

December 14, 2020

VIA E-MAIL AND FEDEX

Timothy B. Henseler, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-3628

Re: In the Matter of Tierion, Inc.

Dear Mr. Henseler:

We write on behalf of Tierion, Inc. ("**Tierion**" or the "**Company**") in connection with the settlement of the above-captioned matter with the U.S. Securities and Exchange Commission (the "**SEC**" or "**Commission**"). The settlement will result in an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing Penalties and a Cease-and-Desist Order (the "**Order**"). Tierion understands that the entry of the Order would disqualify it from relying on certain exemptions under Rule 506 of Regulation D promulgated under the Securities Act of 1933, as amended (the "**Securities Act**"). On behalf of Tierion, we hereby respectfully request, pursuant to Rule 506(d)(2)(ii) of Regulation D, a waiver of any such disqualification that will arise under Regulation D with respect to Tierion as a result of the entry of the Order.

BACKGROUND¹

The Order states that Tierion, a startup blockchain technology company then based in California, raised approximately \$25 million by selling 350 million digital tokens ("**Tierion Network Tokens**," or "**TNT**") via a "Token Sale" for which the offering began on July 10, 2017. The sale took place between July 22, 2017 and July 28, 2017. Tierion and its promoters told investors that Tierion would continue its development of the Tierion Network, a distributed network which allowed users to create blockchain receipts using Tierion's existing technology protocol, Chainpoint, to verify the existence and integrity of digital data, checked against a contemporaneous recording on the Bitcoin blockchain, as well as other applications to be developed in the future. Tierion also told investors that it planned that TNT would be used as a medium of exchange to access Chainpoint and in those future applications. In promoting its Token Sale, Tierion touted its founders' and early investors' backgrounds and experience in the blockchain industry, and publicized its past history of partnerships with prominent companies. Tierion

¹ As stated in the Order, Tierion neither admits nor denies the activities described in the Order.



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took steps to ensure that TNT would be made available to trade on secondary markets, and touted TNT to digital asset enthusiasts and members of the general public.

The Order finds that, based on the facts and circumstances described therein, TNT were offered and sold as investment contracts, and therefore securities, pursuant to *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) and its progeny, including the cases discussed by the Commission in its Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (Exchange Act Rel. No. 81207) (July 25, 2017). The Order also finds that a purchaser in the Token Sale would have had a reasonable expectation of obtaining a future profit based on Tierion's statements that it would use the funds raised to continue to develop the Tierion Network by adding partners, infrastructure, and services. Moreover, the Order finds that Tierion violated Sections 5(a) and 5(c) of the Securities Act by offering and selling these securities without having a registration statement filed or in effect with the Commission or qualifying for exemption from registration with the Commission.

As further discussed below, the Order requires Tierion to, among other things: cease and desist from committing or causing any violations and any future violations of Section 5(a) and (c) of the Securities Act; institute a claims process and, subject to specified conditions, make payments to those who purchased TNT in the Token Sale and still hold such tokens or sold them at a loss, to current holders of TNT who purchased such TNT on the secondary market, and to current holders of TNT received for operating a public Tierion Node; and permanently pause the smart contract that currently enables transactions of TNT.

Tierion understands that, absent a waiver, the entry of the Order will disqualify Tierion from relying on Regulation D. Tierion is concerned that if it is deemed to be an issuer, predecessor of an issuer, affiliated issuer, general partner or managing member of an issuer or promoter, underwriter of securities, or it is deemed to be acting in any other capacity described in Rule 506 for purposes of Rule 506(d)(1), then Tierion, and third parties with which Tierion is associated in one of those listed capacities that may seek to rely on Regulation D in connection with their securities offerings, would be prohibited from doing so.

The Commission, or the Division of Corporation Finance ("**Division**"), acting pursuant to its delegated authority, has the authority to waive this disqualification upon a showing of good cause that such disqualification is not necessary under the circumstances.²

² See Rule 506(d)(2)(ii) (disqualification "shall not apply . . . [u]pon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied").

