NFT Artists v. the SEC: Reassessing Securities Law in the Age of Digital Art

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ABSTRACT

The explosive rise and rapid decline of the NFT art market has intensified uncertainty over whether an NFT constitutes a security subject to regulation by the SEC. In the absence of clear rulemaking, the SEC has relied heavily on regulation-by-enforcement, producing inconsistent guidance and prompting widespread concern among NFT creators. This Article provides the most comprehensive examination to date of the legal landscape governing NFT art. It traces the evolution of blockchain-based digital art; analyzes major SEC enforcement actions; assesses artists' attempts to obtain declaratory relief; and evaluates the significance of the landmark *Adonis v. Yuga Labs* decision, which rejected securities classification for certain NFTs under the *Howey* test. The Article further surveys pending legislative proposals—including the NFT Act, the Digital Asset Market Clarity Act, and the Responsible Financial Innovation Act—and highlights the growing role of no-action letters following the SEC's 2025 DoubleZero determination. Finally, it

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explores how the second Trump Administration's deregulatory stance is reshaping the SEC's approach to digital assets, including new interpretative guidance. Synthesizing these developments, this Article proposes a practical framework for NFT artists to structure, market, and sell their works without triggering securities regulation, emphasizing economic-reality analysis, limitations on pooling and promotional claims, and strategic use of no-action relief.

Keywords: art, blockchain, crypto, cyber, digital art, Non-fungible tokens, NFTs, regulation, Securities and Exchange Commission, SEC, virtual art

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I. OVERVIEW

Based on blockchain technology enabled by the advent of non-fungible tokens (NFTs), virtual art gained prominence in March 2021, when $69 million was paid in Ether digital currency for a unique piece of digital art titled "Everydays—The First 5000 days."[1] By 2025, the value of NFT art has dramatically declined. The decline in the market value of NFTs is linked to concerns of NFT artists that their NFTs are considered securities and subject to Securities and Exchange Commission (SEC) enforcement actions. There are no direct SEC regulations concerning NFTs. Instead, the SEC has been employing a regulation-by-enforcement strategy to determine whether NFTs are a security. Concerns that the SEC may be overbearing in its enforcement are being concurrently addressed in several ways. Congress has proposed several bills to address the regulation of crypto assets, which include studying NFTs to create future regulatory schemes.

NFT artists Brian L. Frye and Jonathan Mann brought suit against the SEC to try to obtain injunctive and declaratory relief to challenge its regulation of NFTs. A recent no-action letter was granted by the SEC, which determined that an NFT was not a security. Also, the second Trump Administration and its SEC board members have brought a more hands-off approach to the regulation of crypto assets. All of this helps clarify a strategy for NFT artists to be free to create NFTs without being stymied by SEC restraints.

This Article proceeds in eleven parts. First, Part II of this Article looks at how the NFT fits into the evolution of the blockchain.[2] Second, Part III explores the topic of whether regulation by the SEC is stifling NFT growth.[3] Third, Part IV discusses the mainstream acceptance of NFTs.[4] Fourth, Part V of this Article highlights developments with the regulation of NFTs and crypto assets.[5] Fifth, Part VI looks at recent SEC enforcement actions involving NFTs.[6] Sixth, Part VII explores the 2024 attempt by NFT artists Jonathan Mann and Brian Frye for declaratory relief.[7] The seventh topic addressed in Part VIII is legislative attempts to clarify securities regulation of NFTs.[8] Part IX discusses *Adonis v. Yuga*

1. *See* Lawrence J. Trautman, *Virtual Art and Non-fungible Tokens,* 50 HOFSTRA L. REV. 361, 365 (2022).
2. *See infra* Part II.
3. *See infra* Part III.
4. *See infra* Part IV.
5. *See infra* Part V.
6. *See infra* Part VI.
7. *See infra* Part VII.
8. *See infra* Part VIII.

Labs.[9] Part X of this Article addresses SEC "no action" letters.[10] Part XI analyzes how the second Trump Administration has dramatically impacted the SEC and its regulation of NFTs.[11] Finally, Part XII concludes by considering how these developments collectively shape the emerging regulatory landscape for NFT artists and outline the practical implications for creators moving forward.[12]

II. NFTS ARRIVE

Brian Frye is a concept artist and a law professor who produces digital art and sells it as NFTs.[13] Professor Frye defines an NFT as "an encrypted unit of data on a digital ledger, typically a 'blockchain.' An NFT is a 'token,' because it consists of a particular unit of data. And an NFT is 'non-fungible' because only the owner of the NFT can access or transfer that particular unit of data."[14] In sum, "an NFT is a unique 'digital object' that someone can own, sell, or buy. In many respects, NFTs resemble digital currencies like Bitcoin and Ethereum, which also consist of units of data on a digital ledger."[15] However, the "primary difference between an NFT and a digital currency is that digital currencies are intended to be infinitely divisible, but NFTs are intended to be indivisible. In other words, you are supposed to transact in fractions of a bitcoin, but you are only supposed to transact in entire NFTs."[16] Elsewhere, Trautman and Molesky provide an explanation of the underlying blockchain technology.[17] The arrival and evolution of NFTs take place in an environment of rapid growth and popularity within the cryptocurrency ecosystem.[18]

Based upon blockchain technology enabled by the advent of NFTs, virtual art gained prominence during March 2021, when $69 million was paid in Ethereum digital currency for a unique piece of digital art titled "Everydays—The First 5000 days."[19] Among the earliest and largest collections during 2021, a study of CryptoPunks by Kong and Lin finds

9. *See infra* Part IX.
10. *See infra* Part X.
11. *See infra* Part XI.
12. *See infra* Part XII.
13. *See* Complaint at 4, Mann v. SEC, No. 24-cv-01881 (E.D. La. July 29, 2024).
14. BRIAN L. FRYE, NFTS & THE DEATH OF ART 3 (2021), https://perma.cc/TQ9A-V238.
15. *Id.*
16. *Id.*
17. *See* Lawrence J. Trautman & Mason J. Molesky, *A Primer for Blockchain*, 88 UMKC L. REV. 239, 239–47 (2019).
18. *See* Lawrence J. Trautman, *Risk Disclosure Through the Lens of Coinbase Global, Inc.*, 17 U.C. L. BUS. J. (forthcoming 2026).
19. Trautman, *supra* note 1 at 365.

that "NFTs ha[d] higher returns than traditional financial assets" at that time.[20]

A. Demand for Virtual Art

The spectacular rise in demand, reaching $2.5 billion in sales for NFT art during early 2021, and subsequent decline thereafter, has been documented by many.[21] By "2024, the value of crypto-art [had] substantially dropped[,] and NFT collectors' interest [had] slowly declined. Tokens [that] once sold for millions are now largely viewed as stored metadata in the blockchain for many."[22] Professors Lapatoura and Mezei report that "in 2023[,] the crypto art sector faced $82 million in losses as well as the striking loss of its market share by 17%. As of January 2024, collectibles dominate 80% of the NFT market, while art occupies a humble 8%."[23] Even so, the trend is that the overall market value of all NFTs has been declining since 2022.[24]

III. IS THE SEC STIFLING NFT GROWTH?

During the period of decline in NFTs, NFT creators and others in the industry had been seeking specific securities law regulations aimed at crypto assets.[25] The lack of regulation was at least partially liable for the NFT decline in market value in 2021.[26] Professor Hazen likened this to the speculation on, and crash of the value, of tulip bulbs in the sixteenth and seventeenth centuries. Hazen notes:

> [A] contemporary example of the events leading to the tulip bubble can be found with respect to NFTs. The second quarter of 2021 witnessed a wild rise in NFT collectible prices. By mid-2021, it became apparent that the bubble was about to burst. For example,

20. Massimo Franceschet & Davide Della Libera, *Return on NFTs*, FRONTIERS IN BLOCKCHAIN, Feb. 2023, at 3 (citing De-Rong Kong & Tse-Chun Lin, *Alternative Investments in the Fintech Era: The Risk and Return of Non-Fungible Token (NFT)*, SSRN ELEC. J. (2021)), https://perma.cc/5TE9-H47S; *see id.* at 1.

21. *See generally* Ioanna Lapatoura & Péter Mezei, Not for Treasuries? The Role of NFTs in the Preservation of Cultural Heritage Following the Collapse of the NFT Market (preprint manuscript), https://perma.cc/9Z8L-FQJZ; Joshua Fairfield, *Digital Property Cycles*, 80 WASH. & LEE L. REV. 1115 (2023).

22. *See* Lapatoura & Mezei, *supra* note 21, at *3.

23. *Id.*

24. *See* Josh Howarth, *Top NFT Trends and Statistics in 2025*, EXPLODING TOPICS (Oct. 15, 2025), https://perma.cc/47GD-VTHK.

25. *See generally* Thomas Lee Hazen, *Rational Investing or Speculative Fever?: SPACs, Robinhood, and Digital Assets—Securities Markets or Casinos?*, 18 FIU L. REV. 565 (2024).

26. *See id.* at 599.

> according to a [2023] report, after initial huge success, ninety-five percent of the NFT market ha[d] become worthless.[27]

Many in the crypto industry argue that the lack of specific regulation by the SEC has negatively impacted the general crypto industry.[28] The uncertainty over whether one would become subject to an SEC investigation has had a chilling effect on the industry.[29] The specter of an SEC investigation drives up costs by raising legal expenses in the creation of crypto assets.[30] SEC commissioners, however, have had differing opinions on the need for regulation aimed specifically at crypto assets. Former SEC Chairman Gary Gensler has long argued that existing securities laws are adequate to regulate crypto assets.[31] Gensler's point of view was that most crypto tokens are securities, and the *Howey* test would be sufficient to distinguish those tokens that were not.[32]

Gensler repeatedly called on Congress to provide clarity in crypto asset regulation.[33] When Congress failed to act quickly, Gensler used the broad powers given to the SEC under securities laws to bring enforcement actions against crypto asset issuers.[34] This action cemented the SEC's regulation-by-enforcement strategy for determining whether a crypto asset constitutes a regulated security.[35]

SEC Commissioner Hester Peirce noted that if clear guidance was not given, the threat of SEC action would stifle the crypto industry. Peirce stated that "[r]ather than sorting through the factors or hiring an expensive lawyer to do so, a wary company may reasonably decide to forgo certain opportunities or to pursue them in a more crypto-friendly jurisdiction overseas."[36] Peirce's long resistance to a heavy-handed SEC approach to crypto regulation distinguished her views from those of Gensler's position that almost all crypto assets are securities. Peirce's view is shared with SEC Commissioner Mark Uyeda. Uyeda has also

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27. *Id.* at 600 (citations omitted).

28. *See* Carol R. Goforth, *Regulation by Enforcement: Problems with the SEC's Approach to Cryptoasset Regulation*, 82 MD. L. REV. 107, 122 (2022) [hereinafter Goforth, *Regulation by Enforcement*].

29. *See* Jennifer J. Schulp & Jack Solowey, *Collecting Jurisdiction: The SEC's Wrongheaded Expansionary Approach to NFTs*, CATO INST. (Oct. 3, 2024, at 15:18 ET), https://perma.cc/Z8WA-VZE3.

30. *See id.*

31. *See* Gary Gensler, Chair, SEC, Speech: Kennedy and Crypto (Sep. 8, 2022), https://perma.cc/7TZN-YKAS.

32. *See* Michael Conklin, Brian Elzweig & Lawrence Trautman*, Legal Recourse for Victims of Blockchain and Cyber Breach Attacks*, 23 U.C. DAVIS BUS. L.J. 135, 154–55 (2023).

33. *See* Goforth, *Regulation by Enforcement*, *supra* note 28, at 108.

34. *See id.* at 121–22.

35. *See id.* at 122–23.

36. Hester M. Peirce, Comm'r, SEC, Speech: How We Howey (May 9, 2019), https://perma.cc/A532-BN5V.

taken the long-standing opinion that regulation-by-enforcement works against the crypto industry. Specific regulation would allow for public comment, where industry stakeholders' perspectives would be considered. The SEC should not be tempted to "develop 'new' interpretations of existing statutes and rules and apply them through enforcement action[s]."[37] Without SEC regulation, Peirce and Uyeda continued to allege that the SEC is stifling the crypto industry through enforcement actions, especially against NFT creators.

A. NFT Markets and The Impact of Rapid Technological Change

Much of the reason regulation has been slow to develop is that our laws struggle to keep pace with the rate of technological change, especially since the advent of the Internet.[38] Worthy of brief mention as this article examines the NFT markets and ecosystems are the recent developments in and the increased prominence of augmented reality, collectibles, communities, DAOs, generative AI tools, platforms, utility tokens, and virtual gaming. As advancements in technology impact each of these various aspects of the NFT ecosystem, "they are likely to intersect with and influence traditional financial markets."[39] However, a positive regulatory environment will likely lead to a "comeback" for NFT sales.[40]

IV. NFTS AND MAINSTREAM ACCEPTANCE

Even with declines in the markets, NFTs are going to be critical to society in the future.[41] Baletti, Celebi, and Tercero-Lucas conducted the seminal demographic study of NFT investors.[42] The international study

37. Mark T. Uyeda, Comm'r, SEC, Remarks at the "SEC Speaks" Conference 2022 (Sep. 9, 2022), https://perma.cc/4STF-KXPR.

38. *See* H. Justin Pace & Lawrence J. Trautman, *Financial Institution D&O Liability After* Caremark *and* McDonald's, 76 RUTGERS U. L. REV. 449, 467–71 (2024); Lawrence J. Trautman, *Bitcoin, Virtual Currencies and the Struggle of Law and Regulation to Keep Pace*, 102 MARQ. L. REV. 447, 473–79 (2018); Lawrence J. Trautman, *Rapid Technological Change and U.S. Entrepreneurial Risk in International Markets: Focus on Data Security, Information Privacy, Bribery and Corruption*, 49 CAPITAL U. L. REV. 67, 83–86 (2021).

