BUFFONE LAW GROUP PLLC

MEMORANDUM

TO:	Ayre Ventures[1]
FROM:	Samuel J. Buffone, Jr., Partner, Buffone Law Group PLLC
DATE:	August 9, 2023
RE:	Bitcoin and Securities Enforcement

EXECUTIVE SUMMARY

Fiat currency is not a security. Similarly, the Securities and Exchange Commission ("SEC") has repeatedly stated that Bitcoin is not a security because it is a form of currency.

However, the SEC has repeatedly stressed that labels alone are meaningless, and it is the underlying economic reality that governs whether something is a security. Just calling one's digital asset a "currency" does not make it one and the SEC has stressed that most so-called "cryptocurrencies" are in fact securities. Further, just because a digital asset started as a currency does not mean it stays one. Instead, if the core developers behind a digital asset change the base protocol and the way the digital asset is promoted, what was once a currency can become a security.

All digital assets are based on an underlying protocol. A protocol is a base set of rules, such as the Hypertext Transfer Protocol (HTTP), that defines how information is moved, stored, and exchanged. As long as the protocol remains unchanged, various programs can operate on top of the protocol in an interoperable way, such as how Chrome, Firefox, Edge, and other web browsers can all show the same website that uses the HTTP protocol.

---

[1] I would like to thank the BSV Association which helped provide much of the background on the underlying technology and explain much of the technical details behind how crypto, and Bitcoin in particular, functions.

Bitcoin, as originally conceived, was a protocol for digital cash. As such, it was not a cryptocurrency. Instead, Bitcoin was designed to be pseudonymous and fully traceable, creating a complete audit trail. However, today the concept of Bitcoin has become obfuscated by competing digital assets that all claim to be the true Bitcoin. What is commonly referred to as Bitcoin is not the protocol but instead a digital asset, or coin. But any analysis of whether a digital asset that claims to be Bitcoin is a security must go back to what is the protocol underpinning that digital asset. Only Bitcoin Satoshi Vision (BSV) still utilizes the original Bitcoin protocol. Other versions of bitcoin, including Bitcoin Core (BTC), have changed their underlying protocol, necessitating ongoing developer intervention and promotion, that raise questions about whether these digital assets have transformed into securities. Only BSV, which has remained unchanged and consistent with the original Bitcoin White Paper since bitcoin first launched in 2009, does not face these risks.

The SEC has been grappling with digital assets and how and when to enforce the requirements of U.S securities laws on digital assets. The SEC has initiated over 100 enforcement actions related to digital assets. And the SEC has recently become more aggressive in pursuing some of the major participants in the digital asset and cryptocurrency industry, including Binance and Coinbase. Additionally, the cryptocurrency industry has been roiled by scandal as multiple major exchanges have declared bankruptcy. Meanwhile, the SEC has questioned the new trend in cryptocurrency, proof of stake, as a form of securitization.

One truth remains: that Bitcoin is not a security. However, today there exists a dispute over what that original Bitcoin is. When Bitcoin is analyzed not as a digital asset, but instead as the Bitcoin protocol — a static and immutable protocol, similar to the HTTP protocol — the analysis of which digital assets are safely not a security becomes clearer. BSV, which is based

upon the original Bitcoin protocol and committed to keeping that protocol static, is clearly not a security. However, other digital assets, in particular BTC, have changed their underlying protocol from the original Bitcoin protocol. The tagalong effects of those changes should call into question whether BTC and other digital assets that claim to be Bitcoin still fall within the SEC's proclamations that Bitcoin is not a security.

The following memo first provides background on digital assets. It then provides an overview of the SEC's enforcement actions. Next, it analyzes the court decisions that have grappled with when and how to classify digital assets and cryptocurrencies as securities. Finally, it analyzes the SEC's public statements on Bitcoin, as well as the history of BSV and BTC, to discuss the risks that any changes from the Bitcoin protocol could lead to the classification of different bitcoin digital assets as securities.

DIGITAL ASSETS AND CRYPTOCURRENCY OVERVIEW

The SEC has defined cryptocurrency, digital assets, and tokens, as an asset issued and/or transferred using blockchain or distributed ledger technology. This includes assets referred to as cryptocurrencies, virtual currencies, and digital coins.[2] Digital assets, such as Bitcoin and Ethereum, are designed to act as a medium of exchange, and belong to their own native blockchain.[3] While a blockchain may produce a number of tokens, there can only be one native digital value transfer medium, whether or not the digital asset is a cryptocurrency.

Digital cash is intended to be a mechanism to facilitate electronic transactions that mirror the privacy and trustless nature of physical cash transactions. Cryptocurrencies are a subset of digital cash that are by definition, anonymous. Cryptocurrencies are commonly designed to be

---

[2] Compl. at ¶ 62, *SEC v. Binance Holdings Ltd.*, No. 1:23-cv-01599 (D.D.C. Jun. 5, 2023).
[3] *Cryptocurrencies vs. crypto tokens*, Brave (Jul. 18, 2023), https://brave.com/web3/cryptocurrency-versus-tokens/#:~:text=Cryptocurrencies%20belong%20to%20their%20own,to%20the%20entire%20asset%20class.

untraceable and fully anonymous, operating on cryptographic principles that can often obfuscate transaction details and user identities.

According to the above definition, Bitcoin under the original Bitcoin protocol is not a cryptocurrency. The original Bitcoin protocol was designed to ensure privacy through pseudonymity without losing legal traceability.

All digital assets are based on an underlying protocol. Software implementations and further applications are developed on top of, and based on, the protocol. It is natural that developers will constantly improve the software implementations and applications. Sometimes developers will implement changes to the underlying protocol itself. However, as the protocol defines how any software runs on the system, a protocol change necessarily means creating a new system and effectively results in a new blockchain different from the original blockchain. The creation of a new blockchain in turn creates the issuance of new digital assets to the holders on that particular chain, whether the new digital assets continue to use the original label (ticker) or not.[4]

A protocol can only be changed when a group of developers draft the change and then push through the implementation and adoption of the change. To become effective, a new protocol must be adopted, and a new protocol therefore necessarily implies a core group of developers akin to promoters of the new protocol. Due to the need to force a consensus and create compatibility with the new protocol, a protocol change almost inevitably creates a centralized system, because the developers must work together or risk incompatibility.

---

[4] Jake Frankenfield, *Hard Fork: What It Is in Blockchain, How It Works, Why It Happens*, Investopedia (May 25, 2022), https://www.investopedia.com/terms/h/hard-fork.asp

In contrast, a set protocol can allow for a decentralized system because decentralized and uncoordinated groups can all work off the same protocol and develop different solutions that work off the same protocol.