1. *The Misconduct Described in the Order Involves the Offer and Sale of Securities.*

The Division's statement on Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D³ provides that the Division will consider whether the misconduct at issue "involved the offer and sale of securities." The Order here describes activities that involve the offer and sale of a security.

2. *The Misconduct Described in the Order Does Not Involve Criminal Activity or Violation of Any Scierter-Based Statutes.*

The Division's statement on Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D provides that the Division will "consider whether the conduct involved a criminal conviction or scierter based violation, as opposed to a civil or administrative non-scierter based violation." That statement also provides that "where there is a ... scierter based violation involving the offer and sale of securities, the burden on the party seeking the waiver to show good cause that a waiver is justified would be significantly greater." Notably, the Order here describes activities that involve the offer and sale of a security, but **do not** involve a criminal conviction or a violation of any antifraud statutes—scierter or non-scierter based. Thus, Tierion is not subject to the "greater" burden under the Division's waiver policy.

Based on the factors set forth by the Division for considering waiver requests, and the facts and circumstances set forth below, Tierion respectfully submits that there is good cause not to require disqualification, and therefore requests that the Division, on behalf of the Commission, or the Commission waive any disqualifying effects that the Order will have under Regulation D.

3. *The Responsibility for the Misconduct Supports the Requested Waiver*

Tierion is responsible for the conduct discussed in the Order.

The Order will not name any individual participants in connection with the conduct underlying the Order. At the time of the Token Sale, Tierion had three executive officers, two of whom were co-founders of Tierion. Both of Tierion's co-founders remain executive officers of Tierion, and are, and were at the time of the Token Sale, Tierion's largest shareholders. Neither of these two co-founders individually controls a majority of the voting stock of Tierion, nor will vote his shares in a block together with the other; rather, each will vote his shares individually according to his own interests.

One of Tierion's co-founders is Tierion's CEO, who served in this role at the time of the Token Sale. He also served on Tierion's two-member board of directors (along with a representative of an independent outside minority investor) at the time of the Token Sale, and Tierion's board composition

³ Division of Corporation Finance, *Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D*, available at: <https://www.sec.gov/divisions/corpfin/guidance/disqualification-waivers.shtml>.

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has not changed since then. Tierion's other co-founder is Tierion's Lead Developer.⁴ In their roles as Tierion officers, and in relation to the Token Sale, these two individuals consulted with each other, other Tierion personnel, attended meetings with internal employees and external parties, reviewed Tierion materials related to the Token Sale, received information regarding the Token Sale, and provided direction to Tierion personnel in connection with the Token Sale.

Tierion's two remaining executive officers are, and are anticipated to be, primarily responsible for operating Tierion's business day-to-day. Tierion expects that these executive officers will be involved in future offerings made by Tierion, including offerings in reliance on Regulation D. Such involvement will include meeting with potential investors, and will not include any legal determination as to whether such offering may rely on Regulation D. All legal determinations concerning compliance with Regulation D will be made by outside securities counsel and any in-house legal counsel.

In addition, Tierion is seconding an attorney from a nationally recognized law firm to act as its part-time general counsel for at least one year, beginning in December 2020, and undertakes to engage a leading consulting firm to act as its compliance officer in advance of any future issuance of digital assets or offering and sale of securities in reliance on Regulation D.

4. The Modest Duration of the Violation Supports the Requested Waiver

The Order describes violations in connection with the unregistered offer and sale of TNT during the period from July 10, 2017 through July 28, 2017, with TNT being delivered to Token Sale purchasers on August 25, 2017. Such violations were part of an "isolated instance" of conduct, not a pattern of conduct that "occurred over an extended period," which—according to the Division's guidance concerning this factor—will "weigh favorably in the waiver determination."

5. Tierion's Remedial Steps to Date and Future Remedial Steps Support the Requested Waiver

If, during the five-year period following the date of entry of the Order or such shorter period as may be agreed by the Division and Tierion, Tierion or its affiliates intend to distribute a digital asset⁵ other

⁴ Tierion's third executive officer at the time of the Token Sale, who was not a co-founder, no longer is employed at Tierion.

⁵ This is not intended to apply to any distribution made solely for testing or engineering purposes.