39. Mfon Akpan, *Exploring Market Dynamics: Analyzing the Correlation Between Non-Fungible Tokens, Bitcoin, Ethereum Growth Rates, and NASDAQ Performance*, 8 CORP. GOV. & SUSTAINABILITY REV. 51, 54 (2024), https://perma.cc/9APG-C84M.

40. Boaz Sobrado, *A $3.2 Billion Opportunity? OpenSea CEO On NFTs' Unexpected Comeback*, FORBES (May 6, 2025, at 11:30 ET), https://perma.cc/FX9Z-AHGS.

41. *See id.*

42. *See* Stefano Balietti, Can Celebi & David Tercero-Lucas, *From Crypto to NFTs: Identifying the New Wave of Digital Investors*, 104 INT'L REV. FIN. ANALYSIS 104172, at *7 (2025).

was conducted from October to December of 2022 and consisted of 3,752 respondents.[43] The findings are as follows:

> NFT owners are younger and possess, on average, a lower educational level than the general crypto population but a higher cryptocurrency knowledge. Second, there are no significant gender differences among NFT investors and non-NFT investors, but those working in the crypto sphere are more likely to invest in NFTs. Additionally, individuals involved in yield farming or using crypto derivatives are more likely to own NFTs. Finally, we show that individuals with more concerns about the potential misuse of cryptocurrency for illicit activities are less likely to engage in the ownership of NFT.[44]

This younger demographic views NFTs not as speculative assets, but as a part of the fundamental infrastructure of a "digital future."[45] As people increasingly embrace the digital world, the uses for NFTs are myriad.[46] Some uses include galleries and museums, augmented reality, collectibles, communities for NFT enthusiasts, generative AI tools, and virtual gaming.

A. Galleries and Museums

Professor Mfon Akpan observes that "[t]he art world has embraced NFTs, offering artists a new medium for expression and monetization. Digital art NFTs provide artists with more control over their work, including the ability to receive royalties for secondary sales, which is a significant departure from traditional art market practices."[47] Professors Lapatoura and Mezei report that "[i]n 2024, several galleries and museums around the world have embraced NFTs and are increasingly utilizing them as a means to educate and engage diverse communities of art admirers with their collections."[48]

B. Augmented Reality

Block Consulting reports that augmented reality "will allow collectors to show their NFTs in the real-world, with interactive settings, and creat[e] a new dimension for digital art. This might become the norm

43. *See id.*
44. *Id.* at *1.
45. Sobrado, *supra* note 40.
46. *See* Brian Elzweig & Lawrence J. Trautman, *When Does a Non-Fungible Token (NFT) Become a Security?*, 39 GA. ST. U. L. REV. 295, 306 (2023).
47. Akpan, *supra* note 39, at 54.
48. Lapatoura & Mezei, *supra* note 21, at *1.

since big institutions, like the MoMA are implementing interactive experiences to improve the user experience."[49]

C. Collectibles

Scholars document how the collectible market has been revolutionized and transformed by NFTs through the introduction of "digital scarcity and verifiable ownership. Popular examples include digital art pieces, trading cards, and virtual pets, with some items fetching high prices at auctions due to their rarity and the reputation of their creators."[50]

D. Communities for NFT Enthusiasts

During recent years, "[s]everal NFT marketplaces (NFTMs), *e.g.*, OpenSea, Rarible, and Axie, emerged . . . to facilitate buying and selling NFTs. This has sparked the interest of both crypto art collectors and traders."[51] For background and "perspective, OpenSea, the largest NFTM, collected $236M USD in August 2021 alone. This is about half of the volume generated by the e-commerce giant eBay during the same period. And the all-time combined trading volume of the top three NFTMs—OpenSea, Axie, and CryptoPunks—surpassed $10B USD in September 2021."[52] For the period of February to August 2021, sales of individual NFTs "skyrocketed . . . with nine out of ten of the most expensive sales taking place. . . . For example, . . . the first tweet of Twitter CEO Jack Dorsey was sold for $2.9M USD."[53]

E. Decentralized Autonomous Organizations (DAOs)

In their Report to the Council of Europe, professors Florence G'sell and Florian Martin-Bariteau explain that "[a] decentralized autonomous organization (DAO) is a blockchain-based organization that enables collective action and decision-making. Those computerized organizations leverage a multitude of smart contracts connected together to autonomously operate their governance scheme without the need for central leadership, or any human intervention, on a peer-to-peer network

49. *NFT Edition: 2025 NFT Trends: What's Next for Blockchain Art*, BLOCK (Jan. 12, 2025), https://perma.cc/U3XK-4FR3.

50. Akpan, *supra* note 39, at 54.

51. Dipanjan Das et al., *Understanding Security Issues in the NFT Ecosystem*, *in* PROCEEDINGS OF THE 2022 ACM SIGSAC CONFERENCE ON COMPUTER AND COMM'NS SEC. 667, 667 (2022), https://perma.cc/MM9A-FAEX.

52. *Id.* (citations omitted).

53. *Id.* (citations omitted).

involving all stakeholders."[54] In sum, "DAOs may allow for more secure, transparent and accountable governance . . . . The first DAO, called 'The DAO,' was launched in 2016 on the Ethereum platform to facilitate the crowdfunding of diverse projects."[55] It is easy to imagine how a DAO can be used to crowdfund an NFT investment.

F. Generative AI Tools

The influence of artificial intelligence (AI) tools permeates society.[56] During 2024, at least two generative artworks sold for more than $10 million each.[57] In addition to the more prominent use for digital art and collectibles, "utility NFTs have emerged as a significant segment. These tokens provide functional use such as access to services or events, memberships, and other digital rights or privileges."[58]

G. Virtual Gaming

Virtual economies developed within the virtual worlds of massive multiplayer online games (MMOGs), in such titles as *World of Warcraft*, *Everquest*, and *Second Life*—all containing elements of online currencies.[59] Within these games, during the early 2000s, real money was exchanged for virtual real estate or items, such as Jimmy Choo shoes, that only existed in digital form.[60] More recently, "NFTs in gaming have led to the emergence of 'play-to-earn' models, where players can earn tangible rewards, often in the form of cryptocurrencies or other NFTs for participating in the game."[61] As a result, new economic models have developed "within the gaming industry, allowing players to own, buy, sell, and trade in-game assets across platforms."[62] As virtual environments and a market for NFTs have grown during recent years, younger generations have expressed an elevated concern about cyber theft and the risk of NFTs being stolen.

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54. FLORENCE G'SELL & FLORIAN MARTIN-BARITEAU, THE IMPACT OF BLOCKCHAINS FOR HUMAN RIGHTS, DEMOCRACY, AND THE RULE OF LAW 12 (2022), https://perma.cc/6ZAB-AZFP.

55. *Id.* at 13.

56. *See* Lawrence J. Trautman, W. Gregory Voss & Scott Shackelford, *How We Learned to Stop Worrying and Love AI: Analyzing the Rapid Evolution of Generative Pre-Trained Transformer (GPT) and Its Impacts on Law, Business, and Society*, 34 ALBANY L.J. SCI. & TECH. 203, 226–44 (2025), https://perma.cc/DZD6-6RPT.

57. *See* Steven Kurutz, *The NFT is Dead. Long Live the NFT?*, N.Y. TIMES (Dec. 5, 2024), https://perma.cc/56YH-SENA.

58. Akpan, *supra* note 39, at 54.

59. *See* Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 CARDOZO L. REV. 1041, 1042 (2017).

60. *See id.*

61. Akpan, *supra* note 39, at 54.

62. *Id.*

H. Cyberattacks and Theft of Digital Assets

The theft of digital assets and vulnerability of platforms holding these assets, such as cryptocurrencies and NFTs, have been widely documented.[63] Under current technology, like all other sectors of society, certain aspects of the NFT ecosystem remain subject to cybersecurity attacks.[64] For corporations that currently or in the future may hold digital assets, cybersecurity remains a significant challenge for directors to govern.[65] As technologies advance, including the likelihood of quantum-based systems during the coming years, the extent to which blockchain-based assets remain secure against attack is currently unknown.[66] The level of malware and cyber intrusion attributable to nation-state actors is particularly concerning.[67]

V. SEC, THE REGULATION OF CRYPTO, AND NFTS

Trautman, Elzweig, and Newman have observed that "[t]he SEC's Strategic Plan for Fiscal Years 2022–26 is focused on the rapidly developing rate of change in new technologies that provide for markets to be more interconnected and interdependent than ever."[68] Challenges include: "[t]echnological developments [that] have led to a parade of highly-touted, internet-related securities promotions and hypes"; NFTs

63. *See generally* Huaqun Guo & Xingjie Yu, *A Survey on Blockchain Technology and Its Security*, 3 BLOCKCHAIN: RSCH. & APPLICATIONS, June 2022, https://perma.cc/TY45-H9MA.

64. *See generally* Lawrence J. Trautman, Scott Shackelford, Brian Elzweig & Peter C. Ormerod, *Understanding Cyber Risk: Unpacking and Responding to Cyber Threats Facing the Public and Private Sectors*, 78 U. MIA. L. REV. 840 (2024).

65. *See* Bernice Donald, Brian Elzweig, Neal F. Newman, H. Justin Pace & Lawrence J. Trautman, *Crisis at the Audit Committee: Challenges of a Post-Pandemic World*, 42 REV. BANKING & FIN. L. 119, 152–57 (2024), https://perma.cc/HG74-XWJ7. *See generally* H. Justin Pace & Lawrence J. Trautman, *Mission Critical:* Caremark*. Blue Bell, and Director Responsibility for Cybersecurity Governance*, 2022 WISC. L. REV. 887 (2022); Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503 (2019); Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things,* 72 U. MIA. L. REV. 761 (2018); Lawrence J. Trautman et al., *Corporate Directors: Who They Are, What They Do, Cyber and Other Contemporary Challenges*, 70 BUFF. L. REV. 459 (2022); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board's Responsibility for Information Technology Governance*, 28 J. MARSHALL J. COMPUT. & INFO. L. 313 (2011).

66. *See* Conklin, Elzweig & Trautman, *supra* note 32, at 164–65.

67. *See* Dustin Volz, *China Firm Behind 'Salt Typhoon' Hacks Is Sanctioned*, WALL ST. J., Jan. 18–19, 2025, at A7. *See generally* Lawrence J. Trautman, *Tik Tok! TikTok: Escalating Tension Between U.S. Privacy Rights and National Security Vulnerabilities*, 108 MARQ. L. REV. 985 (2025); Lawrence J. Trautman, *Is Cyberattack the Next Pearl Harbor?*, 18 N.C. J. L. & TECH. 233 (2016).

68. *See* Lawrence J. Trautman, Brian Elzweig & Neal F. Newman, *The SEC, Fraud, and Cryptocurrencies*, 90 MO. L. REV. 425, 429 (2025).

have received investor interest; and "development of blockchain technology has resulted in the phenomenal growth of crypto asset development" post-2009."[69] During recent years, "the Commission has found it necessary to focus on fraud and other issues resulting from the rapid emergence of cryptocurrencies and cybersecurity risks to issuers and other market participants."[70]

A. Crypto Regulation and Enforcement

Under the leadership of SEC Chairman Gary Gensler from 2021 to 2024, numerous enforcement activities were brought against crypto issuers and market platforms.[71] Prominent among these were FTX and Terraform Labs.[72]

B. The Overbroad and Prior Restraint Arguments

Professor Edward Lee contends that under the Gensler chairmanship, "[t]he SEC had failed to provide the public with any guidance on its treatment of artwork NFTs. Instead, it has resorted to ad hoc and overbroad treatment of NFTs as so-called 'crypto asset securities' in the settlement orders against two NFT projects in 2023."[73] Prior to 2026, the only SEC guidance issued was the 2019 Framework for "Investment Contract" Analysis of Digital Assets (here, the "Framework").[74] The Framework, which used 38 different factors to consider whether the *Howey* test was met, was widely seen as bringing more confusion than clarity to the crypto industry. SEC Commissioner Hester M. Peirce, shortly after the Framework was issued, in a speech calling for clearer regulation, stated:

> While *Howey* has four factors to consider, the framework lists 38 separate considerations, many of which include several sub-points. A seasoned securities lawyer might be able to infer which of these considerations will likely be controlling and might therefore be able to provide the appropriate weight to each. . . . [N]on-lawyers and

69. *Id.*

70. *Id.* at 429–30.

