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SHOULD CRYPTO ASSETS BE REGARDED AS SECURITIES? IMPLICATIONS AND FINDINGS

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Abstract:
This paper examines the debate surrounding the classification of crypto assets as securities and its implications on the regulatory framework. The emergence of blockchain technologies and their widespread adoption have presented challenges for regulators in fitting these assets into existing financial and regulatory frameworks. The U.S. Securities and Exchange Commission (SEC) has taken a proactive stance in asserting its authority over the crypto economy. To analyze the SEC's position, this paper explores the Howey Test, a legal framework used to determine whether an investment arrangement qualifies as a security. It evaluates each criterion of the test in the context of crypto assets and discusses the SEC's evolving stance. The paper emphasizes the importance of considering the context and actual influence of investors and promoters when determining whether a common enterprise exists. It also highlights the need to distinguish between cryptocurrencies marketed as currencies and those primarily used as investment assets. The paper concludes that clear definitions and regulatory guidelines are necessary to address the complexities of crypto assets and their interaction with traditional financial markets. The outcome of ongoing lawsuits and regulatory decisions will shape the future development and integration of crypto assets into existing frameworks.

Key words: Cryptocurrency, Regulation, Bitcoin, Securities, Exchange

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I. INTRODUCTION

The emergence of more advanced blockchain technologies paired with a widening of the userbase and vast increase in trade volumes has proven to be a challenge for regulators as they sought to fit these new economic phenomena into the existing financial and regulatory framework. Due to their digital and decentralized nature, these new assets brought authentic innovation to the market, marking a paradigm shift in contemporary finances. Conventional institutions found themselves facing a new form of competition and users got access to new financial instruments and asset management tools that no longer relied on third parties. However, this exposed them to completely new types of risks which, in turn, urged policy makers to seek solutions to regulate these new markets. Additionally, the tremendous investor gains due to exponential growth in value put pressure on regulators to adopt taxation measures, albeit unclear definitions of these assets. This, in turn has led to a wide disparity in approach in various jurisdictions, and while authorities are eager to tax cryptocurrencies or outright ban various endeavors in this market space, actual protection measures for consumers are lagging behind.

The U.S. Securities and Exchange Commission (SEC) has been one of the most aggressive actors trying to become the de facto regulator of the crypto economy. As an independent federal agency of the United States government, the primary role of the SEC, according to their own website (https://www.sec.gov/about/what-we-do), is to enforce the law in order to protect investors by enforcing securities laws and combating market manipulation and other forms of fraud. Because many blockchain technologies have underlying companies that are based or operate in the United States of America, and because centralized market operators cater for users from US jurisdictions,

the SEC has deemed itself, at an institutional level, as responsible for safeguarding the way in which capital formation occurs in the crypto space. To achieve this goal, it has embarked on a series of high-profile court cases against that are based on the assumption that cryptocurrencies are securities, hence fall under its jurisdiction.

In this paper we will look further into this issue and try to determine whether the labeling of a high number of blockchain tokens as securities by the SEC has any merit. If the lawsuits against Ripple, Binance or Coinbase would end in favor of the SEC, this would bring the requirement of issuers, trading companies, market makers and other parties to register with the SEC or meet specific criteria for exemptions. Either way, this will undoubtedly be a significant event in the evolution of these markets and will dictate the way forward in terms of development and technological integration with conventional financial markets.

II. BRIEFLY DEFINING A SECURITY

As the crux of the SEC effort is the assumption that various tokens should be deemed securities, thus falling under the existing framework for regulating them, we should quickly review the origins of this concept and try to determine what constitutes a security, how can it be defined and how are they currently regulated. It is important to acknowledge that all these concepts are, in fact, referring to constructs of the collective imagination of contemporary man and the definitions and established frameworks could be changed by policy makers to adjust to a more fluid reality. The manner in which this process is conducted, however, can have significant short-term impact on various economic phenomena.