Blockchains, which store data packages known as "blocks" across a network, employ a consensus mechanism to reach an agreement on which transactions are valid, when and how to update the blockchain, and to compensate certain participants for validating transactions and adding new blocks. Blockchains typically employ one of two major consensus mechanisms, "proof of work," which is currently used by the Bitcoin blockchain, and "proof of stake," which is currently used by the Ethereum blockchain.[5] A proof of work mechanism validates transactions by incentivizing miners to solve complex mathematical problems, and rewards those who complete the puzzle with the blockchain's native crypto asset. A proof of stake mechanism requires miners to lock up their crypto assets, a process known as "staking," to validate transactions. If miners are successful, they earn a reward, but if they improperly validate the transactions, they lose the assets they staked.[6]

SEC'S DIGITAL ASSET AND CRYPTOCURRENCY ENFORCEMENT

The SEC has stepped up its regulatory efforts across the crypto industry. In May of 2022 the agency doubled the size of its Crypto Assets and Cyber Unit within the Division of Enforcement. The SEC plans to continue to grow the division to over 50 dedicated positions.[7] Thus far, the SEC has engaged in at least 99 enforcement actions concerning cryptocurrencies; of those, at least 33 are ongoing and involve the unauthorized offer and sale of newly created tokens

---

[5] Mike Antolin, *Proof-of-Work vs. Proof-of-Stake: What Is the Difference?*, Coindesk (May 11, 2023), https://www.coindesk.com/learn/proof-of-work-vs-proof-of-stake-what-is-the-difference/
[6] Antolin, *Proof-of-Work vs. Proof-of-Stake: What Is the Difference?, supra* note 5.
[7] Press Release, SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit (May 3, 2022), https://www.sec.gov/news/press-release/2022-78

and other digital assets, often as part of an initial coin offering (ICO). Exhibit 1 is a list of the SEC's enforcement actions related to cryptocurrencies and digital assets.

Most recently, the SEC initiated two enforcement actions against two of the most influential cryptocurrency exchanges in the country: *SEC v. Binance Holdings Ltd.*, No. 1:23-cv-01599 (D.D.C. Jun. 5, 2023), and *SEC v. Coinbase, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. Jun. 6, 2023). The SEC alleged that both Binance and Coinbase acted in violation of both the Securities Act of 1933 and the Securities Exchange Act of 1934 by acting as unregistered exchanges, brokers, and clearing agencies.[8] The SEC also contends that Coinbase engaged in the unregistered offer and sale of securities through its staking program, which allowed investors to profit from staking five different crypto assets to the Tezos blockchain — a proof of stake blockchain which allowed Coinbase to obtain investment returns on behalf of investors after pooling their assets.[9] These recent actions are part of a widely recognized push by the SEC to "[make] it an enforcement priority to police crypto platforms."[10] The SEC's enforcement efforts continue to expand. On July 13, 2023, the SEC brought charges against Celsius Network Limited and its former CEO, Alexander Mashinsky, for, in part, selling its own unregistered crypto asset security, CEL.[11]

SEC Chairman Gary Gensler has made several public statements touting the SEC's broad view of the classification of cryptocurrency as a security, and asserted that the SEC "[has] taken and will continue to take our authorities as far as they go."[12] The SEC continues to issue

---

[8] *See* Compl. at ¶ 8, *Coinbase Inc.*, No. 1:23-cv-04738; Compl. at ¶ 15, *Binance Holdings*, No. 1:23-cv-01599.
[9] Compl. at ¶¶ 8, 310, *Coinbase, Inc.*, No. 1:23-cv-04738.
[10] Sarah Heaton Concannon and Abbey Foote, *SEC takes aim at crypto platforms as unregistered exchanges*, Reuters (Jul. 5, 2023), https://www.reuters.com/legal/legalindustry/sec-takes-aim-crypto-platforms-unregistered-exchanges-2023-07-05/
[11] Compl. at ¶ 1,3, *SEC v. Celsius Network Ltd.*, No. 1:23-cv-06005 (S.D.N.Y. Jul. 13, 2023), ECF No. 1.
[12] Remarks of Gary Gensler, Before the Aspen Security Forum, Politico (Aug. 3, 2021) https://static.politico.com/c4/d6/5c46bb1543c792aaa5789d82af80/0803gensler.pdf

guidance and advisories cautioning the market on cryptocurrencies.[13] The SEC appears to have

three key areas of focus within the crypto market: crypto platforms, stablecoins, and crypto

tokens.

I. Crypto Platforms

Crypto trading and lending platforms are the most recent target of SEC enforcement as

evidenced by recent actions against Coinbase and Binance. The SEC reopened proposed

amendments to Rule 3b-16 under the Securities Exchange Act to expand the definition of an

"exchange" in April 2023. Following this reopening, the SEC warned that it already believes

crypto trading platforms constitute an "exchange" under the current definition, and the expanded

definition will likely cause additional platforms to fall into their purview.[14] Chairman Gensler

has highlighted the high likelihood that most, if not all, of these platforms trade tokens that the

SEC deems securities, stating that "the probability is quite remote that any given platform has

zero securities."[15] He has similarly stated that "given many crypto tokens are securities, it

followed that many crypto intermediaries are transacting in securities and have to register with

the SEC in some capacity."[16]

II. Stablecoins

Another key area for SEC enforcement is the growing stablecoins market. Stablecoins

operate as cryptocurrencies, but their value is purportedly (though for most, not actually) tied to

fiat currencies such as the U.S. Dollar or the Japanese Yen. The SEC, in its most recent action

---

[13] Office of Investor Education and Advocacy, *Exercise Caution with Crypto Asset Securities: Investor Alert*, U.S. Securities and Exchange Commission (Mar. 23, 2023), https://www.sec.gov/oiea/investor-alerts-and-bulletins/exercise-caution-crypto-asset-securities-investor-alert
[14] Concannon and Foote, *SEC takes aim at crypto platforms as unregistered exchanges, supra* note 10.
[15] Gary Gensler, *Prepared Remarks of Gary Gensler On Crypto Markets Penn Law Capital Markets Association Annual Conference*, U.S. Securities and Exchange Commission (Apr. 4, 2020), https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422
[16] Gary Gensler, *Kennedy and Crypto*, U.S. Securities and Exchange Commision (Sept. 8, 2022), https://www.sec.gov/news/speech/gensler-sec-speaks-090822

against Binance, argued that Binance's stablecoin, BUSD, which claimed to be redeemable on a 1:1 basis for the U.S. dollar, constituted an investment contract.[17] In addition, Chairman Gensler has previously raised concerns with stablecoin's potential for illicit activity, stating, "the use of stablecoins on platforms may facilitate those seeking to sidestep a host of public policy goals connected to our traditional banking and financial system: anti-money laundering, tax compliance, sanctions, and the like."[18] He has further stressed his concerns with stablecoins' volatility and inherent conflicts of interest. However, the SEC has yet to analyze a stablecoin that is backed by a bank or other institution such that it can offer a true 1:1 redemption promise and is used in real world payments such that it would not seek to sidestep other public policy goals.

