

# Commentary on “Application of Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets” — Jointly Issued by the U.S. Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC)

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This guidance is timely and directly addresses current market pain points. It significantly alleviates excessive restrictions on crypto assets while providing relatively clear grounds for enforcement. The agencies have adopted a cautious approach by using the qualifiers “certain assets” and “certain transactions,” leaving room for future refinement and iteration. However, the coverage of asset types remains incomplete—for instance, real-world assets (RWA) are not addressed. Numerous high-quality in-depth analyses of this document already exist in the market, so they will not be repeated here.

Upon a full reading, I find that the document contains several critical conceptual gaps at the foundational level, which directly undermine the rigor of its classification framework. To date, I have not seen similar analyses that systematically critique the document from its conceptual roots.

Broadly speaking, the document remains largely confined to technical descriptors such as “decentralization” and “blockchain.” It shows insufficient recognition of the fundamental role of transparency in crypto asset regulation. More importantly, it fails to **establish transparency as the foundational cornerstone of regulation**—a principle that Satoshi Nakamoto placed as the very first citation in the Bitcoin whitepaper. Logically, transparency holds a far higher position than decentralization or blockchain technology itself.

Furthermore, the document does not clearly distinguish between **Consensus Value** and **Enterprise Value**. The Howey Test is fundamentally a framework designed to evaluate investment contracts reliant on the managerial efforts of others; applying it directly to consensus-driven assets inevitably leads to inconsistencies. This creates conceptual tension in areas such as the attachment/detachment of investment contracts and the classification of non-security airdrops, planting seeds for future disputes.

This commentary does not address specific provisions clause by clause. Instead, it uses the three typical asset types proposed in the document as examples to illustrate underlying conceptual issues.

## A. Digital Commodities

**Original text:** “A digital commodity is a crypto asset that is intrinsically linked to and derives its value from the programmatic operation of a crypto system that is “functional,<sup>49</sup> as well as supply and demand dynamics, rather than from the expectation of profits from the essential managerial efforts of others.<sup>50</sup> A digital commodity does not have intrinsic economic properties or rights, such as generating a passive yield or conveying rights to future income, profits, or assets of a business enterprise or other entity, promisor, or obligor, but may have certain other rights (as discussed below).”

**Discussion:** The source of Bitcoin’s value is not the Bitcoin system itself—the system is merely the tool for minting coins and recording transactions, just as the value of gold does not derive from gold-mining equipment. The document conflates the “system” with the “asset,” resulting in a mispositioning of Bitcoin’s value.

Stock is a classic security, representing ownership, control rights, and dividend rights in a company. In contrast, control over the Bitcoin system is relatively dispersed among developers and miners. In theory, the 21 million coin cap can be viewed as a mapping of collective ownership of the system by all holders, yet in practice, holders have almost no substantive say in system operations—a phenomenon in Bitcoin’s governance structure that merits serious reflection.

Although Bitcoin lacks traditional dividends, its value manifests dynamically through supply and demand, driven behind the scenes by market consensus and constrained by Metcalfe’s Law. Thus, Bitcoin is a prototypical consensus asset, fundamentally distinct from the enterprise value represented by securities. The Howey Test predates Bitcoin; applying the same framework to assets of entirely different nature is

bound to have limited applicability.

Ethereum differs somewhat: the Ethereum Foundation exerts influence over the system through community mechanisms, yet ownership attribution remains ambiguous. While its burn mechanism objectively benefits all holders (akin to a dividend), the vast majority of Ethereum's asset value still derives from network consensus rather than "enterprise profits" generated by the system.

**The main distinctions between Bitcoin/Ethereum and traditional securities are:**

1. Securities represent the value of the system (company); Bitcoin essentially does not represent system value, while Ethereum represents only a very small portion.
2. The core of Bitcoin's value is consensus (supply and demand); enterprise value stems from system operations.
3. The intrinsic value of Bitcoin and Ethereum is relatively stable, whereas enterprise intrinsic value can change significantly through managerial decisions.