The concept of security slightly varies by jurisdiction but commonly refers to a financial instrument that is tradable, negotiable and holds some form of value. This monetary value stems from either an ownership stake in some company or underlying asset or a creditor relationship with a governmental or private issuer. It can even be a derivative of other financial assets or contracts on projected cash flows, but the key characteristics are fungibility and tradability on a secondary market (Harris and Raviv, 1989). A broad classification of securities includes three main categories: equity, debt and derivative. Equity securities, such as stocks, represent a fractional ownership in a company that confer associated rights depending on the specifics of the issue, specifically voting and dividend rights. Debt securities represent a fraction of a loan underwritten by investors to an issuer, and are, in essence a form of financing in return for a periodic payment of interest along with the principal at maturity. Derivative securities have characteristics depending on an underlying asset and allow for more complex speculation against future price movements or hedges against some forms of financial risks.

Securities play an essential role in economies enabling companies or even governments to raise capital. The main purpose of regulation these securities and the markets they are traded on is to protect the public from misleading marketing practices or outright fraudulent schemes. While the framework of regulation is not homogenous amongst various jurisdictions, a few key elements are usually present (Loss, 1988):

- Defining a regulatory entity with responsibility in defining specific rules, overseeing the markets, the manner in which securities are issued and that enforces the legal framework. Our analysis is heavily focused towards the SEC because if successful in its high-profile lawsuits, it would become the de-facto regulator of the crypto space, given the significant size of the US economy.

- Requiring some form of reporting from security issuers and traders with specific disclosure criteria in order that information is correctly presented to investors and in a timely manner. Here we can include financial statements, prospectuses and periodic reports that reduce the information asymmetry between market participants.

- Setting out standards and compliance rules that require issuers of securities or other market participants, such as brokers, market makers investment advisors or exchanges to register and obtain specific licenses. This ensures compliance with regulations put forth to protect investors.

- Defining and enforcing anti-fraud measures. These regulations usually consist in provisions to prevent fraudulent activities that include, but are not limited to insider trading, market manipulation, ponzi schemes, pump and dump schemes, false statements, front-running or churning in trading accounts.

III. THE HOWEY TEST

When establishing whether specific transactions fall under the purview of securities under US federal law, the Howey Test is a key legal framework. This approach, which was developed in response to the seminal Supreme Court decision SEC v. Howey, has offered clarity and direction in determining whether an investment arrangement is subject to securities regulation (Goforth, 2021). The Howey Test's history, foundational components, and ramifications, as well as its importance in securities law, will all be discussed in this paper.

Firstly, the Howey Test's historical context can provide further insight into our initial dilemma whether crypto tokens can be deemed securities. The Securities and Exchange Commission (SEC) and the Howey Company, which was engaged in the sale of land parcels with accompanying service contracts, were involved in the case that gave rise to the Howey Test. A legal precedent that still influences securities law was created by the Supreme Court's decision in 1946. The result of the lawsuit concluded in what is called „The Howey Test". For an investment to be categorized as a security, it must meet four criteria:

Investment of Money: This component calls for a financial, material, or other type of contribution as consideration. We can safely assume that it includes both conventional kinds of money and unconventional ones like cryptocurrencies.

Common enterprise: Investors' fortunes must be intertwined with those of the promoter or a third party in a single venture, which must be a requirement of the investment. It suggests that other people's efforts will determine whether the investment is successful or unsuccessful.

Profit Expectation: Investors must have a realistic expectation of returns on their investment. This involves hoping for dividends, capital gains, or other financial gains.

Effort of others: The fourth component emphasizes that the gains must mostly be the result of other people's efforts, usually those of the promoter, management, or a third party. The investment might not be considered a security if the investors' earnings depend more on their own efforts than on those of others.

The application of securities legislation is significantly impacted by the Howey Test. Its use aids in determining whether a financial arrangement is subject to federal securities laws, such as those governing disclosure duties, registration requirements, and antifraud laws. These rules, which are intended to safeguard investors and uphold the integrity of financial markets, apply to investments that are considered to be securities. When evaluating novel investment strategies and emerging financial instruments, regulators, courts, and market players use the Howey Test as a benchmark. Its adaptability to shifting market circumstances, including the new world of digital assets and cryptocurrencies, is made possible by its flexibility. The qualities and functionalities of these assets may not cleanly fit inside conventional definitions of securities, hence there are still difficulties in applying the Howey Test to developing technologies.

IV. DO CRYPTO ASSETS PASS OR FAIL THE HOWEY TEST?

Before delving deeper into the arguments the SEC brought in asserting that a number of tokens are securities, let us take the four points at face value and assess whether potential ambiguity may arise.