71. *See* Lawrence J. Trautman, *Crypto Regulation in the Time of Trump*, 32 MICH. TECH. L. REV. (forthcoming 2026), https://perma.cc/RXQ3-NR3G.

72. *See* Lawrence J. Trautman & Larry D. Foster II, *The FTX Crypto Debacle: Largest Fraud Since Madoff?*, 54 U. MEMPHIS L. REV. 289, 329, 337 (2023).

73. Edward Lee, *The Original Public Meaning of Investment Contract*, 58 U.C. DAVIS L. REV. 667, 766 (2024).

74. STRATEGIC HUB FOR INNOVATION & FIN. TECH., SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS (2019), https://perma.cc/4K28-438P. For discussion of the 2026 guidance, see *infra* Part XI.

> lawyers not steeped in securities law and its attendant lore will not know what to make of the guidance.[75]

Professor Lee argues that "the SEC's treatment of artwork NFTs raises a serious First Amendment problem. Requiring the registration of artwork NFTs as securities *before* they can be offered to the public constitutes an unlawful prior restraint."[76] The SEC has brought several important regulatory actions against NFT creators. Primarily, these actions center on whether the SEC has met its basic jurisdictional claims that the NFTs are regulated securities. Several concurrent mechanisms, both by the government and NFT creators, are helping to develop new strategies to combat the perceived overly broad enforcement by the SEC. These strategies include asking for injunctive and declaratory relief against the SEC, a shift in the focus on regulation and new interpretive guidance due to a new SEC board starting with the second Trump Administration, new guidance from recent court actions, and a new call for no-action letters.

VI. RECENT SEC ENFORCEMENT ACTIONS OF NFTS

This Part will discuss the four most important enforcement actions as applied to Impact Theory, Stoner Cats 2, OpenSea, and CyberKongz.

A. Impact Theory

Impact Theory represents a landmark SEC enforcement action, as it is the first time the SEC labeled an NFT as a security.[77] In late 2021, Impact Theory raised $29.9 million by selling 13,921 NFTs.[78] These NFTs could then be sold on secondary markets where Impact Theory would receive a 10% royalty for each transaction.[79] The SEC determined that these NFTs were offered as investment contracts, and therefore met the definition of a security under the *Howey* test.[80] Consequently, the SEC maintained that Impact Theory violated sections 5(a) and 5(c) of the Securities Act, which requires registration before selling securities.[81] Impact Theory agreed to pay the SEC a total of over $6 million in disgorgement, interest, and penalty fees.[82] This is in addition to remedial

75. Peirce, *supra* note 36.
76. Lee, *supra* note 73, at 766–67.
77. Statement, Hester M. Peirce & Mark T. Uyeda, SEC, NFTs & the SEC: Statement on Impact Theory, LLC (Aug. 28, 2023) [hereinafter Pierce & Uyeda, Impact Theory Statement], https://perma.cc/3MY9-QRPT.
78. *See* Impact Theory, LLC, Securities Act Release No. 11226, 2023 WL 5530012, at 2, 4 (Aug. 28, 2023), https://perma.cc/53NK-B4V8.
79. *See id.* at 5.
80. *See id.* at 2.
81. *See id.*
82. *See id.* at 7.

measures implemented by Impact Theory, such as a $7.7 million NFT buyback.[83]

Some marketing statements by Impact Theory appear to support the SEC's claim that the NFTs were a security. Impact Theory told potential investors that they were "trying to build the next Disney,"[84] that the NFTs are "a tremendous way for our community to capture tremendous value from the things that we're building,"[85] and encouraged potential investors to "[i]magine that you could've gotten in on Disney when they were doing Steamboat Willie. . . . That's how we think of [these NFTs]."[86] Impact Theory stated that purchasers of their NFTs would receive a "crushing, hilarious amount of value."[87] And that this value to the purchaser would be the result of Impact Theory using the proceeds of the NFT purchases for "development," "bringing on more team," and "creating more projects."[88]

SEC Commissioners Peirce and Uyeda dissented to this landmark ruling.[89] Their dissent acknowledges that the NFTs were marketed with "loud promises that [they] would increase in value."[90] However, the dissent claims that, regardless, the NFTs do not represent an equity ownership in Impact Theory and did not generate any type of dividend.[91] While the dissent shared concern about this $30 million in NFT sales, it argued that it is beyond the jurisdiction of the SEC, likening it more to the sale of "watches, paintings, or collectibles along with vague promises to build the brand and thus increase the resale value of those tangible items."[92] Finally, the dissenting commissioners criticized the majority for not providing guidance regarding NFTs years ago, rather than continuing with a regulation by enforcement approach.[93]

B. Stoner Cats 2

In 2021, Stoner Cats 2 sold over 10,000 NFTs in just 35 minutes, generating $8.2 million.[94] The offering was not limited to accredited

83. *See id.* at 6.
84. *Id.* at 3.
85. *Id.*
86. *Id.*
87. *Id.*
88. Impact Theory, LLC, Securities Act Release No. 11226, 2023 WL 5530012, at 3 (Aug. 28, 2023), https://perma.cc/53NK-B4V8.
89. *See* Pierce & Uyeda, Impact Theory Statement, *supra* note 77.
90. *Id.*
91. *See id.*
92. *Id.*
93. *See id.*
94. *See* Stoner Cats 2, LLC, Securities Act Release No. 11233, 2023 WL 5956272, at 2 (Sep. 13, 2023), https://perma.cc/SQJ6-NJZ4.

investors.[95] The SEC determined that these NFTs were offered as investment contracts, and therefore, met the definition of securities under the *Howey* test.[96] The SEC explicitly referenced how "investors in Stoner Cats NFTs had a reasonable expectation of obtaining a profit based on Stoner Cats 2's managerial and entrepreneurial efforts."[97] Because Stoner Cats 2 did not register the securities, the SEC pursued the matter as a violation of sections 5(a) and 5(c) of the Securities Act.[98] This resulted in a $1 million penalty, designated to compensate harmed investors.[99] In agreeing to the settlement, Stoner Cats 2 made no admission regarding the SEC's findings.[100]

The stated purpose of the Stoner Cats NFTs was to raise funds to create a Stoner Cats web series.[101] Purchasers of the NFTs were promised exclusive access to the web series.[102] Despite the fact that only one NFT was required to gain access to the Stoner Cats web series, some investors purchased hundreds of NFTs.[103] Stoner Cats 2 participated in a widespread marketing campaign to promote the NFTs.[104] This marketing campaign continued after the NFTs were initially sold to the public.[105] In the marketing materials, Stoner Cats 2 emphasized how owners would be able to resell their NFTs on the secondary market.[106] The NFTs were configured in a way so that Stoner Cats 2 received a 2.5% royalty every time one was sold on the secondary market.[107] At least 20% of the NFTs purchased in the initial offering were resold in the secondary market within two days.[108] More than half of the NFTs were resold in the secondary market within four months.[109]

However, SEC Commissioners Peirce and Uyeda also dissented from the Stoner Cats 2 settlement.[110] Their dissent criticizes the lack of any limiting principle regarding the application of the *Howey* test.[111]

95. *See id.* at 4.
96. *See id.* at 2.
97. *Id.*
98. *Harmed Investor: Stoner Cats 2, LLC*, SEC, https://perma.cc/7LWW-4FUU (last updated May 14, 2024).
99. *See id.*
100. *See Stoner Cats 2, LLC*, 2023 WL 5956272, at 2.
101. *See id.*
102. *See id.*
103. *See id.* at 4.
104. *See id.*
105. *See id.*
106. *See id.* at 5.
107. *See id.* at 3.
108. *See id.* at 2.
109. *See id.*
110. *See* Statement, Hester M. Peirce & Mark T. Uyeda, SEC, Collecting Enforcement Actions: Statement on Stoner Cats 2, LLC (Sep. 13, 2023) [hereinafter Peirce & Uyeda, Stoner Cats 2 Statement], https://perma.cc/7P4N-XDAM.
111. *See id.*

They further argue that, if this interpretation were consistently applied to physical artwork, "artists' creativity would wither in the shadow of legal ambiguity."[112] The dissenters believe that the Stoner Cats 2's NFTs are more analogous to fan crowdfunding than the selling of a security.[113]

C. OpenSea

OpenSea is the leading NFT marketplace.[114] It received a Wells Notice from the SEC in August of 2024.[115] A Wells Notice is a notice from a financial industry regulator, such as the SEC, informing a party of potential violations and often indicating potential enforcement actions.[116] The SEC issuing this Wells Notice is seen as a clear sign that the SEC was attempting to expand its jurisdiction in NFT markets.[117] The CEO of OpenSea, Devin Finzer, alleges that the SEC's interpretation of NFTs as securities is not only incorrect, but would "have profound consequences for artists and collectors."[118] Finzer pledged $5 million to cover the legal fees of NFT artists who receive a similar Wells Notice.[119] Finzer further voiced his support for the commissioners who dissented in the Stoner Cats 2 dispute, which advocated for clear guidelines for NFT artists.[120] In February of 2025, just one month after Donald Trump took office, the SEC concluded its investigation and announced it would not pursue any enforcement actions against OpenSea.[121]

D. CyberKongz

CyberKongz is an NFT gaming platform that received a Wells Notice from the SEC in 2024.[122] Specifically, the SEC alleged that CyberKongz blockchain games featuring an ERC-20 token alongside

112. *Id.*
113. *See id.*
114. *See* Ayesha Aziz, *SEC Closes Investigation into OpenSea, Declining to Pursue Charges Over NFT Marketplace Operations*, YAHOO!FINANCE (Feb. 24, 2025), https://perma.cc/C2MQ-RGS5.
115. *See* Practical Law Finance & Baker Hostetler LLP, *SEC Push to Regulate NFTs Continues with OpenSea Wells Notice*, REUTERS PRAC. L. (Sep. 25, 2024), https://perma.cc/89CP-2SJY.
116. *See Wells Notice*, GLOSSARY: REUTERS PRAC. L. (2025), https://perma.cc/Z8DB-5ZML.
117. *See* Stefanny Acevedo, *Will the Crypto Market Ever Catch a Break?: The SEC's Wells Notice Against OpenSea and What It Means for the Future of NFTs*, FORDHAM J. CORP. & FIN. L. BLOG (Oct. 1, 2024), https://perma.cc/RH73-DVGD.
118. *Id.*
119. *See id.*
120. *See id.*
121. *See id.*
122. *See* James G. Gatto & Maxwell Earp-Thomas, *SEC Hits Blockchain Gaming Project with Wells Notice*, NAT'L L. REV. (Dec. 23, 2024), https://perma.cc/LK7U-JNY5.

NFTs are securities and therefore must be registered.[123] This is despite disclaimers on the CyberKongz website that its NFTs are "NOT an investment and ha[ve] NO economic value."[124] In April of 2025, CyberKongz announced that the SEC investigation had concluded.[125]

VII. ATTEMPT FOR DECLARATORY RELIEF

In July of 2024, NFT artists Jonathan Mann and Brian Frye filed an action for declaratory and injunctive relief, to enjoin the SEC from declaring their NFT projects to be securities.[126] Mann is known as "Song a Day Mann."[127] He has produced and digitally recorded a song a day since 2009.[128] According to the complaint, "[Mann and Frye] have in the past sold digital art, and have imminent plans to sell their art . . . as larger-scale and widely promoted limited edition NFTs."[129] Based on the SEC enforcement actions brought by the SEC against Impact Theory and Stoner Cats 2, Mann and Frye feared that selling their respective art in NFT form would lead the SEC to bring similar actions against them.[130] Mann and Frye saw the settlements as a clear statement of SEC policy that "digital artworks . . . when accompanied by royalties and public statements regarding the artist's current and future endeavors, their hopes for the value of those endeavors, and/or their use of profits to support themselves and their endeavors—are securities."[131] Similar to many commenters, Mann and Frye's argument for declaratory relief relied on whether digital artwork creators and NFT owners of these artworks are substantially different from the relationship between traditional artists and the owners of their works.[132] They were worried that an SEC investigation, even with no litigation, can be financially ruinous to artists.[133] Mann and Frye also take umbrage that the SEC actions against Impact Theory and Stoner Cats 2 have also required NFT creators to destroy their NFTs as part of SEC enforcement action settlements.[134] The threat of costly action and potential forced destruction of NFTs has

123. *See id.*
124. *Id.*
125. *See* Sarah Wynn, *NFT Collection CyberKongz Says It's in the Clear After SEC Probe*, BLOCK (Apr. 15, 2025), https://perma.cc/BF9E-Z4S7.
126. *See* Complaint, *supra* note 13, at 42.
127. *Id.* at 3.
128. *See id.*
129. *Id.* at 5.
130. *See id.*
131. *Id.*
132. *See id.*; *see also* Carol R. Goforth, *How Nifty! But Are NFTs Securities, Commodities, or Something Else*?, 90 UMKC L. REV. 775, 777–90 (2022) [hereinafter Goforth, *How Nifty!*]; Elzweig & Trautman, *supra* note 46, at 328–30.
133. *See* Complaint, *supra* note 13, at 39.
134. *See id.*

caused the SEC to "unleash[] a chilling effect over NFT artists across the United States."[135]

Mann and Frye's complaint centered on the SEC's continuance of using enforcement actions and the *Howey* test to determine which digital assets were securities.[136] The complaint argues that these regulation-by-enforcement actions are only necessary because neither Congress nor the SEC has created a meaningful regulatory structure to guide NFT artists as to when the NFT would be a security.[137] The *Howey* case defined an investment contract as "a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits solely from the efforts of the promoter or a third party."[138] Primarily troubling to Mann and Frye is the SEC's expansive view of the commonality of the enterprise between sellers and buyers of NFT art. Taking a "tongue-in-cheek" approach, Frye has long argued that NFTs (as well as all other art) are a security.[139] Previous to the bringing of a declaratory relief action, Frye argued that "[t]he art market has always been a securities market, we just couldn't see it, because objects got in the way. The art market is the market for 'art as an investment.'"[140] Instead of buying an object, Frye argued that you are buying an entry into the catalog of all of the artworks that are attributed by the art market to that artist.[141] Frye then states that when you buy either an artwork or an NFT, you are essentially buying:

> A fractional interest in the commercial goodwill associated with an artist, or rather, a share of the artist's "clout." If the artist becomes an art star, then their clout will increase and you will be able to sell your artwork or NFT at a profit. But if their star fades, your artwork or NFT is worthless, just like any other failed investment.[142]

Equating the long-term nature of NFTs (and traditional art) to a fractional interest in the future clout of the artist, commonality between

135. *Id.*

136. *See id.* at 19–21.