III.   Crypto Tokens

The SEC and Chairman Gensler have repeatedly emphasized that they generally consider that "most crypto tokens are investment contracts under the *Howey* Test."[19] The SEC has concentrated much of its enforcement against crypto tokens and has maintained that simply claiming a token operates like Bitcoin does not make it a commodity. For example, the SEC deemed the Bitconnect coin a security even though Bitconnect's developers claimed the coin was an open source, peer-to-peer, community driven decentralized cryptocurrency.[20] Similarly, the developer of PlexCoin, "a recidivist securities law violator," attempted to refashion the PlexCoin Tokens as a "cryptocurrency" and likened them to Bitcoin.[21] The SEC contended that, in reality, PlexCoin Tokens are securities within the meaning of the U.S. federal securities laws.[22] Merely

---

[17] See Compl. at ¶317, Binance Holdings Ltd, No. 1:23-cv-01599
[18] Gensler, *Prepared Remarks of Gary Gensler On Crypto Markets Penn Law Capital Markets Association Annual Conference*, *supra* note 15.
[19] Gensler, *Prepared Remarks of Gary Gensler On Crypto Markets Penn Law Capital Markets Association Annual Conference*, *supra* note 15.
[20] Compl. at ¶ 45-48, *SEC v. Bitconnect, et al.,* No. 1:21-cv-0734 (S.D.N.Y Sept. 9, 2021).
[21] Compl. at ¶ 1, 9,,*SEC v. PlexCorps, et al.,* No. 1:17-cv-07007 (E.D.N.Y Dec. 1, 2017)..
[22] *Id.* at ¶ 9.

claiming to be like Bitcoin is not enough to classify a token as a commodity instead of a security.[23] Instead, regulators look to the economic realities of the offering or sale of particular cryptocurrency tokens under the applicable caselaw.

IV.   Summary of the SEC's Efforts

The SEC continues to take an active role in enforcing securities laws within cryptocurrencies and digital assets. It is bringing high stakes enforcement actions against the largest entities in the industry. It is focusing on cryptocurrencies that are used to skirt other enforcement prerogatives of the United States. And it is willing to enforce the securities laws against those cryptocurrencies that falsely claim to be like the original Bitcoin and compliant with securities laws.

LEGAL ANALYSIS OF DIGITAL ASSETS AS A SECURITY

I.   Legal Framework for Determining Which Assets Are Securities

The framework that regulators look to when determining whether an asset qualifies as a security was developed in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946). In *Howey*, the Supreme Court determined that the offering of units of a citrus grove development coupled with a contract for remitting the net proceeds to the investor was a "security" under § 2(1) of the Securities Act of 1933.

The Supreme Court looked to "economic reality" as opposed to placing form over substance.[24] The Supreme Court ultimately held that "an investment contract... means a contract, transaction or scheme whereby a person [1] invests his money in [2] a common enterprise and is

---

[23] *Id.*

[24] *See Howey,* 328 U.S. at 289 (construing term "investment contract" per its usage "in many states 'blue sky' laws" and the interpretation of those terms by state courts as one where "[f]orm was disregarded for substance and emphasis was placed upon economic reality"). This emphasis on "economic reality" rather than a formalist inquiry into structure or purpose suggests that the Court's view of a cryptocurrency might change if the "economic reality" surrounding the usage of that cryptocurrency changes over time, in spite of its formal purpose to be used as a medium of exchange.

led to [3] expect profits [4] solely from the efforts of the promoter or a third party;" it is "immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise."[25]

The Supreme Court later elaborated on the rationale driving the *Howey* test in *United Housing Found., Inc. v. Forman*, 421 U.S. 837 (1975). There, the Court held that shares of stock in a large cooperative public housing project that entitled purchasers to lease apartments did not constitute securities under either the Securities Act of 1933 or the Securities Exchange Act of 1934. The Court found that the simple use of the word "stock" was not dispositive, because of "the basic principle that has guided all of the Court's decisions in this area…[that] form should be disregarded for substance and the emphasis should be on economic reality."[26] There, the stocks in the co-op "lacked what the Court…deemed the most important feature of stock: the right to receive dividends contingent upon an apportionment of profits."[27] The Court held that "[t]he touchstone" for the test "[was] 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."[28] The securities laws do not apply where the purchaser is motivated to "use or consume the item purchased."[29]

A circuit split has arisen on how to best analyze the "common enterprise" prong of the *Howey* test, and whether establishing horizontal commonality or vertical commonality sufficed for finding a common enterprise existed.[30]

---

[25] *Id.* at 298-99.
[26] *United Housing Found.*, 421 U.S. at 848.
[27] *Id.* at 851.
[28] *Id.* at 852.
[29] *Id.* at 853.
[30] In *Sg Ltd.*, the First Circuit summarized the existing circuit split as to whether a common enterprise required horizontal commonality — where a class of investors share equally in the risk such that their investments rise and fall together — or vertical commonality, where an investor's fortunes are tied to the success of the promoter (of which there are two subvariants, broad and narrow). *SEC v. Sg. Ltd.*, 265 F.3d 42, 49 (1st Cir. 2001).

II.   *Howey* as applied to digital assets

Courts later applied the *Howey* test in instances concerning virtual assets, such as

evaluating whether a virtual offer of stock as part of a declared "online game" constituted a

security under the Securities Act. In *SEC v. Sg. Ltd.*, 265 F.3d 42 (1st Cir. 2001), the First Circuit

reversed the district court's dismissal of an SEC complaint which alleged that the Defendants

violated federal securities laws by offering virtual shares in an enterprise that existed only on the

internet that Defendants characterized as part of a game. In evaluating whether the virtual shares

constituted a security, the First Circuit noted that the Supreme Court in *Howey* "long espoused a

broad construction of what constitutes an investment contract," and that the test has recognized

"a kaleidoscopic assortment of pecuniary arrangements" as securities, suggesting that the test is

broadly construed.[31] The First Circuit determined that the Defendants' representation that

participants in the game would "firmly expect a 10% profit monthly" supported the notion that

participants who invested likely did so in anticipation of investment returns.[32] The SEC has

confirmed this view, and has stated that "*Howey* and its progeny make clear that if it looks like a

duck, quacks like a duck, and has the genetic makeup of a duck, it is, indeed, a duck. It matters

not if the seller puts a sign on the bird exclaiming, 'this is not a duck.'"[33]

The First Circuit in *Sg Ltd.* also extensively addressed the common enterprise prong. It

noted that the existing circuit split as to whether a common enterprise required horizontal

commonality or vertical commonality.[34] The First Circuit ultimately held that "a showing of

horizontal commonality… satisfies the test" on the grounds that it "places easily ascertainable

and predictable limits on the type of financial instruments that will qualify as securities."[35] The

---

[31] *See id.* at 47.
[32] *Id.* at 48-49.
[33] Opp. Mot. Dismiss at 1, *SEC v. NAC Foundation, LLC*, No. 3:20-cv-4188-RS, (N.D. Ca. Nov. 19, 2020).
[34] *Sg. Ltd.*, 265 F.3d at 49.
[35] *Id.* at 50.

