

SEC: Ether and Bitcoin Are Not Securities

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On June 14, before a Silicon Valley audience, Hinman indicated that current offers and sales of cryptocurrencies Ether and Bitcoin are not securities transactions. He applied the Supreme Court's "investment contract" test, under which a security exists if there is an investment of money in a common enterprise with an expectation of profit derived from others' efforts. In Hinman's view, a digital asset transaction may no longer represent a security offering when the efforts of others "are no longer a key factor for determining the enterprise's success," which can occur when the network on which the digital asset functions becomes "sufficiently decentralized."

Speaking of Ether, for example, Hinman noted:

Putting aside the fundraising that accompanied the creation of Ether, based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions. And, as with Bitcoin, applying the disclosure regime of the federal securities laws to current transactions in Ether would seem to add little value.

SEC Chairman Clayton has publicly expressed similar views about bitcoin.

However, Hinman was careful to explain that "investment contracts can be made out of virtually any asset (including virtual assets), provided the investor is reasonably expecting profits from the promoter's efforts." If a promoter were to place bitcoin in a fund and sell interests, for instance, that would create a new security. So, while Hinman's and Clayton's unofficial statements regarding Ether and Bitcoin may reassure holders of those cryptocurrencies, determining whether a particular digital asset transaction constitutes a security offering will in most cases still require a careful assessment of the particular facts and circumstances. ▯

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