137. *See id.*

138. *Id.* at 13 (quoting SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946)). Modern courts now characterize the *Howey* test to have the following four elements: "(i) there is an investment of money (or something else of value); (ii) in a common enterprise; (iii) where the purchaser expects to receive profits; and (iv) the expectation of profits is from the essential entrepreneurial efforts of others." Goforth, *Regulation by Enforcement*, *supra* note 28, at 118–19 (footnotes omitted).

139. Jessica Rizzo, *Non-Fungible Token Litigation: The Early Years*, 30 B.U. J. SCI. & TECH. L. 53, 93 (2024).

140. Brian Frye, *NFTs Are Securities and It's Great*, COINDESK (Dec. 28, 2022), https://perma.cc/QE93-QLSK.

141. *See id.*

142. *Id.*

the purchaser and the artist is met.[143] Frye opined that because the *Howey* test is "hopelessly expansive[,]" that "anything can be a security if you squint a little."[144] In their complaint, Mann and Frye expound on the expansiveness of the *Howey* test by stating that "[r]ead broadly enough, *all* art and collectibles involve a person investing money in a common enterprise, with an expectation of profit if the artist becomes more famous or the value of the art increases on the resale market."[145] Essentially, if the SEC has jurisdiction to regulate NFT art markets, then it could claim jurisdiction to regulate traditional art markets as well. Frye noted that because investments in artworks are investments in the career of the artist, "[i]t couldn't be more obvious that art and NFT collectors are buying a security interest in an artist's career."[146] It would however be hard for the SEC to explain why it is regulating NFT markets if it was not also regulating the art and other collectibles markets.[147]

Mark Uyeda, one of the SEC commissioners who dissented in the Impact Theory and Stoner Cats 2 cases, advocated the same position.[148] Uyeda stated that for digital assets, there "appears to be no limiting principle" to the *Howey* test's reach as to what constitutes an investment contract.[149] Without limits to what constitutes an investment contract, Uyeda further stated opposition to the SEC's regulation-by-enforcement in the Impact Theory and Stoner Cats 2 actions:

> [T]he Commission's approach to . . . analysis for cryptocurrencies and digital assets has been that any item sold whose value is based on the efforts of others is a security. In September 2023, the Commission found that the purchase of a digital image via a non-fungible token (NFT), the proceeds from which was used to finance the creation of an animated series was an investment contract, even though only those users who had purchased the digital image could gain access to watch the content. This broad reading of Howey would appear to scope [sic] in many common transactions in the non-digital world, including pre-purchase commitments, collectibles, art, and land.[150]

While *Mann v. SEC* was dismissed for lack of standing, the narrow view of the commonality prong of the *Howey* test is the correct

143. *See id.*
144. *Id.*
145. *See* Complaint, *supra* note 13, at 23.
146. Frye, *supra* note 140.
147. *See id.*
148. *See* Mark T. Uyeda, Comm'r, Remarks to the Council of Institutional Investors—Dangers of the Unbounded Administrative State (Mar. 5, 2024), https://perma.cc/3Z7U-UBAN.
149. *Id.*
150. *Id.*

approach.[151] NFT creators defending against future enforcement actions will likely be successful in arguing that a narrow commonality view is proper. Furthermore, this approach is in accordance with the narrow view and safe harbors in the legislative approaches discussed later in this Article. There are instances where a sale of an NFT would rightfully be considered a security. For example, Frye, one of the *Mann* plaintiffs, claims that the primary difference between digital currencies and NFTs is that NFTs are intended to be indivisible.[152] However, technology allows for NFTs to be divisible, and sellers, both on primary and secondary markets, can sell fractional shares of the NFTs.[153] Some of these NFT secondary market sales are fractionalized shares, which are promoted as investments.[154] Sales of these NFTs are more likely to be considered to be investment contracts than those that are just sold to be art or collectibles.[155]

In *Mann*, the plaintiffs note that purchasers of their NFTs may hope that their value increases, and the increase in value may occur through the individual efforts of the artists to achieve greater fame.[156] The purchasers, however, will have no reasonable expectation of profit because of the plaintiffs' managerial or entrepreneurial efforts.[157] In other words, just because a purchaser of an NFT has an expectation of future profits in their purchase, that does not necessarily mean that the commonality prong of the *Howey* test has been met. In their dissent in *Impact Theory*, Commissioners Peirce and Uyeda endorse this distinction. Peirce and Uyeda balanced concerns about the hype associated with the sale of Impact Theory's KeyNFTs with the economic realities approach in the *Howey* case itself, stating:

> [W]e share our colleagues' worry about the type of hype that entices people to spend almost $30 million for NFTs seemingly without having a clear idea about how they will use, enjoy, or profit from them. This legitimate concern, however, is not a sufficient basis to pull the matter into our jurisdiction.[158]

151. *See* Order & Reasons, Mann v. SEC, No. 24-cv-01881, at 1 (E.D. La. Sep. 30, 2025), Dkt. No. 43, https://perma.cc/9GFM-4LX5. The court found that there was no final agency action, and the case lacked ripeness because the SEC had not brought any action against previous NFT sales, and any enforcement of future NFT sales was speculative. *Id*.

152. *See* FRYE, *supra* note 14, at 3.

153. *See* Elzweig & Trautman, *supra* note 46, at 328–30.

154. *See id.* at 330.

155. *See id.*

156. *See* Complaint, *supra* note 13, at 37.

157. *See id.*

158. *Id.*

Economic reality acknowledges that just because an asset is hyped, even when there may be fraudulent actions in the hyping of the asset, it does not mean that there are securities law violations. Gurbir S. Grewal, Director of the SEC's Enforcement Division when Stoner Cats LLC was charged, stated that "[r]egardless of whether your offering involves beavers, chinchillas or animal-based NFTs, under the federal securities laws, it's the economic reality of the offering—not the labels you put on it or the underlying objects—that guides the determination of what's an investment contract and therefore a security."[159] The SEC only charged Impact Theory and Stoner Cats 2 with engaging in unregistered securities offerings, not with fraud.[160] Commissioners Peirce and Uyeda, in their *Impact Theory* dissent, note that "[t]he handful of company and purchaser statements cited by the order are not the kinds of promises that form an investment contract."[161] While Grewal made his statement to affirm his belief that the economic reality showed that the sale of Stoner Cats was an unregistered security, Peirce and Uyeda disagreed. By analogizing NFT creators building a fan base to the way that Star Wars built a fan base in the 1970s, they seem to believe that if it was not for the digital component of the NFTs, Stoner Cats would not have been charged.[162] However, just because an NFT is digital, many art NFTs are more akin to traditional art than securities. Just like the traditional art market, the NFT crypto art market is highly illiquid.[163] Accordingly, these NFT "assets do not have a market price and cannot be immediately traded."[164]

The available literature characterizes art as a "conspicuous consumption good."[165] Accordingly, "[t]he concept of conspicuous consumption is first illustrated by Veblen and refers to the consumption of costly goods or services for reputability. Mandel claims that art assets are appealing both for their ability to transfer consumption over time and for their use as signals of wealth."[166] Therefore, the illiquid market for NFTs differs from the dynamics of cryptocurrencies, which "are known for their high volatility[,] which can be attributed to several factors[,] including regulatory news, technological advancements, and changes in investor sentiment. In contrast, traditional stock markets, while also

159. Press Release 2023-178, SEC, SEC Charges Creator of Stoner Cats Web Series for Unregistered Offering of NFTs (Sep. 13, 2023), https://perma.cc/TU86-D7FS.

160. *See* Pierce & Uyeda, Impact Theory Statement, *supra* note 77.

161. *Id.*

162. *See* Peirce & Uyeda, Stoner Cats 2 Statement, *supra* note 110.

163. *See* Franceschet & Della Libera, *supra* note 20, at 3.

164. *Id.*

165. *Id*. (citing B.R. Mandel, *Art as an Investment and Conspicuous Consumption Good,* 99 AM. ECON. REV. 1653–63 (2009)).

166. *Id*. (internal citations omitted).

subject to volatility, are generally more influenced by economic indicators, corporate earnings, and monetary policy."[167] Professors De-Rong and Daniel Rabetti explain:

> [T]he utility derived from possessing private-value assets [art] can be twofold. First, there is the potential for financial gains through resale. These assets may appreciate over time, providing a lucrative opportunity for owners to realize profits when they decide to sell. This financial aspect often serves as a primary driver for investment in private-value assets, attracting individuals with the promise of monetary returns. Apart from financial gains, private value assets also offer non-financial benefits through emotional dividends. Emotional dividends represent the personal enjoyment from possessing and interacting with these assets. The sentimental value associated with possessions, such as rare artwork or vintage wine, can provide personal satisfaction to their owners.[168]

NFTs in the form of digital art do not possess the same characteristics as many other digital assets. For example, cryptocurrencies possess different liquidity, market characteristics, and ethical concerns[169] from NFTs, in that cryptocurrencies exhibit an "around-the-clock trading nature . . . retail investor participation, and the cryptocurrency market's relative youth contribut[ing] to distinct market behaviors."[170] The increased participation of institutional investors in the cryptocurrency markets during 2024 and 2025 also distinguishes NFTs from Bitcoin and other digital currencies as an asset class.[171] In the *Impact Theory* dissent, Peirce and Uyeda made a statement based on the economic reality that "[the SEC does] not routinely bring enforcement actions against people that sell watches, paintings, or collectibles along with vague promises to build the brand and thus increase the resale value of those tangible items."[172] Economic reality requires that NFT art should not be assumed to be a security just because it shares some characteristics with crypto assets that are securities.

167. Akpan, *supra* note 39, at 54 (citations omitted).

168. DE-RONG KONG & DANIEL RABETTI, IS LOVE BLIND? AI-POWERED TRADING WITH EMOTIONAL DIVIDENDS 23 (2024), https://perma.cc/QWS2-J8J3.

169. *See generally* Michael Conklin & Ruben Cabellos, *The Ethics of Investing in Cryptocurrencies*, 21 FLA. ST. U. BUS. REV. 69 (2022), https://perma.cc/2E48-ENDN.

170. Akpan, *supra* note 39, at 54.

171. *See* Increasing Allocations in a Maturing Market: 2025 Institutional Investor Digital Assets Survey, EY Parthenon (2025), https://perma.cc/7A4M-EAKT.