Circuit Court then found that pooling was easily established by the fact that "[Defendant] unambiguously represented to its clientele that participants' funds were pooled in a single account used to settle participants' [online] transactions."[36] The First Circuit similarly found that Defendants' operation of a "Ponzi or pyramid scheme[,] dependent on a continuous influx of new money to remain in operation," sufficed to find horizontal commonality.[37]

The First Circuit subsequently found that the Defendants created the expectation of profits on part of the purchasers solely by the efforts of others. Though Defendants' "use of gaming language [was] roughly analogous to the [*Forman*] cooperative's emphasis on the nonprofit nature" of its stocks, Defendants "made additional representations…that played upon greed and fueled expectations of profit," such as guarantees of particular monthly and annual returns.[38] And Defendants were the ones responsible for creating those returns, in that they "represented to its customers the lack of investor effort required to make guaranteed profits on purchases" and "[were] responsible for all the important efforts that undergirded the 10% guaranteed monthly return."[39]

In making this determination, particularly with respect to finding horizontal commonality, the First Circuit also highlighted the similarities between this case and *SEC v. Infinity Grp. Co.*, 212 F.3d 180 (3d Cir. 2000), where the Third Circuit rejected the Defendants' appeal of a grant of permanent injunction in a securities fraud action.[40] In *Infinity Group*, the court found that horizontal commonality existed, and clarified that "the definition of security does not turn on whether the investor receives a variable or fixed rate of return… profits can be either capital

---

[36] *Id.*
[37] *Id.* at 50-51.
[38] *Id.* at 52-54.
[39] *Id.* at 55.
[40] *See Sg Ltd.*, 265 F.3d at 51 (stating "SG's virtual shares bear striking factual similarities to the financial instruments classified as investment contracts in *Infinity Group*" after finding the existence of horizontal commonality based on the Third Circuit's analysis in that case).

appreciation resulting from the development of the initial investment or earnings contingent on profits gained from the use of investors' funds."[41]

III.   The *Howey* Test as Applied to Digital Assets

As digital assets entered the investment mainstream in the late-2010s, the SEC reinforced the flexibility of the *Howey* test to analyze new financial arrangements. In its 2017 investigative report concerning whether the DAO, a German corporation, violated the securities law through its offering of DAO Tokens — a cryptocurrency offered on the Ethereum blockchain — the SEC applied the *Howey* test to determine that DAO Tokens constituted securities.[42]

However, Agency officials have clarified multiple times that Bitcoin is unique among other cryptocurrencies in that it is a commodity, not a security.[43] Chairman Gensler has gone so far as to label cryptocurrency as a "highly speculative asset class," and claimed that, as opposed to Bitcoin, "most of" these tokens "have the attributes of securities."[44] Accordingly, the SEC has taken the stance that, while Bitcoin falls outside their regulatory purview, other cryptocurrency tokens or offerings of tokens would constitute securities under the Howey test.

Multiple courts have also recognized that some digital assets can be regulated as commodities, and that Bitcoin is a commodity, not a security. In *CFTC v. McDonnell*, 332 F. Supp. 3d 641 (E.D.N.Y. 2018), the Court granted the CFTC's request for a permanent injunction

---

[41] *Infinity Grp. Co.*, 212 F.3d 180, 189 (3d Cir. 2000).

[42] Securities and Exchange Commission, *Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934: The DAO,* Securities Act Release No. 81,207, at 10-14 (Jul. 25, 2017) https://www.sec.gov/litigation/investreport/34-81207.pdf [hereinafter "DAO Report"]

[43] *See, e.g.,* William Hinman, Dir., Div. of Corp. Fin., SEC, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418; Andre Beganski, *SEC Chair Gensler Again Says Bitcoin Is Not a Security. What About Ethereum?*, Decrypto.co (June 27, 2022), https://decrypt.co/103926/sec-chair-gensler-bitcoin-not-security-what-about-ethereum ("'Some, like Bitcoin, and that's the only one, Jim, I'm going to say because I'm not going to talk about any one of these tokens, my predecessors and others have said, they're a commodity,' Gensler said in response to a question from CNBC's Jim Cramer."); See also Andrew Ross Sorkin, *CNBC Transcript: SEC Chair Gary Gensler Speaks with CNBC's Andrew Ross Sorkin on 'Squawk Box' Today*, CNBC (July 21, 2022), https://www.cnbc.com/2022/07/21/cnbc-transcript-sec-chair-gary-gensler-speaks-with-cnbcs-andrew-ross-sorkin-on-squawk-box-today.html [hereinafter "Gensler CNBC Interview"].

[44] Gensler CNBC Interview.

against the Defendants, a corporation and its owner, for violating the Commodity Exchange Act after a bench trial. The Court stated that "the [CFTC] has standing to bring this action for fraud involving virtual currencies... [v]irtual currency may be regulated by the CFTC as a commodity."[45] Similarly, in *CFTC v. Gelfman Blueprint, Inc.*, No. 17-7181 (PKC), 2018 U.S. Dist. LEXIS 205706 (S.D.N.Y. Oct. 15, 2018), the Court granted the CFTC a permanent injunction and final judgment by default against Defendants for their fraudulent scheme soliciting money from at least eighty customers to invest in Bitcoin. There, the *Gelfman* Court similarly stated that Bitcoin fell within the definition of a commodity: "[v]irtual currencies such as Bitcoin are encompassed in the definition of 'commodity' under" the Commodity Exchange Act.[46] Notably, neither of these courts applied the *Howey* test to Bitcoin in making their determinations. However, though "an investment of money in a cryptocurrency utilized by members of a *decentralized* community connected via blockchain technology, which itself is administered by this community of users rather than by a common enterprise, is not likely to be deemed a security under" *Howey*, the distribution of coins by a centralized issuer may run afoul of securities laws.[47]

However, with respect to other digital assets, various Courts have followed the SEC's lead and ruled that cryptocurrencies constitute securities under the *Howey* test. Generally, the test is applied in actions brought under the Securities Act of 1933 or Securities Exchange Act of 1934 in the context of initial coin offerings (ICOs), though the SEC may enforce securities laws against an issuer of digital tokens that did not conduct an ICO.[48] Further, agreements to purchase