1. Investment of money. When people buy or swap traditional cash for digital tokens or coins, it usually entails a financial investment. Investing in cryptocurrency typically satisfies this requirement of the Howey Test.

2. Common enterprise. When it comes to cryptocurrencies, the idea of a shared company is more difficult to understand. Cryptocurrencies can lack a central issuer or regulating body and are decentralized. It is less obvious whether there is a single enterprise because of this dispersed structure. However, a recognizable entity or group frequently produces and promotes cryptocurrencies when they are issued and distributed through initial coin offers (ICOs) or similar fundraising procedures. It may be claimed that such circumstances constitute a shared enterprise.

3. Expectation of profit. The majority of cryptocurrency investors anticipate making money. Cryptocurrencies are frequently purchased with the expectation that their value would increase over time, allowing investors to sell them for more money. Additionally, several cryptocurrencies give users the chance to earn more tokens or prizes through staking or yield farming.

4. Effort of Others. The Howey Test's component on this question examines whether the earnings come mostly from the labor of others. The question of whether cryptocurrency gains depend on the labor of others is more complex when it comes to cryptocurrencies. The success of a cryptocurrency can be influenced by the actions of its developers, promoters, and the larger crypto community, even though cryptocurrencies do not itself represent ownership in a firm or the direct efforts of a centralized institution. Examples of factors that may affect a cryptocurrency's value and profitability include the creation of new features, network improvements, marketing initiatives, and adoption campaigns.

So, it is obvious that any effort in successfully classifying cryptocurrencies as securities relies on arguing that they meet the criteria 2 and 4, namely common enterprise and effort of others, as they align with criterial 1 and 3. The underlying structure of a token, decentralization, utility and even the way it was launched on the market can lead to a debate in the legal interpretation of the test and regulatory bodies can take different stances on the matter. A wide acknowledgement that a specific token is a security can have a spillover effect on other market entities, especially exchanges that allow trading operations, staking or initial offering underwriting.

The SEC has struggled to adapt to the new disruptive technology that only emerged in 2008, leading to increasingly convoluted explanations of how the Howey test, introduced in 1946, should apply to crypto assets. Early claims showed that the SEC was treating—or at the very least assuming—that all crypto assets were securities. The initial discovery that widely scattered assets like Bitcoin did not seem to match the preexisting definition of investment contract marked the first substantial departure from this perspective (Hinman, 2018). Following its determination that Bitcoin and Ether were not securities, the SEC published a "Framework" to further describe its methodology through FinHub, a portal created expressly to interact with businesses using blockchain and other cutting-edge financial technologies (Securities and Exchange Commission; 2018). The Howey test, which was rather brief, was expanded into more than three dozen separate aspects by the Framework. The majority of these elements center on the issue of whether or not buyers might reasonably expect to profit from the labor of others. Despite the fact that some traits are labeled as "especially relevant," the Framework emphasizes that no one aspect of the test is "necessarily" conclusive. Even more perplexingly, the Framework advises that after the initial sale, interests may need to be reevaluated to see if any formerly non-security interests may have changed to securities. The Framework outlines a number of features with relation to whether there is a reasonable expectation of profits and contends that the more of them there are, the more likely it is that the interest is a security. However, the Framework does not indicate whether any of the defined qualities would be given more weight than the others or how many of the described attributes will be required or adequate. It most definitely doesn't explain the circumstances under which an asset can cease to be a security and become anything else.

So how to tackle this sensitive issue? In our opinion one should consider the context of the actual existence, acts, control, and influence of the investors and promoters that could potentially become a "common enterprise" and avoid seeing "decentralization" in abstract and for the sake of decentralization itself. Also, one should avoid being distracted by labels and claiming languages like "currencies" when analyzing various tokens. For instance, the majority of cryptocurrencies refer to themselves as "currencies" or "utility tokens." However, such a title would be with

questionable merit without actual use as currency and if the asset is largely advertised, bought, and exchanged as an investment rather than having any current or potential utility as an alternative currency. A coin's claim to be a "currency" would be suspicious, to say the least, if it positions itself as "digital gold," is marketed as a purely speculative investment asset whose price is only supported by a "buy and hold" psychology, and has transaction costs that are so high that few people can actually use it to make a payment. Great scalability and extremely low transaction cost are a requirement; however, both these points are the subject of technological advancements, protocol changes, upgrades and development roadmaps designed to address the issue. And while current transaction cost structure can allow for large, almost instantaneous high value transfers, in the field of microtransactions there is much to be desired. Moreover, viewing the problem from a transaction cost economics vantage, as proposed by Williamson theory, we might discover that regulatory pressure and other barriers artificially inflate true transaction costs. So, it would be unfair, as a policy maker, to ask for low transaction costs while actively working to increase them. Apart from this, the manner in which the project is promoted, specifically the emphasis on utility instead of coin price is an indicator whether or not the claimed currency can actually function as an effective medium of exchange, rather than an investment vehicle.