172. Pierce & Uyeda, Impact Theory Statement, *supra* note 77.

VIII. LEGISLATIVE ATTEMPTS TO CLARIFY SECURITIES REGULATION OF NFTS

A. The NFT Act

In December 2024, Congressmen William Timmons and Richie Torres introduced the New Frontiers in Technology Act (here, the "NFT Act").[173] The NFT Act was the first Congressional action to directly address the regulatory treatment of NFTs. The bill was an attempt to separate those NFTs that are not designed to be investments from the SEC's regulatory regime. NFTs that were "covered" by the bill were "[f]or the purposes of the securities . . . not an investment contract."[174] Because the covered NFTs are not an investment contract, "an offer or sale of a covered non-fungible token is not a transaction in a security."[175] Some saw this as a push against SEC overreach by broadly construing the definition of investment contract to digital assets, and thereby claiming SEC jurisdiction over them.[176] Some NFTs are analogous to non-digital assets, which have never been subject to SEC jurisdiction, leading to uncertainty in the SEC's jurisdictional claims.[177] An example of these analogous assets was acknowledged by SEC Commissioners Hester Peirce and Mark Uyeda in their statement dissenting from the *Stoner Cats 2* settlement agreement.[178] Peirce and Uyeda noted that purchasers received "a still image of a character from the series, access to all six episodes of the Stoner Cat series, and the excitement of being part of a popular phenomenon."[179] The Stoner Cats images were compared to Star Wars collectibles sold in the 1970s.[180] With the excitement of the Star Wars movie release in 1977, Kenner toy company sold certificates that were redeemable later for sought after future releases of Star Wars action figures. These certificates helped build the Star Wars community.[181] Because these "IOU certificates" could be resold, Peirce and Uyeda asked, "Would those I.O.U. certificates . . . constitute investment contracts?"[182] They then stated that they believed using the analysis of the Stoner Cats enforcement action that the SEC would "have parachuted in to save those kids from Star Wars mania."[183]

173. *See* H.R. 10544, 118th Cong. (2024).
174. *Id.* § 2(a).
175. *Id.* § 2(a)(2).
176. *See* Schulp & Solowey, *supra* note 29.
177. *See id.*
178. *See* Peirce & Uyeda, Stoner Cats 2 Statement, *supra* note 110.
179. *Id.*
180. *See id.*
181. *See id.*
182. *Id.*
183. *Id.*

To differentiate between NFTs that are securities and those that are not, the NFT Act defines covered securities as those that were "*developed* primarily for personal, family, or household consumption."[184] This definition specifically includes NFTs that are "a work of art, musical composition, literary work, or other intellectual property";[185] "a collectible, merchandise, virtual land, or video game asset";[186] "a digital identifier or other certificate or credential";[187] "an affinity, reward, or loyalty point";[188] or, "a right, license, membership, or ticket."[189] Even if an NFT meets one of these criteria, it still would not be a covered NFT if an issuer or promoter markets it "primarily as an investment opportunity"[190] or if the issuer or promoter "promises future actions or a series of actions designed explicitly and for the purpose of increasing the value of the covered non-fungible token."[191]

The NFT Act called for specific regulation regarding NFTs, which the crypto industry has long desired.[192] However, the NFT Act still lacked clarity as to the definition of an NFT in key areas. The NFT Act did not define what would be considered an NFT developed primarily for personal, family, or household consumption. The "primarily for personal, family, or household consumption" appears to be borrowed language from the Truth in Lending Act (Regulation Z). Regulation Z defines "consumer credit" as "credit offered or extended to a consumer primarily for personal, family, or household purposes."[193] Regulation Z then separates consumer credit, which is covered by the Act, from business credit, which is not covered, when the credit "is primarily for personal, family, or household purposes."[194] In this definition, the consumers' use of the credit would determine whether or not the credit is covered by Regulation Z. Instead, the NFT Act includes the clause "which was developed" prior to the clause "primarily for personal, family, or household consumption."[195] By putting the "developed" language in the bill, the bill seems to direct whether an NFT may be exempt from securities regulation laws based on the intent of the creator, and it ignores what happens after the initial sale to the consumer. However, the

184. H.R. 10544, 118th Cong. § 2(b)(1)(A) (2024) (emphasis added).
185. *Id.* § 2(b)(1)(A)(i).
186. *Id.* § 2(b)(1)(A)(ii).
187. *Id.* § 2(b)(1)(A)(iii).
188. *Id.* § 2(b)(1)(A)(iv).
189. *Id.* § 2(b)(1)(A)(v).
190. *Id.* § 2(b)(1)(B)(i).
191. *Id.* § 2(b)(1)(B)(ii).
192. *See, e.g.*, Goforth, *How Nifty!*, *supra* note 132; Elzweig & Trautman, *supra* note 46, at 301–03.
193. 12 C.F.R. § 226.2(a)(11)–(12) (2010) (emphasis added).
194. *Id.* § 226.1(c)(1)(iv) (2010).
195. H.R. 10544 § 2(b)(1)(A).

creator does not have control over what is done with the NFT after the initial sale. It is likely that an NFT would be sold without the creator stating any purpose for why it was developed, nor would they care to whom the NFT was sold.[196] One commentator questions, "What are the consequences, for example, if an NFT representing ownership in a particular painting by an obscure artist is sold to an art collector, but the collector turns around and begins promoting the artist in the hopes that the NFT will increase in value?"[197] This is especially critical when the secondary purchaser can fractionalize the NFT and resell fractional shares.

One reading of the NFT Act would suggest that some understanding may be found in how the bill excludes coverage of NFTs "marketed by an issuer or promoter" primarily for investment or future actions designed "explicitly and for the purpose of increasing the value of the covered non-fungible token."[198] Key definitions are missing that would bring complete clarity as to these exclusions. The NFT Act does not define the term "issuer." Section 2(a)(4) of the Securities Act of 1933 (here, the "Securities Act") defines an issuer as including "every person who issues or proposes to issue any security."[199] The term "person" includes an "individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof."[200] Further, the NFT Act contains no definition of who would be considered to be a "promoter." Rule 405 of the Securities Act defines the term promoter to include

> (i) Any person alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer; or
>
> (ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent or more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the

196. *See* Mauro M. Wolfe & Vincent J. Nolan III, *NFT Bill Needs Refining to Effectively Regulate Digital Assets*, LAW360 (Feb. 27, 2025), https://perma.cc/J3P6-D68N.

197. *Id.*

198. H.R. 10544 § 2(b)(1)(B).

199. 15 U.S.C. § 77b(a)(4).

200. 15 U.S.C. § 77b(a)(2).

> meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.[201]

The terms, issuer and promoter, have an expansive reach.[202] Because it is specifically aimed at excluding NFTs from being an investment contract, the NFT Act would have likely lowered the potential areas of litigation in future SEC enforcement actions. However, the lack of clarity of who would be considered an issuer or a promoter would still likely need to be resolved by litigation. As one commenter questions, "[I]s an NFT platform an issuer or promoter? Is an endorsement from a celebrity, music mogul or sports star the act of a 'promoter'?"[203]

To be considered a security under the NFT Act, an NFT would have to be marketed by the issuer or promoter "explicitly and for the purpose" of increasing the NFT's value.[204] In the *Howey* case, part of the court's definition of a required expectation of profit had come "solely" through the efforts of a promoter or third party.[205] The SEC, in order not to frustrate the purpose of securities laws, has generally taken a broad approach to be more inclusive in its interpretation of what constitutes a security. To keep with its policy, "in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance, and the emphasis should be on economic reality."[206] And the word solely has been broadly interpreted by the SEC. Keeping with the SEC's interpretation, instead of strictly construing the word solely, courts instead require that profits "come 'primarily,' 'substantially,' 'predominantly,' or . . . 'from the entrepreneurial or managerial' efforts of others."[207] While "explicitly and for the purpose" appears to be a lower bar than "solely," to keep with the emphasis on economic reality, the SEC or others may litigate what makes an effort explicitly and for the purpose of increasing an NFT's value. Another area where the NFT Act, if passed, would likely lead to confusion is that the bill excludes most common types of securities from being defined as an NFT.[208] The NFT Act specifically excludes from the definition of covered NFTs:

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201. 17 C.F.R. § 230.405(1) (2024).

202. *See* David Groshoff, Alex Nguyen & Kurtis Urien, *Crowdfunding 6.0: Does the SEC's Fintech Law Failure Reveal the Agency's True Mission to Protect—Solely Accredited—Investors?*, 9 OHIO ST. ENTREP. BUS. L.J. 277, 311 (2015).

203. Wolfe & Nolan, *supra* note 196.

204. H.R. 10544, 118th Cong. § 2(b)(1)(B) (2024).

205. SEC v. W.J. Howey Co., 328 U.S. 293, 299 (1946).

206. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (citing *Howey*, 328 U.S. at 298).

207. Miriam R. Albert, *The* Howey *Test Turns 64: Are the Courts Grading This Test on a Curve?*, 2 WM. & MARY BUS. L. REV. 1, 19 (2011).

208. *See* Wolfe & Nolan, *supra* note 196.

> The term NFT does not include any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, put, call, straddle, option, privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof).[209]

The NFT Act also excludes many assets that are commonly regulated as commodities from the definition of a covered NFT.[210] These exclusions leave only a small subset of possible tokens that could possibly be covered under the NFT Act, leaving coverage to only "a very limited—perhaps even remote—category of content creators and buyers."[211] Perhaps the greatest flaw in the NFT Act, and maybe why it did not gain more traction, is that it is likely putting the proverbial cart before the horse. After trying to define what qualifies as a covered NFT, the bill directs the Comptroller General to carry out a study on NFTs. The study includes an analysis of some basic information about NFTs, such as, among other things, "the nature, size, role, purpose, and use of non-fungible tokens"[212] and "the similarities and differences between non-fungible tokens and other digital assets, including payment stablecoins, and how the markets for those digital assets intersect with each other."[213] Once a study like this is complete, then it may be easier to define which NFTs should be exempt from being considered a regulatable security.

B. The CLARITY and the Responsible Financial Innovation Acts

The House of Representatives has likely agreed that a study should be completed prior to passing comprehensive regulation and prior to defining what makes an NFT a covered security under the securities laws. In 2025, the House passed the Digital Asset Market Clarity Act of 2025, commonly known as the Clarity Act.[214] The Clarity Act is a broad-based bill aimed at providing a clear and stable framework to regulate and govern digital assets, and to clarify jurisdictional friction between the SEC and the Commodity Futures Trading Commission (CFTC).[215]

209. H.R. 10544 § 2(b)(2)(B)(i) (cleaned up).
210. *See id.* § 2(b)(2)(B)(ii).
211. Wolfe & Nolan, *supra* note 196.
212. H.R. 10544 § 3(a)(1).
213. *Id.* § 3(a)(2).
214. *See* H.R. 3633, 119th Cong. (2025).
215. *See, e.g.*, Kathy Casey, Sudhir Jain & Harper Swope, *The Future of U.S. Crypto Regulation: Analyzing the CLARITY Act and the RFIA*, PATOMAK GLOB. PARTNERS (Aug. 4, 2025), https://perma.cc/7PD9-7U9Z.

The CLARITY Act does not define NFTs, but directs the Comptroller General to do a study of NFTs identical to the one that would have been required in the NFT Act.[216]

The Senate Banking Committee, within a few days of the Clarity Act passing the House, released a discussion draft of its own bill, the Responsible Financial Innovation Act of 2025 (RFIA).[217] RFIA is designed to compete with the Clarity Act "to clearly draw the line between digital asset securities and commodities, to impose disclosure requirements for certain transactions involving ancillary assets."[218] The RFIA has the same requirement of having the Comptroller General complete a study on NFTs with the same parameters as the NFT Act and the Clarity Act.[219] Additionally, the RFIA provides a safe harbor provision:

> [T]he offer, sale, resale, transfer, or conveyance of a non-fungible token shall not be deemed to constitute an offer or sale of a security or investment contract under the Securities Act of 1933, the Securities Exchange Act of 1934, or any equivalent State law, unless the transaction, in substance, involves all of the elements of an investment contract.[220]

The safe harbor does not apply to mass-minted series of items, or fractionalized interests in an NFT.[221] Under this safe harbor, resales and secondary market transactions of NFTs where the payments do not flow back to a promoter or are used to raise new capital for an enterprise are specifically excluded from being regulated securities.[222] Unlike the NFT Act, the RFIA does define promoters, which include any people or groups that "controls, or operates an enterprise in which capital is invested, or any person or group acting on behalf of such a person or group with respect to such an enterprise, including an affiliate, agent, or coordinated actor that contributes to the capital raising efforts of the enterprise."[223] Further, the RFIA safe harbor excludes from the securities laws NFTs that are for a non-investment-based use, "solely because the [NFT] may appreciate in value or depend in part on continued efforts or

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216. *See* H.R. 3633 § 505.

217. *See* Discussion Draft, S. Comm. On Banking, Hous. & Urb. Aff., Responsible Financial Innovation Act of 2025 (RFIA), 119th Cong. (2025), https://perma.cc/RY6X-T9AN; *see also* Adrien K. Anderson et al., *Clarifying the CLARITY Act: What to Know About the House Crypto Market Structure Bill and Its Path to Law*, ARNOLD & PORTER (Aug. 26, 2025), https://perma.cc/PG27-9MDD.

218. Discussion Draft, *supra* note 217, at 1.

219. *See id.* § 503, at 154–55.

220. *Id.* § 502(b)(1), at 151–52 (internal citations omitted).

221. *See id.* § 502(b)(3), at 152–53.

222. *See id.* § 502(b)(2)(A), at 152.

223. *Id.* § 502(a)(2), at 151.

the reputation of the creator or issuer of the [NFT]."[224] Non-investment-based NFTs specifically include collectibles, membership rights, event tickets, and access credentials.[225]

These safe harbor provisions seem to legislatively align with positions taken by the current SEC commissioners as to when securities laws apply to NFTs. SEC enforcement under Chairman Atkins has been overly broad in its application to digital art and collectibles. The current SEC seems to seek a more balanced approach where art and collectable NFTs should be shielded from securities laws, unless they cross the line into becoming a true investment vehicle. In the *Stoner Cats* dissent, SEC Commissioners Peirce & Uyeda stated:

> NFT creators, along with other artists, do not get a free pass from the securities laws. In some instances, sales of NFTs may implicate our securities laws. In applying the securities laws in this space, however, the Commission must take care to preserve the ability of artists to sell their work, build a fan base, and involve that fan base in future creative endeavors. That is what was happening in the 1970s with Star Wars, and that is what was happening here with Stoner Cats. The Stoner Cats NFT purchasers received what they paid for—a still image of a character from the series, access to all six episodes of the Stoner Cat series, and the excitement of being part of a popular phenomenon. The Commission's application of the securities laws here makes little sense and discourages content creators from exploring ways to harness social networks to create and distribute content. More generally, it contributes to the legal ambiguity facing artists, writers, musicians, filmmakers, and others seeking to build a loyal, engaged following.[226]

The RFIA, by allowing safe harbor for NFTs, would allow the creative endeavors of NFT artists to flourish and build a fan base during the required study by the Comptroller. The study requires analysis of the similarities and differences between NFTs and other digital commodities, including the intersection of those markets. The study is likely to happen under any legislative approach to NFT regulation reform because it has been identically proposed in the NFT Act, the Clarity Act, and the RFIA. And the study will likely lead to a more nuanced approach to NFT regulation, resulting in a balancing of those NFTs that are collectibles with those that are traditional investment contracts.

