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Howey's Cryptonite: A Deep Dive on Digital Asset Classification—Part I

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On March 17, 2026, the US Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) issued a joint interpretive release establishing a securities taxonomy for crypto-assets (the Taxonomy).¹ The Taxonomy is the most significant step yet in fulfilling SEC Chair Paul Atkins' promise to establish a clear securities law framework as applied to crypto and digital assets. The Taxonomy now serves to help market participants to discern what characteristics the SEC would attribute to a crypto-asset to consider it a security.

Since the widespread adoption of digital assets more than a decade ago, questions have often arisen as to whether certain tokens, cryptocurrencies, non-fungible tokens (NFTs), and other innovative blockchain-based assets are securities. With the exception of Bitcoin (and ambiguously Ether), the SEC has steadfastly refused to answer the question: Is this token a security? Instead, it often has been accused of using a strategy of ad hoc "regulation by enforcement" of crypto-assets or suggesting that token issuers "come on in and register."

The Taxonomy flips the script and seeks to offer the crypto industry clarity. Part I of this article explores the Taxonomy's classification of crypto-assets into five categories and analyzes each category

under the *Howey* test.² Most notably, the Taxonomy "names names" and unambiguously identifies a dozen crypto-assets, including Solana, Bitcoin, Ether, and Cardano, as "digital commodities" rather than "securities." Part II will take a deep dive into the nuances of the Taxonomy and how investment contracts based on crypto-assets may be analyzed in the 21st Century.

History

The first crypto-asset, Bitcoin, was created in 2009 and introduced the concept of a decentralized, blockchain-based alternative to traditional financial systems. Crypto-assets immediately raised questions because they challenged and crossed the boundaries of traditional definitions found in the securities laws: They had features, characteristics, and iterations that fit the definitions of "security," "commodity," and even "currency," sometimes all at the same time. A crypto-asset's classification carried significant implications for which regulatory regime applied to its issuance and trading.

The SEC first addressed crypto-assets in *The DAO Report*, in which it applied the *Howey* test to offers and sales of crypto-assets by an unincorporated virtual organization (known as The DAO). The *Howey* test is used to determine whether an asset

constitutes an “investment contract” and therefore a “security” under the federal securities laws.³ Under the *Howey* test, an “investment contract” is a transaction that involves (i) an investment of money (or other value), (ii) a common enterprise, and (iii) with a reasonable expectation of profits derived from the managerial efforts of others.⁴

In *The DAO Report*, the SEC outlined its determination that the offers and sales of crypto-assets by The DAO constituted investment contracts and, therefore, securities under the federal securities laws.⁵ Specifically, the SEC noted that The DAO was a common enterprise in which people invested money with a reasonable expectation of profits from the efforts of the creators of The DAO.⁶ *The DAO Report* set the stage for the SEC’s analysis of future crypto-assets under the federal securities laws.

In the years that followed, the SEC brought enforcement cases involving a variety of crypto-assets being allegedly offered as unregistered securities. Sometimes, in cases where dealers were accused of dealing in dozens of crypto-assets, the SEC would not identify which specific crypto-assets it claimed were securities.⁷ In some cases, the SEC’s analysis of why a crypto-asset is a security was ambiguous.⁸ In critical responses to such orders, SEC Commissioners Hester Peirce, Elad Roisman, and Mark Uyeda argued that applying specific “clues” from some enforcement actions did not yield clear answers in others,⁹ and echoed industry participants’ calls for clarity in discerning which crypto-assets are securities.¹⁰

The SEC’s approach left crypto-assets in a regulatory morass. Crypto-industry participants were encouraged to register with the SEC as intermediaries dealing in securities and to register crypto-assets as securities;¹¹ however, the framework of federal securities regulation was not designed for decentralized entities such as those involved in dealing in crypto-asset activities.¹² For example, the federal securities laws assume that a securities issuer is a discrete entity, whereas many crypto-assets are associated with open-source protocols featuring diffuse

governance structures, raising questions about who would be required to register as the issuer.

The SEC’s New Guidance

The new Taxonomy signals a retreat from the SEC’s ambiguous “regulation-by-enforcement” approach and seeks to provide greater clarity for participants in crypto-asset markets.