**Conclusion:** Positioning Bitcoin as a "digital commodity" is directionally correct, but describing its value source as arising from "the programmatic operation of a crypto system" is inaccurate. The Howey Test is primarily suited to enterprise-value assets and has limited explanatory power for pure consensus-value assets. The original text focuses excessively on the system while overlooking that the value of Bitcoin and Ethereum primarily originates from consensus rather than the system itself. Incorporating this distinction would make subsequent classification logic far more coherent.

**B. Digital Collectibles**

**Original text:** "A digital collectible is a crypto asset that is designed to be collected and/or used and may **represent or convey rights** to artwork, music, videos, trading cards, in-game items, or digital representations or references to internet memes, characters, current events, or trends, among other things. A digital collectible does not have intrinsic economic properties or rights, such as generating a passive yield or conveying rights to future income, profits, or assets of a business enterprise or other entity, promisor, or obligor."

**Discussion:** These can be divided into two categories: pure on-chain NFTs (not anchored to off-chain assets) generally do not constitute securities; however, when an NFT represents off-chain real-world assets (RWA), while it may not necessarily be a security, it likely requires dedicated legislative regulation.

A point warranting further clarification: when the content of the underlying off-chain asset (e.g., music, video) represented by an NFT can be modified or updated, the mechanism of dynamic change in its intrinsic value more closely resembles fluctuations in enterprise value. In such cases, whether it still fully fits the "non-security" classification requires careful delineation. If no new NFTs are issued and value changes depend primarily on the efforts of others, whether such changes should categorically be excluded from security characteristics also needs clear definition.

**Original text:** "However, as can be the case with physical collectibles,<sup>66</sup> the offer and sale of a digital collectible that either is fractionalized or otherwise enables individuals to acquire a fractional ownership interest of a single digital collectible, could constitute the offer or sale of a security because it may involve essential managerial efforts from which a purchaser would reasonably expect to derive profits and, therefore, may be offered and sold as an investment contract.<sup>67</sup>"

"<sup>67</sup>In *Howey*, the Supreme Court held that offers and sales of individual parcels of a citrus grove, when paired with service contracts giving the offeror/seller exclusive rights to access and manage the land, and providing purchasers a share of the profits, were offers and sales of investment contracts, rather than just offers and sales of real estate. While selling the whole citrus grove to a single, active owner might have been a real estate sale, the subdivision of the citrus grove combined with centralized management of the parcels meant that purchasers depended on the seller's essential managerial efforts for profits. "

**Discussion:** The key issue is that if the intrinsic value of a digital collectible does not itself depend on ongoing managerial efforts by the issuer, and appreciation primarily arises from market consensus, then fractionalization does not necessarily constitute an investment contract. The core of the *Howey* case is

“reliance on the essential managerial efforts of others to produce expected profits,” not the act of fractionalization per se.

**Conclusion:** When the value of the represented off-chain object changes, the focus of assessment should shift from consensus value to enterprise value. The authors’ insufficient understanding of consensus value leads to certain deficiencies in defining the boundary of securities and in the application of the Howey precedent.

### C. Digital Tools

**Original text:** “A digital tool is a crypto asset that performs a practical function, such as a membership, ticket, credential, title instrument, or identity badge.... [full original text as provided]”

**Discussion:** Digital tools are designed primarily for practical utility, and the conclusion that they “do not constitute securities” is generally reasonable. However, once such a tool becomes a non-negligible core component of a particular crypto system, it may indirectly represent system value, significantly increasing the risk of being classified as a security. At what proportion of consensus value versus general operational utility does a tool become a security?

**Conclusion:** The core criterion for determining whether a digital tool constitutes a security remains whether it substantively represents the value of the system, rather than merely whether it possesses practical functionality.

### Overall

### Conclusion

The analysis of the three asset types above demonstrates that if the regulatory framework explicitly incorporates the distinction between consensus value and enterprise value, and establishes transparency as a higher-order foundational regulatory principle, the internal contradictions in the original document would be substantially reduced, and its classification logic would become significantly more rigorous and internally consistent.

For further discussion on transparency and related foundational concepts, please refer to the series of articles in the [“Crypto Asset Regulation” section of the Chainless website](#).