224. *Id.* § 502(b)(2)(B), at 152.
225. *See id.*
226. Peirce & Uyeda, Stoner Cats 2 Statement, *supra* note 110.

IX. *REAL V. YUGA LABS*

Within weeks of the dismissal of *Mann*, a decision was made in *Real v. Yuga Labs*.[227] *Real* is likely to reshape the NFT industry.[228] Originally filed in 2022, *Real* is a class action lawsuit alleging that Yuga Labs Inc. (Yuga) was selling several different NFTs as unlicensed securities.[229] This case garnered much attention, not only because it was an early private action claiming that an NFT issuance was a securities fraud, but also because it listed many celebrity promoters as co-defendants.[230] Yuga created the Bored Ape Yacht Club brand, which was endorsed by, among other celebrities, Paris Hilton, Jimmy Fallon, Justin Bieber, Kevin Hart, Calvin Broadus (Snoop Dogg), and Madonna.[231]

Yuga created 10,000 Bored Ape NFTs, each with its own unique characteristic.[232] Yuga also created spinoff NFTs that included Mutant Ape Yacht Club and Bored Ape Kennel Club.[233] To create a metaverse called Otherside, Yuga created a digital deed called Otherdeed NFTs, where avatars of the other collection of character NFTs could interact.[234] When these NFTs were sold, Yuga retained commercial rights to the NFTs, granting the purchaser a restrictive license.[235] The transactions were recorded on the Ethereum blockchain. When Yuga NFTs were then resold and transferred from one digital wallet to another, the purchasers were charged a "creator earnings" fee that was paid to Yuga.[236] These types of fees are often relied on by NFT creators as royalties to create an ongoing revenue stream in their creations.[237] The original Bored Ape Yacht Club tokens were originally valued at $190.[238] Within a few

227. *See* Adonis Real v. Yuga Labs Inc., No. 2:22-cv-08909, 2025 WL 3437389, at *11–12 (C.D. Cal. Sep. 30, 2025).

228. *See, e.g.*, Debashree Patra, *U.S Federal Court Rules Bored Ape Yacht Club NFTs and ApeCoin Are Not Securities*, COINPEDIA (Oct. 4, 2025), https://perma.cc/8NQL-DY5K.

229. *See generally* Class Action Complaint, Adonis Real v. Yuga Labs, Inc., No. 22-cv-08909 (C.D. Cal. Dec. 8, 2022).

230. *See id.* at 1.

231. *See id.*; Madeline Simpson, *Consumers Caught in the Cryptocurrency Crisis: Why Celebrity Endorsers Should Not Escape Liability*, 64 B.C. L. REV. 2045, 2070 (2023).

232. *See Adonis Real*, 2025 WL 3437389, at *3.

233. *See id.*

234. *See id.* Yuga Labs also created ApeCoin, a cryptocurrency to be spent in the Otherside ecosystem. Although it is outside of the scope of this article, cryptocurrencies also may be considered to be securities.

235. *See id.*

236. *See id.*

237. *See* Sander Lutz, *Bored Ape NFTs Are Not Securities, Court Rules in Landmark Decision*, DECRYPT (Oct. 3, 2025), https://perma.cc/U99U-Y4GH.

238. *See* Sofia Aizenman, *The Art World of Digital Assets: How Non-Fungible Tokens Create a Loophole in Anti-Money Laundering Regulations*, 44 CARDOZO L. REV. 1179, 1196 (2023).

months, partially due to the celebrity hype associated with these NFTs, the Bored Ape Yacht Club NFTs were selling for over $200,000.[239] At the peak, the average Bored Ape Yacht Club NFT was selling for $430,000, with some selling for over $1,000,000.[240] Some of those who bought Bored Ape Yacht Club tokens at their peak, however, experienced a loss of 93%.[241]

When investors sued, the court dismissed the case, finding that the Yuga Labs NFTs were not securities under the *Howey* test.[242] The initial analysis of Judge Olguin noted that there needs to be economic reality in a *Howey* analysis, reiterating the Court in *Reves v. Ernst & Young* stated, "'Congress did not[] . . . intend to provide a broad federal remedy for all fraud[]' when enacting the Securities Act and Exchange Act."[243] The economic reality approach is similar to Peirce and Uyeda's dissent in *Impact Theory* when they specifically noted that the allegations in that action did not include fraud charges, but only charges of selling unregistered securities.[244]

Doing an analysis of the economic reality of the Yuga NFTs, Judge Olguin dismissed the action, finding that the NFTs were not securities under the *Howey* test.[245] Judge Olguin found that the first *Howey* prong, an investment of money, was not met.[246] In the analysis, it was noted that most courts that have previously addressed this prong have focused on the "'money' aspect" not the "'investment' aspect."[247] The SEC has long taken the position that money, under the *Howey* test, does not have to be fiat currency. In *Uselton v. Commercial Lovelace Motor Freight*, the Tenth Circuit stated, "in spite of *Howey*'s reference to an 'investment of money,' it is well established that cash is not the only form of contribution or investment that will create an investment contract. Instead, the 'investment' may take the form of 'goods and services,' or some other 'exchange of value.'"[248] In its first-ever enforcement action

239. *See id.*; *see also* Cheyenne DeVon, *Justin Bieber's Bored Ape NFT Was Valued at $1.3 Million in 2022—Now It's Only Worth Around $60,000*, CNBC (July 7, 2023, at 16:04 ET), https://perma.cc/DRL9-YUEW.

240. *See* DeVon, *supra* note 239, at 1196.

241. *See* André Beganski, *If You Bought Bored Ape NFTs at the Peak, You've Lost 93% of Your Investment*, DECRYPT: R\SCENE (Sep. 4, 2024), https://perma.cc/VDW8-24JG.

242. *See* Real v. Yuga Labs Inc., No. 2:22-cv-08909, 2025 WL 3437389, at *11–12 (C.D. Cal. Sep. 30, 2025).

243. *Id.* at *4 (quoting Reves v. Ernst & Young, 494 U.S. 56, 61 (1990)).

244. *See* Peirce & Uyeda, *supra* note 160.

245. *See Real*, 2025 WL 3437389, at *11.

246. *See id.* at *5.

247. *Id.*

248. Uselton v. Com. Lovelace Motor Freight, Inc., 940 F.2d 564, 574 (10th Cir. 1991) (quoting Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel, 439 U.S. 551, 561 (1979)).

related to cryptocurrencies, *SEC v. Shavers*, Bitcoin and other cryptocurrencies were specifically held to be money to satisfy *Howey*.[249] When focusing on the money aspect, this prong is generally uncontested.[250]

In *Real*, the judge relied on *Warfield v. Alaniz* and its progeny, examining the first *Howey* prong in terms of the investment aspect.[251] In determining whether an investment was made, the "focus [of the] inquiry [is] on what the purchasers were offered or promised."[252] Looking again at economic realities, little bearing is placed on the purchaser's subjective intent.[253] Instead, the focus is put on what the purchaser was promised or offered in the sale.[254] Imperative to this focus is the way the sale was promoted.[255] At issue in *Warfield* was a Ponzi scheme where investors were sold charitable gift annuities.[256] The sellers claimed that the purchasers did not make an investment of money because they lacked the intent to make money, and instead were only making charitable donations. The promotional materials promised purchasers a lifetime of income with attractive returns related to stock market returns.[257] The *Warfield* court stated that "[t]he 'investment of money' prong of the *Howey* test 'requires that the investor "commit his assets to the enterprise in such a manner as to subject himself to financial loss."'" [258] To satisfy the *Howey* test, courts have noted that the investment of money requires turning over substantial amounts of money, hoping that the efforts of others would yield financial gains.[259] In *Warfield*, this test was met because "the purchasers of the [charitable] gift annuities 'turned over substantial amounts of money' in exchange for the Foundation's promise to make annuity payments and turn funds remaining at the end of the annuitant's life over to designated charities."[260]

In *Real*, Judge Olguin distinguished *Warfield's* facts from those in the 1975 Supreme Court case of *United Housing Foundation v. Forman* when determining that purchases of Yuga Labs NFTs were not

249. SEC v. Shavers, No. 4:13-CV-416, 2014 WL 12622292, at *8 (E.D. Tex. Aug. 26, 2014).
250. *See Real*, 2025 WL 3437389, at *8.
251. *See Uselton*, 940 F.2d at 574–75; Warfield v. Alaniz, 569 F.3d 1015, 1020 (9th Cir. 2009).
252. *Warfield*, 569 F.3d at 1021.
253. *See Real*, 2025 WL 3437389, at *5.
254. *See Warfield*, 569 F.3d at 1021.
255. *See Real*, 2025 WL 3437389, at *5.
256. *See Warfield*, 569 F.3d at 1018.
257. *See id.* at 1021–22.
258. *Id.* at 1021 (quoting SEC v. Rubera, 350 F.3d 1084, 1090 (9th Cir. 2003)).
259. *See id.*
260. *Id.*

investments of money.[261] At issue in *Forman* were shares of stock, issued by a residential cooperative, which functioned as the tenants' refundable security deposit. The shares could not be transferred to non-tenants and had to be offered back to the issuer at the purchase price should a tenant move from the cooperative. In *Forman*, the Court found that the shares of stocks were not securities, because a security transaction requires "an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use."[262] Judge Olguin found that Yuga Labs NFTs were marketed "for essentially consumptive uses, rather than with or for the prospect of financial gain."[263] Marketing materials asserted that NFT purchasers would have a membership that conferred status and access to events.[264] Further, purchasers could "join the fun and enjoy future perks associated with membership," and also that "[t]he Bored Ape Yacht Club is more than just an #NFT collection—the NFT grants access to a collaborative art experience."[265] Judge Olguin opined that these statements could not be read as promoting the NFTs as investments. The plaintiffs argued that purchasers were motivated by the investment potential of the NFTs, not only their consumptive uses. The subjective motive of the purchasers was disregarded because of *Howey's* economic reality requirement that "courts conduct an *objective* inquiry into the character of the instrument or transaction offered based on what the purchasers were led to expect."[266] Purchasers stated that their "'ambition is for this to be a community-owned brand, with tentacles in world-class gaming, events, and streetwear,' and that other aspects of the project give the apes 'inherent, long-term, value' besides individual rarity" and some "also made comments on the price of the products."[267] The court found that purchasers were not objectively motivated by investment potential as they were in *Warfield*, where the sellers discussed explicit rates of return.[268] Therefore, the Yuga NFTs were not investments that would satisfy the first *Howey* prong.[269]

261. *See* Real v. Yuga Labs Inc., No. 2:22-cv-08909, 2025 WL 3437389, at *5–6 (C.D. Cal. Sep. 30, 2025). *See generally* United Hous. Found., Inc. v. Forman, 421 U.S. 837 (1975).

262. *Forman*, 421 U.S. at 858.

263. *Real*, 2025 WL 3437389, at *6.

264. *See id.*

265. *Id.* (quoting Second Amended Class Action Complaint, *Real*, No. 2:22-cv-08909 (C.D. Cal. Oct. 17, 2023), Dkt. No. 179).

266. *Id.* at *7 (quoting Warfield v. Alaniz, 569 F.3d 1015, 1021 (9th Cir. 2009)).