Crypto-Asset Classifications, Defined

The most significant change introduced by the Taxonomy is the SEC’s specific classification of crypto-assets. Recognizing that crypto-assets can be used to represent securities, goods, services, rights, or other interests in a digital format, the SEC has classified crypto-assets into five categories based on their characteristics, uses, and functions: (1) digital commodities; (2) digital collectibles; (3) digital tools; (4) stablecoins; and (5) digital securities.¹³

Digital Commodities

A digital commodity is a crypto-asset that derives its value from (1) the programmatic operation of a “functional” crypto-system and (2) supply-and-demand dynamics, rather than from a reasonable expectation of profits from the essential managerial efforts of others, as is required under the *Howey* test.¹⁴ A digital commodity lacks economic properties or rights and does not generate a passive yield or convey rights to future income, profits, or assets.¹⁵

As explained in the Taxonomy, digital commodities are not securities because their value is linked to the programmatic functioning of the associated functional crypto system, rather than another party’s essential managerial efforts.¹⁶

The value of a digital commodity, like that of a physical commodity, derives from the value of the goods and services produced using the commodity, as well as supply-and-demand dynamics.¹⁷ Users of a digital commodity are encouraged to participate in its functional crypto system, and developers are incentivized to build applications for functional crypto systems that attract users.¹⁸

Because a functional crypto system does not have a central party that oversees participation or distributes rewards, the value of a digital commodity is linked to the programmatic functioning of a crypto system. Accordingly, a purchaser of a digital commodity would not reasonably expect to profit based on the essential managerial efforts of others, and a digital commodity therefore cannot pass the *Howey* test.¹⁹

The Taxonomy specifies that the following crypto-assets are digital commodities: Aptos (APT), Avalanche (AVAX), Bitcoin (BTC), Bitcoin Cash (BCH), Cardano (ADA), Chainlink (LINK), Dogecoin (DOGE), Ether (ETH), Hedera (HBAR), Litecoin (LTC), Polkadot (DOT), Shiba Inu (SHIB), Solana (SOL), Stellar (XLM), Tezos (XTZ), and XRP (XRP).²⁰ However, this is not an exclusive list, and it is expected that many other crypto-assets would also be digital commodities.

Digital Collectibles

Digital collectibles, such as NFTs and meme coins, are digital assets designed to be collected.²¹ They typically represent or convey rights to art, trading cards, in-game items, or digital representations or references to internet memes.²² Digital collectibles generally have limited or no functionality and do not provide holders with legal rights or an ownership interest in any business or entity associated with the creator of the digital enterprise.²³

EtherRock provides a useful example. EtherRock is a collection of 100 NFTs that serve no functional purpose and are commonly described as “Pet Rocks on the Blockchain.”²⁴ Nevertheless, one of these digital collectibles sold for approximately US\$1.3 million in 2021.²⁵

The Taxonomy, however, notes that a crypto-asset may begin as a digital collectible—such as a meme coin—with no functionality within an associated functional crypto system, and later become a digital commodity, if it becomes functional within that system.²⁶ Although a digital collectible may have artistic value or utility, it is not an investment;

its value is based on the supply and demand of the digital collectible, rather than on an expectation of profits derived from the essential managerial efforts of its creator.²⁷

Although a digital collectible is not itself a security, the offer and sale of a digital collectible—if fractionalized or otherwise structured to involve reliance on essential managerial efforts from which a purchaser would reasonably expect to derive profits—can give rise to an investment contract.²⁸

Digital Tools

A digital tool is a crypto-asset that performs a practical function in a crypto system.²⁹ For example, digital tools can take the form of a membership, ticket, or identity badge.³⁰ A digital tool derives its value from its practical function, and users acquire it for its utility.³¹ A digital tool does not confer rights or interests in a business enterprise; instead its price is determined by supply-and-demand dynamics associated with its, rather than by an expectation of profits derived from the managerial efforts of its developer.³²

Digital tools may be paired with digital commodities in a single digital asset.³³ For example, the “Bored Ape Yacht Club” (Bored Ape) consists of a series of 10,000 NFTs that entitle holders not only to ownership of a digital image—as would be typical of a digital collectible—but also to access to exclusive Bored Ape gatherings, merchandise, and online forums.³⁴ At their peak, Bored Apes sold for hundreds of thousands of dollars, reflecting the value placed on membership in this exclusive club.³⁵

Similarly, CoinDesk, Inc.’s (CoinDesk) “Microcosm” (Microcosm) is a digital asset that provides holders access to CoinDesk’s “Consensus” conference (Consensus) for three years, in addition to ownership of one of 1,000 unique works of digital art.³⁶