---

[45] *McDonnell*, 332 F. Supp. 3d at 651 (granting CFTC a permanent injunction against Defendants' fraudulent sale of securities after bench trial).
[46] *Gelfman*, 2018 U.S. Dist. LEXIS 205706, at *20-21 (stating that "7 U.S.C. § 9(1) and 17 C.F.R. § 180.1(a) make it unlawful for any person, in connection with the contracts of sale of any commodity in interstate commerce, including virtual currencies such as Bitcoin" to engage in fraudulent conduct).
[47] *See SEC v. Telegram Grp.*, 448 F. Supp. 3d 352, 358 (S.D.N.Y. 2020).
[48] *Accord SEC v. LBRY, Inc.*, No. 21-cv-260-PB, 2022 U.S. Dist. LEXIS 2022738, at *22-24 (D.N.H. Nov. 7, 2022).

yet-to-be-mined coins on a blockchain and the subsequent delivery of those consumptive assets are not to be viewed as two separate sets of transactions; instead, economic reality requires that the deciding court analyze them together under the *Howey* test.[49]

Courts generally find the first prong of the test — an investment of money — was met. The first prong of the test is met where an investor offers an "exchange of value," which includes not only fiat money but also digital tokens and even "goods or services.[50] Instead, courts typically focus on the latter half of the test: namely, whether the cryptocurrency constitutes a "common enterprise" and whether participants have been led to expect profits as a result of the promoter or a third party.

A. Finding a Common Enterprise due to Horizontal Commonality in the Crypto Context

In many circuits, establishing that a digital asset's structure and management constitutes a common enterprise hinges on the presence of horizontal commonality. "In an enterprise marked by horizontal commonality, the fortunes of each investor in a pool of investors are tied to one another and the success of the overall venture," where the "sharing or pooling or funds" is required but "a formalized profit-sharing mechanism is not required."[51]

In *Balestra*, the Court found the pooling of funds where "funds raised through the ICO" were used "to facilitate the launch of the ATB Blockchain, the success of which, in turn, would increase the value of" the coins issued to Plaintiff by Defendant.[52] But an ICO is not necessarily required to find pooling of funds. In *Friel*, the Court declined to find that establishing the pooling of investor funds required that the offering of the digital asset occur in advance of the

---

[49] *See Telegram Grp.*, 448 F. Supp. 3d at 367 (stating "[Defendant] argues there are two distinct sets of transactions: the first set of transactions [being] the offers and sales of the 'interests in Grams;'" and "delivery of the newly created Grams…upon launch of the TON blockchain," which Defendant contended was a commodity, but the Court stated both "are part of a single scheme").
[50] *See, e.g., SEC v. Blockvest, LLC*, 2019 U.S. Dist. LEXIS 24446, at *23 (S.D. Cal. Feb. 14, 2019).
[51] *Balestra v. ATBCOIN, LLC*, 380 F. Supp. 3d 340, 353-554 (S.D.N.Y. 2019).
[52] *Id.* at 353.

"construction of the ecosystem that…increases [] the value of the token."[53] Instead, it noted that pooling was established where "the later-round purchasers' and the initial-round purchasers' funds would support the continued development of the blockchain."[54]

Further, the *Friel* court noted it had an "easier time" finding that the second consideration of horizontal commonality was met "where the digital asset's value is tied, and depends upon, the continued success of the blockchain," because the value of the underlying digital assets (NFTs) "have no intrinsic or inherent value outside the Flow blockchain," which was controlled by Defendant, and "if, hypothetically, [Defendant] went out of business and shut down the Flow blockchain, the value of" the crypto assets at issue would drop to zero.[55] Notably, the blockchain at issue in *Friel* used a Proof-of-Stake protocol and was privately developed by the Defendant; accordingly, similarly privatized Proof-of-Stake protocols might also suffice to create horizontal commonality in other cryptocurrency ventures.

B.   **Finding a Common Enterprise with Vertical Commonality in Digital Assets**

Courts in some circuits require a showing of vertical commonality to establish a common enterprise; there are two subvariants, broad and narrow vertical commonality, which are not interchangeable. In those jurisdictions which hold that a showing of broad vertical commonality is sufficient, such as in the Eleventh Circuit, establishing vertical commonality in the cryptocurrency context merely requires alleging "investors' expectation of profits derived from their expectation that the value of their [at-issue] tokens would increase due to the efforts of [Defendants]," which, in that case, rested on Defendants' assertions the tokens would be backed by gold.[56] This is because the establishing broad vertical commonality merely requires "the

---

[53] *Friel v. Dapper Labs, Inc.,* No. 21 Civ. 5837 (VM), 2023 U.S. Dist. LEXIS 29176, at *20, 27 (S.D.N.Y. Feb. 22, 2023).
[54] *Id.* at 28 (citing *SEC v. Telegram Grp.*, 448 F. Supp. 3d 352, 370 (S.D.N.Y. Mar. 24, 2020)).
[55] *Friel*, 2023 U.S. Dist. LEXIS 29176, at *33-35.
[56] *SEC v. Arbitrade Ltd.*, No. 22-ccv-23171-BLOOM/Otazo-Reyes, 2023 U.S. Dist. LEXIS 59651, at *13-14 (S.D. Fla. Apr. 5, 2023).

movant to show that the investors are dependent upon the expertise or efforts of the investment promoter for their returns."[57]

Other jurisdictions, such as the Ninth Circuit, look to a showing of strict vertical commonality to establish the existence of a common enterprise.[58] Strict vertical commonality requires that "the fortunes of investors be tied to the fortunes of the promoter."[59] In *NAC Foundation*, the Court found that the SEC sufficiently established the existence of strict vertical commonality where "retail U.S. investor exchanged capital for" token with "no use aside from online trading," while "[D]efendants retained a healthy share of [] tokens for their personal and corporate offers," to be used for the development of a cryptocurrency ecosystem, where each token could be exchanged for one coin of the new cryptocurrency.[60] Accordingly, the fortunes of participants in the ICO were directly linked to those of the Defendants, as measured by either the trading value of their tokens or future trading value of the to-be-minted coins.[61] The *Telegram Group* court similarly found a showing of strict vertical commonality where both the initial coin purchasers' and Defendants' own fortunes were "directly dependent" on the successful launch of the Defendants' blockchain.[62]

C.   An Expectation of Profit from the Effort of Others

Courts have previously found that an issuer's statements "pitching a speculative value proposition for its digital token" may suffice to establish the latter portion of the *Howey* test: that