267. *Id.*

268. *See id.*

269. *See id.*

Judge Olguin also held that the Yuga NFTs did not satisfy *Howey's* second prong, which requires the existence of a common enterprise.[270] The court found neither horizontal nor vertical commonality.[271] The plaintiffs alleged horizontal commonality existed because Yuga used the funds from its ApeCoin cryptocurrency to fund its operations.[272] However, because Yuga Labs NFTs were on the Ethereum blockchain, sales were distinguishable from those who operated and allowed sales of their NFTs only on a private blockchain. For example, in *Friel v. Dapper Labs*, the court found that pooling of assets leading to horizontal commonality can be met "where allegations plausibly tied the funds received by the promoter through the offering to an improvement of the ecosystem."[273] In *Dapper Labs*, all secondary sales of its NFTs could only be made on its private blockchain.[274] This intertwined the value of Dapper Labs NFTs with the survival of its private blockchain, improving the *Dapper Labs* ecosystem.[275] In contrast, Yuga Labs NFTs and ApeCoin transactions were recorded on the Ethereum blockchain, where there is no interconnected scheme for the blockchain's survival.[276] Further, secondary transactions in Yuga Labs NFTs were made on independent platforms, such as OpenSea and Coinbase, not on a platform controlled by the defendants.[277] Because there was no interplay between the Yuga Labs NFTs and a proprietary ecosystem, horizontal commonality was not met.[278]

Allegations of vertical commonality were limited to the interplay between ApeCoin and Yuga Labs (not the Yuga Labs NFTs).[279] Judge Olguin, however, did address Yuga Labs receiving a creator earning fee upon any transfer of its NFTs.[280] The discussion was limited to strict vertical commonality, as broad vertical commonality is not recognized in the Ninth Circuit.[281] Strict vertical commonality "requires that the

270. *See id.* at *9.
271. *See id.*
272. *Id.* at *7.
273. *See* Friel v. Dapper Labs, Inc., 657 F. Supp. 3d 422, 436 (S.D.N.Y. 2023).
274. *See id.* at 430.
275. *See id.* at 436–38.
276. *See Real*, 2025 WL 3437389, at *2.
277. *See id.* at *9.
278. *See id.*
279. *See id.*
280. *See id.*
281. *See* Hocking v. Dubois, 885 F.2d 1449, 1459 (9th Cir. 1989) ("The Ninth Circuit accepts either traditional horizontal commonality or, when no pooling among investors is present, a strict version of vertical commonality."); SEC v. NAC Found., LLC, 512 F. Supp. 3d 988, 996 (N.D. Cal. 2021) ("In the Ninth Circuit, a common enterprise exists where the investment scheme involves either 'horizontal commonality' or 'strict vertical commonality.'").

fortunes of investors be tied to the *fortunes* of the promoter."[282] Buyers of Yuga Labs NFTs were charged a 2.5% royalty as a creator fee on secondary purchases of the NFTs.[283] Because this creator fee was charged regardless of the sale price of the NFT, there was a decoupling of the fortunes of Yuga Labs and the owners of the NFTs.[284] Yuga Labs would receive gains from the creator fee whether the owner transferred the NFT at a profit or a loss.[285] There was no relationship between the success or failure of Yuga Labs and that of the NFT owners, which is required for strict vertical commonality.[286]

Whether a creator fee establishes commonality would likely not differ in a jurisdiction that allows for broad vertical commonality. *Revak v. SEC Realty* held that for broad vertical commonality to exist, "the fortunes of the investors need be linked only to the *efforts* of the promoter."[287] In *Harper v. O'Neal*, a similar question arose whether NFTs called Astrals, created for the Astrals project, were securities.[288] Sales of the NFTs were promoted by Shaquille O'Neal.[289] Astrals were to be used in a role-playing game in the Astralverse metaverse on the Solana platform, all part of the Astrals project. The currency of the metaverse was the Solana cryptocurrency.[290] The Astrals Project also created a decentralized autonomous organization (DAO) to "incubate innovative projects."[291] The DAO operated using Galaxy tokens, which allowed holders participation rights in blockchain-based organization and network decisions.[292]

Harper was brought in Florida, so as part of its *Howey* test analysis, the court used a broad vertical commonality test, which is the standard in the Eleventh Circuit.[293] In finding that that broad commonality was met, the court noted that if the Astrals project was limited to a play-to-earn role-playing game, there would be no commonality.[294] The Astrals metaverse, however, originally depended on funding by sales of the

282. Revak v. SEC Realty Corp., 18 F.3d 81, 88 (2d Cir. 1994).

283. *See* Second Amended Class Action Complaint at 224, *Real*, 2025 WL 3437389 (No. 22-cv-8909), Dkt. No. 179.

284. *See Real*, 2025 WL 3437389, at *9.

285. *See id.*

286. *See id.*; *see also In re* Ripple Labs, Inc. Litig., No. 18-CV-06753, 2024 WL 3074379, at *7 (N.D. Cal. June 20, 2024).

287. *Revak*, 18 F.3d at 88.

288. *See* Harper v. O'Neal, 746 F. Supp. 3d 1360, 1365 (S.D. Fla. 2024).

289. *See id.*

290. *See id.*

291. *Id.*

292. *See id.*

293. *See id.* at 1374. Broad vertical commonality has been adopted by the Fifth and Eleventh Circuits. *See* JAMES D. COX ET AL., SECURITIES REGULATION 49 (9th ed. 2020).

294. *See Harper*, 746 F. Supp. at 1374.

tokens.[295] The proceeds were reinvested into the Astral project, and the value which would increase the value of the metaverse and the value of the tokens.[296] Even with the broad vertical commonality test, what appeared to sway the court was the central ownership of all aspects of the Astral project. The central ownership, along with marketing that made the purchasing of the NFTs seem like an investment, tied the fortunes of the NFT holders with those of the Astral project. Had the NFTs been sold on a public secondary market, and the value only determined by the popularity of the roleplaying game, it is unlikely that the court would have found vertical commonality.

Merely adding a royalty in secondary transactions would likely not be enough to tie the holders of the Astral project NFTs to the efforts of the promoter. The court in Revak emphasized the word "efforts" when describing the causal link between the investor and the promoter.[297] Usually, once an NFT is sold, the creator no longer retains any financial interest in the NFT.[298] Consequently, the creator no longer has a financial incentive to put effort into future resales of the NFT.[299] However, if the creator were to earn a royalty fee, the creator would then be incentivized to make promotional efforts to increase secondary purchases of the NFT.[300] Under *Revak*, courts would have to make a factual determination, not only on the tying of the fortunes between the NFT creator and the purchaser, but also on whether sufficient effort by the creator was made to ensure the fortunes were linked. NFT artists need to be wary that courts could rule that a royalty fee may trigger broad vertical commonality, and therefore, the NFT may be considered a security.

Judge Olguin split the third prong of the Yuga Labs *Howey* analysis into two parts, one on the expectation of profits, and one on whether profits were produced by others.[301] In the first part, Judge Oguin opined that even though there were statements that promised Yuga Labs NFTs had inherent long-term and intrinsic value, that was different from statements that would create an expectation of profit.[302] There were no sales statements that mentioned a profit motive or a return on

295. *See id*.
296. *See id*. at 1376.
297. *See* Revak v. SEC Realty Corp., 18 F.3d 81, 87–88 (2d Cir. 1994).
298. *See* Tucker P. Sutlive, *Not Your Grandpa's Trading Cards: Understanding NFTs in Professional Sports and Why Some May Be Considered Securities*, 26 N.C. BANKING INST. 249, 259 (2022).
299. *See id.*
300. *See id.*
301. *See* Real v. Yuga Labs Inc., No. 2:22-cv-08909, 2025 WL 3437389, at *10 (C.D. Cal. Sep. 30, 2025).
302. *See id.*

investment.[303] Further, there was no marketing like there was in *Dapper Labs*, where marketing materials included "use of 'rocket ship,' 'stock chart,' and 'money bags' emoji images that, the court explained, 'objectively mean one thing: a financial return on investment.'"[304] With only "run-of-the-mill" promotional statements, and none that were focused on profit, Judge Olguin found that it was not objectively reasonable for Yuga Labs NFT purchasers to expect profit based on those statements.[305] Judge Olguin did find that the efforts of the other *Howey* sub-prongs were met. But it was only an academic matter because the rest of the *Howey* test was not met; it was held that "[t]o the extent that plaintiffs reasonably expected any profits, there are no allegations that suggest that such profits would come from plaintiffs' own efforts."[306]

While *Yuga Labs* may become a roadmap to avoid future SEC scrutiny of NFT enforcement actions, it must be considered with appropriate caution. The case was a private right of action, not an SEC enforcement action, so it does not necessarily equate to a change in SEC policy. Further, any *Howey* analysis is very fact-specific. What separates Yuga Labs from many enforcement actions is that they did not do any marketing that created the appearance that the NFTs were being sold as an investment, and they created their own blockchain for the secondary transactions of their NFT. Not creating any marketing as an investment gives the first prong of *Howey* more scrutiny than has typically been applied in the past. Instead of concentrating on the money part of the investment of the money prong, the concentration shifts to an investment, not allowing this prong to be easily conceded. The focus is on the economic reality that whether a transaction is an investment is an objective analysis, not the subjective wants of the purchaser. Further, even if there was fraud in the transaction, it does not necessarily mean that there was securities fraud or automatic SEC jurisdiction. Not requiring proprietary blockchain transactions created a separation between the NFT creators and the purchasers, where any financial gain is created without commonality between the creator and purchaser. This separation, therefore, reduces the likelihood of commonality allegations. And this separation was further gained by not having all of the transactions funding an ecosystem. Without funding an ecosystem, each transaction is its own being, and therefore, there is no commonality to determine an expectation of profit.

303. *See id.*

304. *See id.* (quoting Friel v. Dapper Labs, 657 F. Supp. 3d 422, 443 (S.D.N.Y. 2023)).

305. *See id.*

306. *Id.* at *11.

X. NO-ACTION LETTERS

SEC Commissioner Peirce has consistently advocated for the use of no-action letters in crypto sales to prevent future enforcement actions.[307] No-action letters provide comfort to individuals and entities who are not certain if a planned activity would be in violation of securities laws.[308] The request comes from the individual who has the planned activity.[309] The SEC describes the request, analyzes the particular facts, and applies them to the securities laws and SEC rules.[310] If the request is granted, the SEC concludes it would not recommend enforcement action against the requester based on the facts and representations described in the request, assuming they are followed.[311] In 2025, the first no-action relief for a digital token in five years was granted.[312] The request came from the DoubleZero Foundation, which operates a decentralized infrastructure network protocol. The protocol has no central promoter and operates a "set of smart contracts that provide a framework for permissionlessly adding high-performance network connectivity, which others can pay for and use."[313] The protocol operates a network "a new 'purpose-built internet' optimized for distribut[ion] systems like blockchains."[314] DoubleZero plans to issue 2Z tokens as the currency of the network. 2Z tokens will be used for "Programmatic Transfers" to provider payments (as compensation for Network Providers who provide fiber optic cable capacity) and computation payments (to "be used to compensate Resource Providers for providing public goods necessary for the operation of the Network").[315] These 2Z tokens would also become the currency for users to access the network.[316] The no-action letter stated that if the Programmatic Transfers are conducted "in the manner and under the circumstances" described in the request, 2Z tokens need not be registered, and the Programmatic Transfers would not be in violation of securities law.[317]

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307. *See* Peirce, *supra* note 36.

308. *See No Action Letters*, SEC, https://perma.cc/4BNM-8QGB (last visited Dec. 27, 2025).

309. *See id.*

310. *See id.*

311. *See id.*

312. Jenny Cieplak et al., *SEC Staff Issues No-Action Letter for DePIN Token Distributions*, GLOB. FINTECH & DIGIT. ASSETS BLOG (Oct 14, 2025), https://perma.cc/U6ET-NXQ3.

313. Letter from Derek O. Colla, Cooley LLP, to the SEC, Requesting a No-Action Letter Against DoubleZero (Sep. 25, 2025), https://perma.cc/FE9Q-54U5.

314. *Id.*

315. *Id.* at 9.

316. *See id.* at 9–10.

317. DoubleZero, SEC Staff No-Action Letter (Sep. 29, 2025), https://perma.cc/NNW7-MLSN.

DoubleZero proffered several arguments as to why the issuance of 2Z tokens and Programmatic Transfers would not be in violation of securities laws. Applying elements of the *Howey* test, first, DoubleZero asked the SEC to consider the economic reality of the 2Z token issuance. Noting that an objective inquiry into the character of an instrument determines its economic reality, DoubleZero stated that 2Z was not designed as an investment asset, but only for 2Z "consumptive use on [its] Network."[318] Marketing efforts have been "informational and educational in nature" with the emphasis on the tokens' utility within the network.[319] Thus, 2Z was never marketed as an investment product, nor did DoubleZero make any claims that it would increase in value.[320]

Additionally, even if a secondary market was created where others started trading 2Z, the trades would not run afoul of *Howey*. The fourth prong of the *Howey* test requires that there be a reasonable expectation of profits based on the efforts of others. Even if speculators did have an expectation of profits, it would only be because more network providers joined DoubleZero's network.[321] More providers would drive up demand for 2Z, causing increases in its market price. However, any expectation of profit would not be "in reliance on the entrepreneurial or managerial efforts of others and does not render 2Z a security."[322] "Many non-security assets have network effects (for example, a social media handle may become more valuable if more users join a particular service), but that does not turn them into securities."[323] Further, there could be no expectation of profit based on DoubleZero's managerial efforts. DoubleZero's role was described as only educational to the industry, with the goal to coordinate the stakeholders so that the stakeholders would increase their network.[324] Provider payments are based on the entrepreneurial efforts of the network providers themselves. The providers must commit time and money to creating and maintaining their links to the network.[325] The computation of payments is automatically performed by smart contracts based on these efforts by the network providers, not by DoubleZero.[326] Instead, "participants do not rely on the Foundation to operate the Network, the Network Providers and Resource

318. Letter, *supra* note 313, at 9.
319. *Id.* at 15.
320. *See id.* at 15–16.
321. *See id.* at 16.
322. *Id.*
323. *Id.*
324. *See id.* at 15.
325. *See id.*
326. *See id.* at 14.