The activities of the maker of a digital tool may affect the value of the digital tool, but the maker typically does not make representations or promises that would cause a purchaser to reasonably expect

to derive profits from the digital tool.³⁷ The founder of the Bored Ape, Yuga Labs LLC (Yuga Labs), granted buyers full ownership of its Bored Apes, allowing holders to license, market, or otherwise sell their Bored Apes however they saw fit.³⁸ The value of a Bored Ape was not attributable to Yuga Labs' managerial efforts, but rather the desire to participate in an exclusive club.³⁹ Similarly, the value of a Microcosm is based on the desire to access the Consensus conference, not the ongoing managerial efforts of CoinDesk in operating the digital asset.⁴⁰ Accordingly, a digital tool would not constitute a security under the *Howey* test.

Stablecoins

A stablecoin is a crypto-asset that is designed to maintain a stable value relative to a reference asset, such as the US dollar. The Taxonomy notes that, under the Guiding and Establishing National Innovation for US Stablecoins Act (GENIUS Act), enacted in 2025, "payment stablecoins" issued by a permitted payment stablecoin issuer are statutorily excluded from the definition of a security.

However, the Taxonomy notes that, because the GENIUS Act is not yet effective, its interpretation of whether a stablecoin constitutes a "security" is based on the SEC's Staff Statement on Stablecoins.⁴¹ Under that statement, "covered stablecoins"—that is, crypto-assets "designed and marketed for use as a means of making payments, transmitting money, or storing value,"⁴²—would not be considered securities.

Neither the Taxonomy nor the Staff Statement on Stablecoins specifically addresses stablecoins other than "covered stablecoins," such as algorithmic stablecoins, leaving a potential source of ambiguity going forward.

Digital Securities

A digital security (or tokenized security) is a financial instrument enumerated in the definition of a security that is formatted or represented as a crypto-asset and where the record of ownership is

maintained, in whole or in part, on or through one or more crypto networks.⁴³ The Taxonomy is clear: "A security is a security regardless of whether it is issued, or otherwise represented, off-chain or on-chain. All devices and instruments that have the economic characteristics of a security are securities regardless of format or label."⁴⁴

This guidance closely follows a recent statement issued by SEC Staff regarding tokenized securities.⁴⁵ In that statement, the Staff explained that a single class of securities may be issued in multiple formats, including as a token on an issuer's distributed ledger technology, and neither the format in which a security is issued nor the method by which ownership interests are recorded affect the application of the federal securities laws.⁴⁶ Likewise, if a tokenized security represents a class of securities that also is offered in a traditional format and has substantially similar characteristics—conferring comparable rights and privileges—it may be considered the same class of security as the traditionally issued security.

Digital securities may include additional non-financial benefits that resemble those of a digital commodity, digital collectible, or digital tool. The provision of such nonfinancial benefits, however, does not remove a digital security from the definition of a security.⁴⁷

Takeaways

While the Taxonomy is a useful step forward in providing clarity on the application of securities laws to crypto-assets, analysis of crypto-assets remains fact-specific. The clarity on specific digital assets as digital commodities and thus outside the securities laws may lead to a focus on these investment products going forward, given their unambiguous status. It may also lead to new digital assets seeking to resemble the essential characteristics of such named tokens to ensure that their status is not questioned. We will likely see players in the crypto-industry realigning their operations and restructuring any token offerings in a way to

avoid registering the tokens as digital securities and tailor their token offerings to offer nonsecurity crypto-assets.⁴⁸

Part II of this article will explore the nuances of the Taxonomy and reconsider how investment contracts may be analyzed in the 21st Century. It will cover the Taxonomy's guidance regarding when a crypto-asset is a "security" because it takes the form of an "investment contract" and, critically, how it can lose that status. It also will discuss the Taxonomy's approach to certain crypto transactions, such as airdrops, protocol mining, protocol staking, and "wrapping" a nonsecurity crypto-asset in a crypto-asset.

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NOTES

¹ *Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets*, Release Nos. 33-11412, 34-105020 (Mar. 17, 2026), <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf> (Hereinafter Taxonomy).

² SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (The US Supreme Court held that an investment contract exists when there is (i) an investment of money, (ii) in a common enterprise, and (iii) with a reasonable expectation of profits derived from the efforts of others. This standard is known as the *Howey* test.).