---

[57] *Id.* at *13 (citing *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 732 (11th Cir. 2005) (internal quotation marks omitted).
[58] *SEC v. NAC Found., Inc.*, 512 F. Supp. 3d 988, 996 (N.D. Cal. 2021) (stating "[i]n the Ninth Circuit, a common enterprise exists where the investment scheme involves either 'horizontal commonality' or 'strict vertical commonality'").
[59] *SEC v. Telegram Grp.*, 448 F. Supp. 3d 352, 369 (S.D.N.Y. 2020) (stating the Third Circuit also recognized a showing of strict vertical commonality to establish the existence of a common enterprise).
[60] 512 F. Supp. 3d at 996 (stating "retail U.S. investors exchanged capital for ABTC tokens, which could, at the time of the exchange, be put to no use aside from online trading. Simultaneously, defendants retained a healthy share of ABTC tokens for their personal and corporate coffers. The ICO proceeds would fund the development of the AML BitCoin ecosystem, and each ABTC token could (eventually) be redeemed for an AML BitCoin").
[61] *Id.*
[62] *Id.* at 369-70.

there is an expectation of profits to be derived solely from the efforts of the promoter or third party.[63] Further, the court clearly stated that "[n]othing in the [caselaw] suggests that a token with both consumptive and speculative uses cannot be sold as an investment contract;" accordingly, the consumptive use of a token will not suffice to clear the *Howey* test where an issuer touts the underlying coin as likely to appreciate in value and provide some form of investment return or profit to coin holders.[64]

Courts have also held that, within the context of blockchain-based digital assets more broadly, the use of a Proof-of-Stake protocol requiring the lock-up of coins is part of the "economic realities" to be considered whether the underlying digital asset is a security under *Howey*.[65] Indeed, in those instances where "the promoters privatized their ledger," and the utility of an underlying coin is required to give the digital asset continuing value, it "mak[es] the purchases reliant upon the promoter for the asset's value," and the court may find that this arrangement satisfies the final prong of the *Howey* test.[66] Accordingly, a touchstone for finding whether profit is expected from the effort of the promoter or third party is whether the blockchain underlying the digital asset is privatized.

However, in some instances, the same underlying digital token may both meet or fail to clear the latter part of the *Howey* test where it is sold to two different groups of coin holders. In a recent Order in *SEC v. Ripple Labs*, No. 1:20-cv-10832-AT-SN (S.D.N.Y. Jul. 13, 2023) (slip op.), the Court determined on summary judgment that the Defendants' sales of the crypto asset

---

[63] *SEC v. LBRY, Inc.*, No. 21-cv-260-PB, 2022 U.S. Dist. LEXIS 2022738, at *9-16 (D.N.H. Nov. 7, 2022).

[64] *See LBRY, Inc.*, 2022 U.S. Dist. LEXIS 2022738, at *20.

[65] *See Friel v. Dapper Labs, Inc.*, No. 21 Civ. 5837 (VM), 2023 U.S. Dist. LEXIS 29176, at *20 (S.D.N.Y. Feb. 22, 2023) (noting that Plaintiffs argued "without FLOW tokens, no transactions on the [Defendant's] Flow Blockchain can be validated" due to its Proof-of-Stake mechanism, and that this arrangement ought to be considered when evaluating whether Defendant-issued NFTs on the Flow Blockchain constituted securities).

[66] *See Friel*, 2023 U.S. Dist. LEXIS 29176, at *21-22, 52 (finding profit was dependent on efforts of promoter where the underlying digital asset's value "[was] derived almost entirely from the continued operation by [Defendants] of the Flow Blockchain, which… appears to provide purchasers with the ability to trade at all).

XRP constituted securities per *Howey* with respect to Institutional Buyers, but not with respect to

Programmatic Buyers (public buyers on digital asset exchanges).[67] In its opinion, the Court

noted that "[Defendant's] communications, marketing campaign, and the nature of the

Institutional Sales" would have provided the Institutional Buyers "with the expectation that they

would derive profits from Ripple's efforts" through Defendant's eventual "use [of] the capital

received from its Institutional Sales to improve the market for XRP and develop uses for the

XRP ledger, thereby increasing the value of XRP."[68]

However, the Programmatic Buyers "could not reasonably expect" that the Defendant

would use the money from the sales of XRP to increase its value, because the Programmatic

Buyers purchased their XRP in blind bid/ask transactions and "could not have known if their

payments of money went to Ripple, or any other seller of XRP."[69] Therefore, the sale of a

cryptocurrency is likely to fulfill the latter portion of the *Howey* test where the buyers have

knowledge that their payments of money are going to the promoter, and will likely not where the

sale and purchase of the coin is blind. The SEC has indicated it will appeal this decision and

believes the distinction between institutional and retail investors is legally incorrect.[70]

In another recent Order in *SEC v. Terraform Labs Pte. Ltd., et al.*, 23-cv-1346-JSR

(S.D.N.Y. Jul. 31, 2023) (slip op.) the court rejected the *Ripple Labs* decision and did not draw a

distinction between coins based on their manner of sale. The Court concluded that the SEC

asserted a plausible claim that Defendants' crypto-assets qualified as securities under the *Howey*

test. The Court explicitly noted that "[a] product that at one time is not a security may, as

---

[67] *Ripple Labs.*, slip op. at 21-23.
[68] *Id.* at 19.
[69] *Id.* at 23.
[70] Dave Michaels, *SEC Says XRP Ruling Was Wrong, Signals It Will Appeal*, The Wall Street Journal (Jul. 21, 2023), https://www.wsj.com/livecoverage/stock-market-today-dow-jones-07-21-2023/card/sec-says-xrp-ruling-was-wrong-signals-it-will-appeal-oCqi2N05kHNT7MqOkDev

circumstances change, become an investment contract that is subject to SEC regulation." *Id.* at 32. Specifically, the Court noted that Terraform Labs changed the protocol that governed the crypto-assets and the new protocol created crypto-assets that were securities. *Id.* at 33-34. The Court found commonality and an expectation of profit under the *Howey* test, specifically noting that the Defendants touted a "unique combination of investing and engineering experience" highlighting the risk that a core group of developers face when changing the underlying protocol of a digital asset. *Id.* at 35-40.

