves. Listing of Tokens on the crypto currency exchanges cannot be considered as organization of trading, hence why, Remme Company is not proposing nor organizing any secondary trading of Tokens.

Based on the findings of the legal analysis according to the US Securities Laws, we find that there is a low risk of REMME Token being considered a security as it has no attributes of the financial or investment instrument.

Final Conclusion

In conclusion, due to the commonplace and popular nature of the Software Pre-Order business model in the sphere of software and product development, we find this model applicable to REMME Tokens.

On the basis of the above legal analysis, the following key factors lead us to conclusion that REM Tokens fall under the low risk of being considered as securities under the existing securities laws across various jurisdictions:

1. REMME Token Sale being a one-off token sale of REM Tokens with the pre-order function attached and the company not attempting to trade REM Tokens as pre-order keys;
2. REMME Token's narrow and purely utility functionality of being a pre-order access key that enables access to the software programme ones it is developed.

Based on the above, we find REM Tokens legitimate for a public offer to an unlimited number of persons due to the Software Pre-Order business and legal model adopted, which negates the risk of REM Tokens being recognized as securities due to the reasons explained above.