Another issue that arises on the point of the common enterprise is the claim that many crypto projects make regarding “decentralization”. Specifically, some have argued that despite using a dispersed node structure for the network itself, having a development team is an act of centralization and constitutes a “common enterprise”, regardless of whether there is a form of incorporation or not (Gao, 2023). However, we believe that simply labeling a party in such a way as lacking in methodology. While investors of the specific token do not have direct control over aspects of its development, there should be adequate proof that the investment’s profitability relies substantially on the expertise, management, promotion or operational activities of a third party. Without a clear correlation between token returns and a variety of factors that determine the reliance between the investor pool and other parties and resources.

Going beyond parties that promote the price of a token to be purchased by investors expecting returns, there are other aspects of the cryptocurrency itself that is relevant in applying the Howey test to crypto. We will summarize several that we believe might indicate the formation of a common enterprise thus providing evidence in support of the labeling of tokens as securities, and not commodities.

A. The mechanisms with which cryptocurrencies are distributed to investor are an important factor in understanding the underlying structure of a specific project.

- An initial coin offering (ICO) is a method of raising money in which a cryptocurrency project or business sells investors digital tokens in return for fiat money or other cryptocurrencies. A predetermined token supply and a set token price per token are typical components of ICOs. By submitting money to the project's designated wallet address, investors can take part in the ICO and receive the corresponding number of tokens in return. ICOs can be security offerings, however there is now sufficiently streamlined regulation regarding Simple Agreements for Future Tokens (SAFT) or investment contracts offered by developers to accredited investors (Batiz-Benet, Clayburgh and Santor; 2017). Our focus is more towards the existing currencies for which there is ongoing litigation regarding their status as securities.

- Airdrops: Airdrops are free token distributions to current cryptocurrency owners or customers of a particular platform (Harrigan et al; 2019). To increase awareness and encourage the adoption of a new cryptocurrency, airdrops are frequently employed as a marketing strategy. To include and reward the community, airdrops might be carried out as a one-time delivery or as a recurring distribution. While this would apparently indicate a common enterprise, a point can be made that airdrops do not incur a cost on the investor.

- Similar to ICOs, token sales or token generation events (TGE) include the sale of tokens to investors. Nevertheless, they can differ from conventional ICOs in terms of their structures and workings. For instance, prior to launching the sale to the general public, certain projects may perform a private sale or pre-sale to a small group of investors (Regner et al; 2019).

- Adding new transactions to a blockchain network and validating existing ones are both done through mining. For their computational labor and commitment to network security, miners are compensated with newly created tokens in some cryptocurrency networks. Then, according on their choices, miners can sell or keep the tokens they have earned.

- Staking and Yield Farming: Some cryptocurrencies allow users to stake their tokens or supply liquidity to decentralized finance (DeFi) protocols in exchange for rewards. Yield farming is the process of supplying liquidity to DeFi protocols in exchange for token payouts, as opposed to staking, which is locking up tokens in a wallet to support the network's security and consensus procedures.

- Private Placements or Investment Rounds: Certain cryptocurrency projects might hold private placements or investment rounds where a select number of investors, including venture capitalists or institutional investors, can participate in the project in exchange for equity or tokens. The general population typically cannot access these private positions.

Apart from these main mechanisms, a special case can be made regarding pre-mining of a coin by an issuer, that could be considered a form of control and, if later sold on the secondary market could constitute a form of raising capital. However, we do not believe that this, in itself, is sufficient to define the endeavor as an investment contract.

B. The protocol characteristics can be indicative of a whether we fall under the definition of a security or not. Firstly, while a true proof-of-work consensus mechanism is an algorithmic way to issue a token, proof-of-stake resembles a form of traditional shareholder ownership. Even in mining pools, miners do not collaborate in a sense that is affecting the daily governance of a token, they just combine computational resources and share the workload in order to distribute the rewards. Mining pools have taken various stances with regard to protocol changes, but this was never under conditionality towards participating miners.