³ The term "security" is defined in Section 2(a)(1) of the Securities Act of 1933 (Securities Act), Section 3(a)(10) of the Securities Exchange Act of 1934 (Exchange Act), and Section 2(a)(36) of the Investment Company Act of 1940, each of which expressly includes "investment contract" within its scope.

⁴ See *W.J. Howey Co.*, 328 U.S. at 301.

⁵ See *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Release No. 34-81207 (July 25, 2017), <https://www.sec.gov/files/litigation/investreport/34-81207.pdf> (The DAO Report).

⁶ *Id.*

⁷ See, e.g., *In re ShapeShift AG*, Release No. 34-99676 (Mar. 5, 2024), <https://www.sec.gov/files/litigation/admin/2024/34-99676.pdf> (bringing an enforcement action against a decade-old platform that facilitated trading in crypto-assets); *In re Blotics Ltd f/d/b/a Coinschedule Ltd.*, Release No. 10956 (July 14, 2021), <https://www.sec.gov/files/litigation/admin/2021/33-10956.pdf> (settling claims that the respondent was obligated to disclose that it was compensated for profiling and publicizing token offerings that were offered and sold as investment contracts, which were securities).

⁸ *In re Stoner Cats 2, LLC*, Release No. 11233 (Sep. 13, 2023), <https://www.sec.gov/files/litigation/admin/2023/33-11233.pdf> (finding that NFTs offered by Stoner Cats were crypto-asset securities that were required to be registered, but were not registered as securities).

⁹ See Commissioner Hester M. Peirce & Commissioner Elad L. Roisman, *In re Coinschedule* (July 14, 2021), <https://www.sec.gov/newsroom/speeches-statements/peirce-roisman-coinschedule> (criticizing the SEC's order because it "tells us only that some unspecified quantity of the 2,500 tokens profiled on Coinschedule's website were offered or sold as securities" and "provides no useful information to market participants" about which ones were securities or how the SEC's reasoning in making those determinations).

¹⁰ See Commissioner Hester M. Peirce & Commissioner Mark T. Uyeda, *On Today's Episode of As the Crypto World Turns: Statement on ShapeShift AG* (Mar. 5, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-crypto-world-turns-03-06-24> (demonstrating through satirical dialogue the frustrations of a potential future registrant trying to determine whether it needs to register);

Commissioner Hester M. Peirce & Commissioner Mark T. Uyeda, Collecting Enforcement Actions: Statement on Stoner Cats 2, LLC (Sep. 13, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-stonercats-091323> (arguing that the order in *Stoner Cats 2* expands the application of *Howey* without limit, which could cast a shadow that withers artists' creativity and ability to build a following).

¹¹ See Chair Jay Clayton, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017), <https://www.sec.gov/newsroom/speeches-statements/statement-clayton-2017-12-11> (encouraging those launching cryptocurrencies to “comply with applicable registration and other requirements under our securities laws”); Chair Gary Gensler, Statement on Financial Stability Oversight Council’s Report on Digital Asset Financial Stability Risks and Regulation Before the Financial Stability Oversight Council Open Meeting (Oct. 3, 2022), <https://www.sec.gov/newsroom/speeches-statements/gensler-statement-fsoc-meeting-100322> (stating the belief that the “vast majority” of crypto-tokens are securities and that crypto-intermediaries are, therefore, transacting in securities and must register with the SEC “in some capacity”). See also Chair Gary Gensler, Statement on the Financial Innovation and Technology for the 21st Century Act (May 22, 2024), <https://www.sec.gov/newsroom/speeches-statements/gensler-21st-century-act-05222024> (highlighting the importance of registering securities and intermediaries so investors have “full, fair and truthful disclosure” when making investment decisions).

¹² See Commissioner Hester M. Peirce, Overdue: Statement of Dissent on LBRY (Oct. 27, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-lbry-102723> (citing Rodrigo Seira, Justin Slaughter, and Katie Biber, The Current SEC Disclosure Framework is Unfit for Crypto (Apr. 20, 2023), <https://www.paradigm.xyz/2023/03/secs-path-to-registration-part-iii>, and arguing that a legitimate, functioning blockchain that sold tokens to facilitate data sharing had “no path ... to come in and register its functional token offering”).

¹³ See Taxonomy at 13.

¹⁴ See *id.* at 13–14.

¹⁵ Digital commodities may convey certain technical rights to holders, such as enabling participation in a consensus mechanism or offering certain governance rights, such as the right to vote on software upgrades or treasury expenditures.