Providers do that themselves. Their own efforts are far weightier and the 'sine qua non' without which the Network would not operate."[327]

While the token in question for the DoubleZero no-action letter was not an NFT, it provides guidance for NFT issuers about parameters the SEC would consider in issuing future no-action letters. Commissioner Peirce encourages the use of no-action letters to keep "[r]egulatory gray zones" from harming investors.[328] Peirce issued a statement in support of DoubleZero's no-action letter, asserting:

> Today's no-action letter from the Division of Corporation Finance concerning DoubleZero's token distributions designed to facilitate the programmatic functioning of a decentralized physical infrastructure network . . . offers an opportunity to reflect on how we, as regulators, can foster innovation without expanding our reach beyond what Congress has mandated. Congress created the Securities and Exchange Commission to oversee the securities markets, not to regulate all economic activity.[329]

With Peirce's continual focus on not overregulating crypto assets, the no-action letter gives insight as to some issues the SEC would consider in its determination of whether a particular NFT was a security. NFT issuers should make efforts to ensure that the economic reality is that the NFT is not being presented as an investment product. Marketing should be clear that the NFT is not being sold as an investment product, and instead should be marketed for its underlying value (for example, as an artwork or a collectible). Also, there should be careful consideration to make sure that if there is an increase in the NFT's value, the increase is based on market forces, not on the efforts of the issuer or a network associated with the issuer.

XI. SEC, NFTS, NEW GUIDANCE, AND THE SECOND TRUMP ADMINISTRATION

An indication of the new Administration's attitude toward crypto assets generally, and NFT art in particular, may be found in President Trump's December 2024 sale of his own NFT digital trading cards, "which quickly sold out, according to their promotional website, generating more than $4 million."[330] *The Wall Street Journal* reports that

327. *Id.* at 15.

328. Statement, Hester M. Peirce, Comm'r, SEC, Out of the Gray Zone: Statement on the Division of Investment Management's No-Action Letter Relating to the Custody of Crypto Assets with State Trust Companies (Sep. 23, 2025), https://perma.cc/65PC-ANSN.

329. Statement, Hester M. Peirce, Comm'r, SEC, Deep In: Statement on DoubleZero No-Action Letter (Sep. 29, 2025), https://perma.cc/N7XG-KGNP.

330. Alex Leary, *Trump Digital Cards Mocked, but Sell Out,* WALL ST. J., Dec. 17–18, 2024, at A5.

"Mr. Trump . . . in pitching the cards . . . described them in a social media post as 'very much like a baseball card, but hopefully much more exciting,' adding, 'Only $99 each! Would make a great Christmas gift. Don't wait. They will be gone, I believe, very quickly!'"[331] This was a significant pivot from Trump's position during his first term as president, where he criticized NFTs and cryptocurrencies.[332] In January 2025, reports emerged that "[c]rypto executives expect an end to Biden's efforts to regulate the [crypto] industry through the Securities and Exchange Commission."[333] *The Wall Street Journal* reports, "President Trump promised a crypto-friendly administration. Days before taking office a second time, he and his family began selling new cryptocurrencies. Named $TRUMP and $MELANIA, the projects are meme coins, a type of crypto whose value is based largely on the popularity of internet memes."[334] Issued just before assuming his second term in office, "The president-elect's token . . . quickly soared in value and held a market value of more than $9 billion" in just a few days.[335]

To help implement his crypto-friendly agenda, shortly after Donald Trump began his second presidential term, he appointed Paul S. Atkins to chair the SEC.[336] Since assuming office, Atkins has shifted the focus towards the deregulation of crypto assets.[337] Atkins has stated that he wants to establish a crypto task force and to adopt rules to "'future proof' his [deregulatory] agenda against tampering by future administrations."[338] Associated with deregulation efforts, the SEC has pulled back enforcement against crypto assets.[339] Part of the pullback, dealing directly with NFTs, included the SEC closing its investigation against OpenSea without a recommendation of enforcement.[340] OpenSea

331. *Id.*

332. *See generally* Michael Conklin, *Trump's Cryptocurrency Pivot and the Ethical Implications*, 18 J.L. & PUB. POL'Y (forthcoming 2026), https://perma.cc/ACL5-MQQE.

333. Scott Patterson & Ken Thomas, *Trump Set to Start Slashing Regulations,* WALL ST. J., Jan. 18–19, 2025, at A4.

334. Vicky Ge Huang, *First Family is Now Selling Meme Coins,* WALL ST. J., Jan. 21, 2025, at A2.

335. *Id.*

336. *See* Press Release 2025-68, SEC, Paul S. Atkins Sworn in as SEC Chairman (Apr. 21, 2025), https://perma.cc/HS6T-JWRS.

337. *See* Paul S. Atkins, Comm'r, SEC, Statement on the Spring 2025 Regulatory Agenda (Sep. 4, 2025), https://perma.cc/UNM4-63AC.

338. Jessica Corso, *SEC's Atkins Wants To 'Future-Proof' Deregulatory Agenda*, LAW360 (Oct 7, 2025), https://perma.cc/HPH7-MQGG.

339. *See* Jaclyn Jaeger, *What to Expect from Atkins-Led SEC*, CORP. COMPLIANCE INSIGHTS (May 6, 2025), https://perma.cc/8VHC-5MUA.

340. *See* Daniel Kuhn, *SEC Ends OpenSea Probe, Weeks After NFT Platform Confirms SEA Token Airdrop: Bloomberg*, BLOCK (Feb. 21, 2025, at 19:29 ET), https://perma.cc/ZTY9-ULZ4. At the time the OpenSea investigation was closed, Mark Uyeda was Acting Chair of the SEC. Paul Atkins had been nominated as Chair, but had yet to take office.

CEO Devin Fizner opined that classifying NFTs as securities misinterpreted the law and slowed innovation. Fizner stated, "[t]his outcome allows creators to continue shaping the future of digital ownership and innovation without unnecessary constraints."[341]

Commissioners Peirce and Uyeda were the two Republicans on the SEC board and were in the minority of the five commissioners during the Biden administration. They were known to be "unusually outspoken in objecting to certain enforcement actions, often voting in the minority against authorizing the action, or approving the matter with exceptions."[342] Between June of 2002 and January of 2025, when Trump took office, nearly 200 administrative proceedings were decided by a three-to-two vote, with Peirce and Uyeda being in the minority.[343] Also, during that period, Peirce and Uyeda issued 25 dissenting opinions.[344] Two of these dissenting opinions were in the major NFT settlements involving *Impact Theory* and *Stoner Cats*.

With Atkins, who is also a Republican, becoming chair and sharing a similar view on overregulation by enforcement actions, Peirce and Uyeda now have a champion as SEC chair. This is a harbinger that the SEC will change direction and bring fewer enforcement actions. By January 2025, *The Wall Street Journal* observed that "Crypto executives expect an end to Biden's efforts to regulate the industry through the Securities and Exchange Commission."[345] Just before Trump's inauguration, "[h]undreds of crypto executives and political heavyweights had gathered in the nation's capital . . . to celebrate what they expect to be a golden age for digital assets under the Trump administration."[346] While there may be less regulation, Atkin assures that "[the] SEC will work to ensure that regulations promote capital formation rather than stifle it."[347] This mirrors the approach taken by Peirce and Uyeda towards NFT regulation. In 2026, the SEC, jointly with the CFTC, took an important step towards regulation when they issued broad guidance taking the position that most digital assets are not

341. Devin Fizner (@dfizner), X (Feb. 21, 2025, at 17:51 CT), https://perma.cc/ZD57-SBUN.

342. Joshua M. Newville et al., *Eight Enforcement Trends That Likely Will End Under a Trump SEC*, PROSKAUER (Dec. 20, 2024), https://perma.cc/GFG3-A4TL.

343. *See id.*

344. *See id.*

345. Scott Patterson & Ken Thomas, *Trump Set to Start Slashing Regulations,* WALL ST. J., Jan. 18–19, 2025, at A4.

346. Vicky Ge Huang, *First Family is Now Selling Meme Coins,* WALL ST. J., Jan. 21, 2025, at A2.

347. *Testimony of Paul S. Atkins, Chairman, United States Securities and Exchange Commission Before the H. Appropriations Subcomm. on Financial Services and General Government*, 105th Cong. (May 20, 2025), https://perma.cc/S4UV-66HH [hereinafter *Testimony of Paul S. Atkins*].

securities.[348] This marked a major policy shift from the SEC under Gensler, which assumed that most digital assets are securities. Part of this interpretation clarifies that NFTs that are digital collectables, are not, in and of themselves securities. A digital collectible is defined as "a crypto asset that is designed to be collected and/or used and may represent or convey rights to artwork, music, videos, trading cards, in-game items, or digital representations or references to internet memes, characters, current events, or trends, among other things."[349] While the SEC may not regard an NFT as a non-security digital asset, the guidance cautions that any non-security digital asset may become subject to an investment contract.[350] To transform a non-security digital asset to a security, the guidance states that "[a] non-security crypto asset becomes subject to an investment contract when an issuer offers it by inducing an investment of money in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits."[351] If these elements, which are essentially the same elements as the *Howey* test, are met then an asset becomes an investment contract. The SEC cautions that the transformation from a non-security digital asset to an investment contract is often based on "how an issuer markets and promotes a contract, transaction, or scheme."[352] Specific to NFTs, the guidance also notes that similar to physical collectables, selling fractionalized ownership an NFT could constitute the offer or sale of a security, "because it may involve essential managerial efforts from which a purchaser would reasonably expect to derive profits and, therefore, may be offered and sold as an investment contract."[353]

This interpretive guidance specifically supersedes previous SEC interpretations, including the 2019 Framework, to determine if a crypto asset is a security.[354] However the long-term impact of the guidance is yet to be determined. The guideline itself notes that is only "first step toward developing a clearer regulatory framework for the treatment of crypto assets under the Federal securities laws."[355] In the short term, it will likely reduce the SEC's regulation by enforcement as Atkins promised that the SEC will "protect investors from fraud, keep politics

348. *See* Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, 91 Fed. Reg. 13714, 13718, 13721 (Mar. 17, 2026) (to be codified at 17 C.F.R. pts. 231, 241).

349. *Id.* at 13718.

350. *See id.* at 13721.

351. *Id.*

352. *Id.* at 13723.

353. *Id.* at 13719.

354. *See id.* at 13716 n.21.

355. *Id.* at 13716.

out of how our securities laws and regulations are applied, and advance clear rules of the road that encourage investment in our economy to the benefit of all Americans."[356] With similar goals, the principles advocated for by Peirce and Uyeda towards NFT regulation will likely be the bedrock of Atkin's approach to future NFT regulation.

XII. CONCLUSION

The rapid ascent and equally rapid deflation of the NFT art market exposed a regulatory vacuum that neither Congress nor the SEC had meaningfully anticipated. In the absence of formal rules, the SEC relied on regulation by enforcement—an approach ill-suited to a creative economy built on experimentation, community-building, and decentralized technologies. The *Impact Theory* and *Stoner Cats 2* actions marked an inflection point, not because they conclusively defined the boundary between art and securities, but because they revealed deep fractures within the Commission itself. The dissents of Commissioners Peirce and Uyeda underscored a growing recognition that the *Howey* framework, as currently applied, can sweep too broadly and chill legitimate artistic innovation.

Mann and Frye's attempt at declaratory relief demonstrated how even sophisticated creators lack a predictable compliance roadmap. The dismissal of their case did not resolve the underlying uncertainty; rather, it highlighted an urgent need for rulemaking, legislative reform, or both. At the same time, *Adonis v. Yuga Labs* provided a significant judicial signal that courts may be unwilling to embrace an expansive theory of commonality or managerial reliance for NFT art. The decision injected a degree of doctrinal restraint that had been largely missing and offered a template for analyzing future NFT disputes grounded in economic reality rather than regulatory overreach. Judges in future court cases will now also be able to rely on the SECs recent interpretative guidance to minimize the risk of NFTs, especially those that meet the definition of a digital collectable, from being deemed a security. While this guidance will not be mandatory authority in private rights of actions, it will likely still have interpretive value.

Meanwhile, Congress's legislative proposals—whether the NFT Act, the Clarity Act, or the RFIA—reflect an emerging bipartisan willingness to address NFTs on their own terms. Although each bill contains ambiguities and conceptual gaps, the movement toward tailored statutory frameworks marks a meaningful departure from attempting to retrofit eighty-year-old securities doctrines to digital art. And with the second Trump Administration and its newly constituted SEC leadership

356. *Testimony of Paul S. Atkins*, *supra* note 347.

signaling a more permissive and deregulatory posture, which includes new interpretive guidance, the near-term trajectory of NFT governance is poised to shift yet again.

Taken together, these developments suggest a path forward for NFT artists. By grounding NFT sales in consumptive uses, avoiding pooled arrangements, limiting promotional claims, and leveraging the revived no-action letter process, creators can mitigate regulatory risk without abandoning the core artistic and technological possibilities that make NFTs distinctive. Ultimately, thoughtful future guidance and regulation—whether from Congress, the courts, or the SEC itself—should aim not to inhibit this emerging form of cultural production but to cultivate an environment where artists can innovate, communities can flourish, and investors can be protected without collapsing art into investment contract doctrine by default.