V. CONCLUSIONS

The deciding factors in ongoing litigation initiated by the SEC are facing a serious challenge in reaching a verdict. Trying to fit new instruments under pre-existing definitions cannot be done without distorting the original definition. Given the permissionless nature of cryptocurrencies the burden of proof falls on those who put the label of securities on various cryptocurrency tokens. Amusingly, while the SEC sued Ripple, the creator of the XRP token for the sale of an unregistered security, the same token is not mentioned in subsequent lawsuits against Coinbase or Binance. Despite the somewhat lack of consistency by the SEC and a lack of consensus on how to fit cryptocurrencies in a particular label, these latest developments have outlined the seriousness and dimension of the problem, as over 100 bln USD in assets can be potentially affected by the result. It is not just a battle of definitions, but serious accusations can affect investments of millions of people. Binance, the largest trading platform in the world faces allegations including: operating an unlicensed exchange and enabling US investors to purchase, sell, and transact in cryptocurrencies; selling the BNB and BUSD stablecoins that belong to Binance; offering the BNB Vault and Simple Earn staking and revenue-generating initiatives; not permitting Binance.US to function freely; misrepresenting how investor protection procedures are enforced at the Binance.US platform; despite claims that the firm does not permit US nationals to utilize Binance.com, efforts are being made behind the scenes to ensure that high-value US investors can continue to trade on the platform; using the crypto and fiat assets of the customer; engaging in wash trading that increased the trade volume on the Binance.US platform artificially (US DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 2023).

Binance responded to the legal dispute with a belligerent tone and the promise to "vigorously" defend itself. The cryptocurrency exchange criticized the U.S. SEC's strategy and blasted the agency for refusing to work with the sector to offer "much-needed clarity and guidance to the digital asset industry." The SEC, according to Binance, prioritizes securing "jurisdictional ground from other regulators" like the Commodity Futures Trading Commission (CFTC) over

protecting investors. There are constrained however that Binance is not listed on a U.S. exchange so it can be considered as a jurisdictional overreach (Lepcha, 2023).

The SEC vs Coinbase lawsuit provides further insight into the regulatory conundrum as what was believed to be a compliant exchange has been accused of non-compliance: The SEC charged Coinbase with "operating as an unregistered securities exchange, broker, and clearing agency" (US District Court Southern District of New York, 2023). In its defense, the exchange outlined failed efforts to register its business with regulators due to a lack of methodology for compliance. Moreover, it has repeatedly requested the SEC for aid yet wat met with a lack of cooperation.

In conclusion, authorities around the world have faced issues as a result of the development of blockchain technologies and the quick expansion of the cryptocurrency sector. These assets' decentralized and digital nature has sparked innovation and given consumers new options, but it has also introduced new concerns. The SEC, a significant US regulatory organization, has assumed responsibility for overseeing the cryptocurrency industry and considers many tokens to be under its purview as securities. Whether an investment arrangement meets the criteria for classification as a security is determined in large part by the Howey Test, a legislative framework created in 1946. However, it has proven difficult and debatable to apply this criteria to cryptocurrencies. The SEC has had a difficult time adjusting to this disruptive technology, which has resulted in complicated explanations and an expansion of the Howey Test's framework. Cryptocurrencies' designation as securities depends on elements including the presence of a shared company and reliance on third parties. The question of whether these standards apply to cryptocurrencies is still up for dispute. When assessing whether a common enterprise exists, it is crucial to take the context, control, and influence of investors and promoters into account. To gauge cryptocurrencies' potential as alternative currencies, it is also necessary to consider their usefulness and transaction costs. Projects' categorization is also influenced by the way tokens are distributed and by their fundamental structure. All things considered, the designation of cryptocurrencies as securities has important ramifications for market players and the integration of the crypto markets with traditional financial systems. At the moment, we are of the belief that current efforts to label a number of cryptocurrency tokens as securities are insufficiently backed up by the current legal framework, and if successful, the deciding entities will have a difficult time providing adequate argumentation for the general market. Perhaps a crypto as a commodity class approach would accelerate the development of new and effective regulation that would actually reach de desired purpose of protecting the public.

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