¹⁶ See Taxonomy at 16.

¹⁷ See *id.* at 14.

¹⁸ See *id.* at 15.

¹⁹ See *id.* at 16.

²⁰ See *id.* at 14. In addition, the SEC and CFTC noted that other digital assets, even those that do not underlie a futures contract, may be considered digital commodities, specifically pointing to Algorand (ALGO) and LBRY Credits (LBC).

²¹ See *id.* at 16–17.

²² See *id.* at 16–18.

²³ See *id.* at 17–18.

²⁴ See Mackenzie Sigalos, “Somebody just paid \$1.3 million for a picture of a rock,” *CNBC* (Aug. 23, 2021), [https://www.cnn.com/2021/08/23/people-are-paying-millions-of-dollars-for-digital-pictures-of-rocks.html#:~:text=Clipart%20of%20a%20rock%20just,weeks%20ago%2C%20it%20was%20\\$97%2C716](https://www.cnn.com/2021/08/23/people-are-paying-millions-of-dollars-for-digital-pictures-of-rocks.html#:~:text=Clipart%20of%20a%20rock%20just,weeks%20ago%2C%20it%20was%20$97%2C716). See also *etherrock.com* (titled “Ether Rock—Pet Rocks On The Blockchain” and noting “[t]hese virtual rocks serve NO PURPOSE beyond being able to be bought and sold, and giving you a strong sense of pride in being an owner of 1 of the only 100 collectible rocks”).

²⁵ See Taxonomy at 18.

²⁶ See *id.*

²⁷ See *id.* at 18–19. Note that the Taxonomy draws a direct comparison between digital collectibles and physical collectibles. Commissioners Peirce and Uyeda have drawn the same connection following an SEC settlement in which NFTs were considered securities. See Peirce & Uyeda, *supra* at n.10 (arguing that “Stoner Cats NFTs are not that different from *Star Wars* collectibles sold in the 1970s” that could and that be redeemed for membership in a fan club).

²⁸ See Taxonomy at 19–20.

²⁹ See *id.* at 20.

³⁰ See *id.* at 20.

³¹ See *id.* at 20–21.

³² See *id.*

³³ See *id.*

³⁴ See Will Stephenson, “Bored Ape Is Going Hollywood,” *GQ* (June 2, 2022), <https://www.gq.com/story/bored-ape-profile> (explaining that Bored Apes received artwork of a monkey in addition to “access to members-only meetups, merch[andise] drops, and Discord rooms”).

³⁵ See *id.*

³⁶ See CoinDesk, “CoinDesk Brings Back ‘Microcosms’ NFT Consensus Ticket” (Mar. 8, 2024), <https://www.coindesk.com/business/2024/01/31/coindesk-brings-back-microcosms-nft-consensus-ticket> (listing the entitlements of Microcosms, which include a “companion Pro Pass to Consensus” that can be used, given away, or sold, and an NFT created by “generative artist and engineer Fahad Karim”).

³⁷ See Taxonomy at 21.

³⁸ See Stephenson, *supra* n.34.

³⁹ See *id.*

⁴⁰ See CoinDesk, *supra* n.36.

⁴¹ See SEC, Division of Corporate Finance, Staff Statement on Stablecoins (Apr. 4, 2025), <https://www.sec.gov/newsroom/speeches-statements/statement-stablecoins-040425>.

www.sec.gov/newsroom/speeches-statements/statement-stablecoins-040425.

⁴² See *id.*

⁴³ See Taxonomy at 23.

⁴⁴ *Id.* at 24.

⁴⁵ See Securities and Exchange Commission, Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets, *Statement on Tokenized Securities* (Jan. 28, 2026), <https://www.sec.gov/newsroom/speeches-statements/corp-fin-statement-tokenized-securities-012826-statement-tokenized-securities>.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ The SEC chair recently expanded on this definition in an interview. During the interview, he noted, “A digital security is viewed in light of what an investment contract is. It is a set of promises that the developer of the particular instrument has made to investors as to how [the investment contract] will be managed, what rights investors have with regard to the investment contract, and how they expect to make money from the investment contract. See *CNBC Television*, “SEC Clarifies Position on Crypto: Chair Atkins on New Interpretation of Digital Assets,” at 3:23 (YouTube, Mar. 18, 2026), <https://www.youtube.com/watch?v=cjibSqTvINc>.

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