THE RISK TO BITCOIN

In April 2018, in a hearing before the House Appropriations Committee, SEC Chairman Jay Clayton stated that Bitcoin does not qualify as a security.[71] He reasoned that Bitcoin functions "[a]s a replacement for currency[.]"[72] Chairman Clayton later added in a media interview that because some digital assets (not just Bitcoin) "are replacements for sovereign currencies, [which] replace the dollar, the euro, the yen . . . That type of currency is not a security."[73] In other words, Chairman Clayton reasoned that any digital currency whose primary function is to serve as a substitute for fiat currency would not qualify as a security.[74] Subsequently, in a July 2018 speech,[75] the SEC's Director of the Division of Corporation Finance, William Hinman, expressed his view that Bitcoin is not a security under the test first established in the landmark Supreme Court decision in *SEC v. W.J. Howey Co.*[76] Hinman's speech in large part focused on how the distinction between

---

[71] Neeraj Agrawal, SEC Chairman Clayton: Bitcoin is not a security, Coin Center (Apr. 27, 2018), https://www.coincenter.org/sec-chairman-clayton-bitcoin-is-not-a-security/
[72] *Id.*
[73] Kate Rooney, *SEC chief says agency won't change securities laws to cater to cryptocurrencies*, CNBC (June 6, 2018), https://www.cnbc.com/2018/06/06/sec-chairman-clayton-says-agency-wont-change-definition-of-a-security.html
[74] While Bitcoin is not itself a substitute for sovereign currency, it serves as electronic cash to be used as a medium of exchange in place of a sovereign currency.
[75] Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic), supra* note 43.
[76] 328 U.S. 293 (1946). The case involved a company's sale of 250 acres of citrus acreage to the public, along with a contract to service the groves and sell the produce for investors, while the proceeds of the sale would "help [it] finance additional development." *Cf. CFTC v. McDonnell*, 332 F. Supp. 3d 641, 723 (E.D.N.Y. 2018) (concluding that Bitcoin constituted "a commodity in interstate commerce").; and *CFTC v. Gelfman Blueprint, Inc.*, No. 17-7181 (PKC), 2018 U.S. Dist. LEXIS

a decentralized technology and central promoters driving a blockchain can create the distinction between a commodity and a security. Specifically, he stated "but the way it is sold — as part of an investment; to non-users; by promoters to develop the enterprise — can be, and, in that context, most often is, a security — because it evidences an investment contract. And regulating these transactions as securities transactions makes sense. The impetus of the Securities Act is to remove the information asymmetry between promoters and investors."[77] He contrasted this with a decentralized system "where purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts — the assets may not represent an investment contract."[78] More recently, current SEC Chair Gary Gensler confirmed in July 2022 that Bitcoin is not a security.[79]

The Bitcoin protocol is a direct-exchange (or user-to-user) network through which participants may send other participants bitcoins without the need for any intermediary. The Bitcoin system is comprised of 21 million coins that are designated as bitcoins and which each includes 100 million fungible, indivisible digital tokens known as Satoshis. The Bitcoin protocol uses digital signatures, hashing algorithms that publish data in clear text, and a distributed network of nodes to control the management of Bitcoin.[80]

The idea for Bitcoin was discussed in a white paper, a link to which was posted to a cryptography mailing list in 2008 under the pseudonym Satoshi Nakamoto.[81] The Bitcoin system

---

205706, at *21 (S.D.N.Y. Oct. 15, 2018), (holding that "[v]irtual currencies such as Bitcoin are encompassed in the definition of 'commodity' under Section 1a(9) of the [Commodity Exchange] Act.").

[77] Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic), supra* note 43.

[78] *Id.*

[79] Beganski, *SEC Chair Gensler Again Says Bitcoin Is Not a Security. What About Ethereum?*, *supra* note 43, ("'Some, like Bitcoin, and that's the only one, Jim, I'm going to say because I'm not going to talk about any one of these tokens, my predecessors and others have said, they're a commodity,' Gensler said in response to a question from CNBC's Jim Cramer."); *See also* Sorkin, *CNBC Transcript: SEC Chair Gary Gensler Speaks with CNBC's Andrew Ross Sorkin on 'Squawk Box' Today*, *supra* note 43.

[80] Jerry Brito; Andrea Castillo (2013). "Bitcoin: A Primer for Policymakers." Mercatus Center. George Mason University.

[81] Satoshi Nakamoto, *Bitcoin: A Peer-To-Peer Electronic Cash System*, (2008), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2018/Emerging_Tech_Bitcoin_Crypto.pdf

enables Bitcoin transactions to be recorded on a permanent, unalterable public ledger, known as the "blockchain," that is distributed among several nodes. This process creates a publicly available permanent history of all transactions involving the currency while allowing for privacy of the transacting parties. By virtue of this design, all transactions over the Bitcoin blockchain are traceable and auditable, though not necessarily public as to who is engaged in any particular transaction.

The Bitcoin protocol was designed to incentivize node operators to validate transactions. At Bitcoin's inception, anyone with a computer and internet access could process Bitcoin transactions by downloading the Bitcoin node software and employing their computer to solve a complex mathematical problem presented by the system.

In order to receive or spend Bitcoins, users typically have a Bitcoin wallet, which is a data file that includes the user's unspent Bitcoin (referred to as "unspent transaction output"), as well as associated private keys. Not all bitcoin transactions use keys, but these are the simplest form of transaction used. Custodial wallets are those which keep a user's private keys; non-custodial wallets do not keep a user's private keys. Private keys are only known by the individual who creates the Bitcoin wallet, akin to a password. Users can share their "public key" without compromising the privacy of their corresponding private key. The user's private keys can be used to calculate the public key. The public key is represented using a complex string of letters and numbers. This is the user's Bitcoin address to which other users may send Bitcoins.

Several years into the development of the Bitcoin system, a series of disagreements emerged within the Bitcoin developer community over whether the underlying Bitcoin protocol should be changed. Eventually, a group of developers, who were referred to as the core bitcoin developers, introduced changes to the Bitcoin protocol. This new protocol was introduced through

Segregated Witness ("SegWit") in August 2017. SegWit removed all data from ScriptSig, which contains the signature and data used to unlock the bitcoin.[82] This change enabled the Lightning Network, a software that could now run on top of the new protocol and created a separate network which no longer has the characteristics of a blockchain and takes advantage of the separation from the blockchain to limit the traceability of transactions. These changes moved away from the digital asset concept of the Bitcoin protocol towards a cryptocurrency concept that would allow for anonymous and untraceable transactions. Because SegWit introduced a new protocol that was incompatible with the Bitcoin protocol, new coins that complied with the new and changed protocol had to be issued.

Despite changing the underlying Bitcoin protocol, the new coins that complied with the new protocol were able to keep the original bitcoin ticker, BTC, thanks to the cooperation of major crypto exchanges as well as a large-scale social media campaign. But BTC utilizes a new and different protocol from the Bitcoin protocol and thereby moved beyond the original vision of Satoshi Nakamoto in his original 2008 White Paper. This included the fundamental changes to the underlying protocol from SegWit, as well as an additional change to the protocol called Taproot, which had the intended outcome of making it harder to audit transactions and potentially allow for the anonymous use of BTC. It is unclear what changes will continue to happen to the protocol underlying the BTC coin.