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than on a registered basis or pursuant to an exemption from registration,⁶ it will consult with the Division⁷ prior to initial distribution of such digital asset.⁸

Additionally, in connection with the Order, Tierion will take substantial remedial steps, including by conducting a claims process to make certain payments to purchasers and/or holders of TNT, subject to specified conditions.

Tierion has engaged leading law firms, including sophisticated U.S. securities counsel. Such legal counsel is in close contact, and consults frequently, with Tierion's executive officers regarding compliance with applicable securities laws, including with respect to Tierion's consideration of various projects and improvements involving Tierion's blockchain technology and the digital assets used in connection with such technology.

Likewise, as discussed above, Tierion will work closely with its sophisticated securities counsel in connection with any future offering or sale of securities pursuant to Regulation D, in which such counsel will make all determinations concerning compliance with, and applicability of, Regulation D, as well as monitoring Tierion personnel in connection with fundraising activities to ensure such compliance. More specifically, Tierion will work closely with experienced U.S. securities counsel in advance of and during any Regulation D offering. From the initial point in time in which Tierion contemplates the offer and sale, in the future, of a security pursuant to Regulation D, experienced outside securities counsel will be responsible for advising on, and determining, securities law compliance matters, ensuring such compliance, and assisting Tierion in establishing and communicating clear guidelines regarding communications regarding the offering such as who may communicate on behalf of Tierion regarding the offering, what may be communicated, and how, or prohibiting any statements regarding the offering in any forum.

Tierion's outside securities counsel has developed written policies and procedures, as well as trainings (referred to collectively as the "compliance program"), to ensure compliance with federal securities laws, including Regulation D in particular. The training and written policies and procedures were developed in the second half of 2020, and the written policies and procedures were formally adopted by the Company at that time as well. On October 16, 2020, Tierion held a formal training session conducted by outside counsel to educate Tierion's management on the specific requirements under Regulation D for a private placement of securities, including restrictions and limitations on communications and disclosure obligations under Rule 506(b) or Rule 506(c), as applicable, and SEC

⁶ "Pursuant to an exemption" will be deemed to include, with respect to a non-security digital asset, if distributed in a manner that would comply with an available exemption or safe harbor if it were a security.

⁷ Tierion will email or call the FinHub Chief Legal Advisor and provide a brief description of the digital asset, its proposed key features and the proposed distribution.

⁸ This provision is intended to provide that Tierion will not be required to consult with the Division with respect to subsequent distributions of a digital asset in circumstances where the digital asset and the method of distribution of such digital asset have not changed.

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reports, guidance, and enforcement actions regarding digital assets. Tierion will continue to hold such trainings annually.

Tierion is committed to ensuring that all future offers and sales of securities will comply with applicable SEC regulations. To this end, Tierion now requires senior management members, prior to the commencement of any offering, to seek advice and counsel from experienced securities attorneys. Legal counsel will play a prominent role during the entire offering process for any offering that Tierion makes, in order to help Tierion comply with securities laws and eliminate or reduce the risk of violation of the registration requirements under the Securities Act. Relatedly, under Tierion's compliance program, Tierion must engage and confer with outside legal counsel, and compliance counsel if Tierion's legal counsel so recommends, with respect to Tierion's development of new technologies and launch of potential new projects in order to include, from the earliest stage, design features or restrictions that support compliance with securities laws generally as well as other regulatory regimes. Likewise, as part of its securities offering compliance program the Company has adopted a "bad actor" questionnaire that will be provided to potential investors prior to any offering under Regulation D in order to preclude their investment in the Company absent a waiver from disqualification. The questionnaire also will be provided to all prospective executive officers and directors prior to their hiring, election or appointment, as applicable, to make sure that offerings are not impacted by "bad actors."

