

ADVISORY ON BITCOIN AND SECURITIES

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SEC OGC Opinion No. 24-44
Opinion on whether or not Bitcoin can
be considered "Securities" under the
SRC

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OPINION RELATING TO BITCOIN AND SECURITIES

Summary

The SEC was requested by an Entity¹ to provide its opinion on the following:

1. Whether or not Bitcoin can be considered a security as defined under the SRC²; and
2. Whether or not the Entity is engaged in the purchase and sale of securities, specifically derivatives.

While the SEC did not give a definitive ruling due to limited facts and numerous factors to be considered, the following observations were made:

- I. The Howey Test is applied to determine if digital assets (e.g. Bitcoin) should be considered as investment contract/securities*

The Howey Test³ provides certain elements to determine if a transaction, contract, or scheme is within the scope of an investment contract:

- There is an investment of money
- In a common enterprise
- With expectation of profits
- That the profits are to be derived solely or primarily from the efforts of others

The SEC identified certain circumstances which may lead to Bitcoin being considered as an investment contract. However, the main issue in analyzing whether a digital asset is a security is whether a person has a reasonable expectation of profit derived from the efforts of others.

- II. Bitcoin per se does not bear the indicia of shares of stock*

Under the SRC, securities include shares of stock. However:

- Bitcoin does not necessarily carry the rights accorded to a shareholder (*i.e.* to vote, to receive dividends, to receive assets upon liquidation).

¹ A domestic corporation engaged in buying, selling, transferring, crediting, and storing Bitcoin

² Securities Regulation Code

³ *SEC vs Howey*, 328 U.S. 293 (1946)

- ☑ Bitcoin wallets are not akin to a stock certificate because a certificate is a tangible evidence of ownership.

III. Bitcoin may be the subject of a derivative

The SEC opined that Bitcoin may be the subject of a derivative⁴, specifically a Commodities Futures Contract⁵. However, to determine whether a Bitcoin is a derivative and what type of derivative it is, more information is required which includes but is not limited to, the terms, maturity date, rate, the underlying asset, etc.

⁴ A financial instrument whose value depends on a secondary source like an underlying bond, currency, or commodity

⁵ A type of derivative which provides for the making or taking delivery at a prescribed future time of a specific quantity and quality of a commodity or the cash value thereof, which is customarily offset prior to the delivery date, and includes standardized contracts having the indicia of commodities futures, commodity options and commodity leverage, or margin contracts