Bitcoin Cash (BCH),[83] and subsequently BSV, kept the original Bitcoin protocol, and did not implement the new and different protocol of BTC.[84] The BSV Association, and others who

---

[82] *What Is Segregated Witness (SegWit)?,* River (n.d.), https://river.com/learn/what-is-segwit
[83] BCH has made changes to the base protocol to date but also has not made a firm commitment to never change the Bitcoin protocol similar to BSV's commitment. It is therefore uncertain what will happen to BCH in the future.
[84] The SegWit chain was able to keep the original ticker (BTC), a controversial decision opposed by those who supported Satoshi's original vision, including BSV Association. The decision to allow the SegWit chain to keep the original bitcoin ticker, BTC, has no bearing on whether it is the true Bitcoin, and whether it should be classified as a security or is the bitcoin Chairman Gensler and the SEC has stated is not a security.

create software for the Bitcoin protocol, continue to implement changes designed to maintain functionality of BSV according to the original vision of Satoshi Nakamoto and allow massive scaling. The Genesis software implementation, in particular, was designed to enable innovation to occur on top of a stable base protocol by focusing on stability, scalability, security, and safe, instant transactions. However, none of these changes to the implementing software changed the underlying and original Bitcoin protocol.

The SEC has in part focused on centralized management of a blockchain to argue that the coins issued under that blockchain are securities. This is because of the consequences that can flow from centralized management. First, centralized management often can bolster an argument that a common enterprise exists. Further, centralized management, which almost always is financially motivated, bolsters an argument an expectation of profit exists. The SEC has also expressed an interest in regulating digital assets that facilitate the evasion of regulation. Digital assets that allow for fully anonymous transactions by definition facilitate the evasion of regulation.

BTC, with its core developers who implemented the changes to their new protocol to support anonymity, opens itself to all these pitfalls. By changing the underlying protocol rather than merely changing the software that runs on the protocol, the BTC core developers have created a managed system. Similarly, any open involvement of the Core developers in the market for BTC, coupled with changing the underlying blockchain protocol (which could be viewed as an attempt to increase the value of BTC), may suffice to create an expectation of profit. By taking a static and immutable protocol and implementing changes developed, advocated for, and implemented by a core group of developers with an obvious financial interest in the value of BTC, BTC has opened itself to the argument that it has changed what was once a commodity

into a security. Finally, by allowing for anonymity, BTC allows for the evasion of regulation that the SEC has disfavored. In short, as the SEC says, it is not enough to say you are not a duck. Merely claiming to be bitcoin will not save a coin that transforms into a security. Further, BTC's issuance of new coins after implementing changes to the underlying Bitcoin protocol could be considered a new coin offering. While no court has analyzed this issue, it highlights the risk that changes to an underlying protocol can fundamentally change how a bitcoin is analyzed under securities laws.

BSV has not deviated from the original Bitcoin protocol and therefore does not run the risks of a centrally managed system. In practice, the BSV has created a platform suitable for everyday transactions. For example, BSV transactions are processed in a matter of seconds compared to between 10 minutes and up to 1 hour for BTC. Further, the average BSV transaction fee is now less than 1/1000 of a cent compared to around $7.25 for BTC.[85] BSV has a transaction volume of more than 2,500,000 per day (with peaks of up to 50,000,000),[86] compared to approximately 450,000 per day for BTC.[87] This transaction volume data demonstrates that BSV is being used for a high volume of smaller transactions, while BTC is being used for a low volume of much larger transactions.

As a result of the upgrades made to BSV's underlying software, the BSV Association maintains that BSV is the only remaining implementation of Bitcoin that follows the original white paper, retains the original economics and opcodes, and focuses on the white paper's original intent of being an electronic cash system.

---

[85] *Compare* BSVdata.com/applications (showing average BSV fee at $0.0000023 as of June 5, 2023) *with* Sage D. Young, *Bitcoin's Frenzy of Activity Pushes Average Transaction Fee Over $7, Nearly 2-Year High*, CoinDesk (May 4 2023), https://www.coindesk.com/tech/2023/05/04/bitcoins-frenzy-of-activity-pushes-average-transaction-fee-over-7-nearly-2-year-high/.
[86] *See* BSVdata.com/applications (showing average transaction volume of 3,872,000/day) (last visited June 5, 2023)
[87] *See* Blockchain.com, Confirmed Transactions Per Day, https://www.blockchain.com/explorer/charts/n-transactions (showing approximately 300,000-600,000 transactions per day in August 2023)

BSV does not walk like a duck nor quack like one. BSV satisfies all the following conditions:

(1) It did not do pre-mining.

(2) It had no new issuance, reissuance, a secondary offering and/or airdropping in its lifetime (through whatever means, hidden or clandestine).

(3) It is based on genuine Proof-of-Work (PoW).

(4) It has a locked base protocol according to the law.

The above four factors all weigh strongly in favor of the view that BSV is a commodity, not a security.

The unbounded scalability and extremely low transaction costs of BSV ensure that it is operated and used for true utilities such as payments and other types of value transactions. This utility is one of the key features that made Bitcoin a commodity comparable to a fiat currency. Paradoxically, while BCH and BSV had to create new tickers from BTC, it is only BTC that had to airdrop new coins and therefore only BTC, and not BCH or BSV, runs the risk of the issuance of the new coins being viewed as an initial coin offering.

Furthermore, the BSV community has historically shown a strong emphasis on the utility rather than the coin price. The BSV development community is robust and decentralized, with over 500 development projects, but is not focused on actions akin to securitization, with zero ICOs or ITOs. BSV presently ranks at the top of all blockchains in terms of the daily transaction volumes.

The enforcement surrounding digital assets and the digital assets themselves are evolving quickly. The SEC will continue to find new avenues to bring digital assets into its purview.[88] Chairman Gensler has affirmed that "when a new technology comes along, our existing laws don't just go away."[89] There appears to be one definitive position: that Bitcoin is not a security. The safest way to ensure any cryptocurrency is not a security is to ensure it stays true to the original Bitcoin protocol as envisioned by Satoshi Nakamoto. That protocol was static and immutable. BSV is the only cryptocurrency utilizing that same static and immutable protocol. Meanwhile, those cryptocurrencies moving away from Nakamoto's original vision and protocol, as in the case of BTC — are increasingly at risk of securitization and being subject to SEC oversight.

---

[88] Rob Rosenblum, *Reading the Not-So-Subtle Tea Leaves: What the SEC Is Likely to Do Next in Crypto, and How Crypto Participants Should Prepare*, Wilson Sonsini (Jul. 26, 2022), https://www.wsgr.com/en/insights/reading-the-not-so-subtle-tea-leaves-what-the-sec-is-likely-to-do-next-in-crypto-and-how-crypto-participants-should-prepare.html#6

[89] Gensler, *Prepared Remarks of Gary Gensler On Crypto Markets Penn Law Capital Markets Association Annual Conference*, *supra* note 15.