Tierion takes the federal securities laws, and the Commission's related guidance, very seriously, and has made concerted efforts to fully understand and abide by such laws and guidance. Tierion's two remaining executive officers discussed above, who would be involved in any future Regulation D offering, have been extensively educated concerning compliance with federal securities laws, and the Commission's related guidance, including in particular compliance with Regulation D. Tierion's officers now appreciate and understand the types of activities that may constitute "directed selling efforts" and "general solicitation" in connection with the offer and sale of a security. Tierion's officers review the Commission's guidance and regulatory activities with respect to the application of the federal securities laws to digital assets—including the April 3, 2019 *Framework for 'Investment Contract' Analysis of Digital Assets*,⁹ and orders instituting proceedings issued by the Commission over the past several years in which the Commission has applied the federal securities laws to digital assets. Further exemplifying and underscoring Tierion's efforts to comply with federal securities laws, and its commitment to avoid even the appearance of non-compliance with such laws, Tierion has not sold any of its reserve TNT after the Token Sale, nor compensated its employees with such TNT.

6. *The Impact on Tierion Absent a Waiver Supports the Requested Waiver*

Within the period during which Tierion would face disqualification absent the waiver requested herein, Tierion intends to seek to raise capital through an offering and sale of securities pursuant to Regulation D. Tierion is a growth stage company focused on novel, innovative technologies in a competitive landscape which require substantial capital to research, develop, and deploy. Tierion thus expects that it will require capital and resources to successfully compete for users, engineers, technologists and community contributors. Likewise, as Tierion still is an early-stage company, it is

⁹ Available at <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>.



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expected that Tierion will raise funding in future financing rounds in order to finance its continued operations and growth initiatives. It is most likely that such financings will be through private securities offerings in reliance on Rule 506 of Regulation D, as opposed to Section 4(a)(2) of the Securities Act.

If the requested waiver is not granted, Tierion will have to rely on the exemption provided pursuant to Section 4(a)(2) of the Securities Act to raise funds in private securities offerings. Tierion understands that venture capital and strategic partners prefer to engage in transactions that rely on Regulation D over Section 4(a)(2) for a number of reasons. In addition, Tierion's ability to rely on Regulation D provides additional certainty to investors. If Tierion must rely on Section 4(a)(2), a court ultimately could determine that Section 4(a)(2) was not complied with, and that the offering did not ultimately qualify as an exempt offering. In addition, we understand that offerings conducted under Section 4(a)(2) do not have the benefit of Federal preemption of state registration requirements. As a consequence, if Tierion could only offer securities in reliance on Section 4(a)(2), then each offering would require an analysis of state blue sky laws and, in many instances, offerings would have to be registered in multiple states. Together, the analysis and potential state registration would impose significant additional costs on Tierion for each offering and likely delay many offerings pending state registration—which Tierion expects would dissuade strategic partners from investing in Tierion. Furthermore, as a commercial matter, Tierion's most likely source of investors, the venture capital and strategic partner investor community, prefer offerings that are exempt from state registration. In addition, Regulation D allows for general solicitation that Tierion expects to conduct in its next financing in order to find new investors—which is not possible if Tierion must rely on Section 4(a)(2).

In the event that the Division, on behalf of the Commission, or the Commission grants the requested waiver, for a period of five years from the date of entry of the Order, Tierion will furnish (or cause to be furnished), at a reasonable time prior to any sale by Tierion of any securities, to each purchaser in an offering under Regulation D that would otherwise be subject to disqualification under Rule 506(d)(1)(ii) as a result of the Order, a description in writing of the Order and related waiver.

REQUEST FOR WAIVER

In light of the non-fraud, non-scienter nature of the violations in the Order, the enforcement remedies to be obtained by the entry of the Order, Tierion's commitment to ongoing compliance with respect to applicable securities laws and regulations, and the material impact of a Regulation D disqualification on Tierion, we respectfully submit that disqualification of Tierion from relying on Regulation D is not necessary. Under the circumstances, Tierion respectfully submits that it has shown good cause that relief should be granted.

Accordingly, we respectfully request the Division, on behalf of the Commission, or the Commission, pursuant to 506(d)(2)(ii) of Regulation D, to waive the disqualification provisions in Rule 506 of Regulation D under the Securities Act that will apply to Tierion as a result of the entry of the Order, effective as of the date of the Order.



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We appreciate your consideration of this request. Please contact me at (650) 752-3236, or my partner, Nicholas Reider, at (415) 733-6054 with any questions.

Sincerely,

Grant Fondo

Grant P. Fondo

GPF