Utility Tokens: Recommended Jurisdictional Guidance

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A. Introduction

One type of digital asset that has been the subject of considerable legal and regulatory discussion in the United States is the "utility token." Generally speaking, utility tokens are digital assets that serve a specific purpose within a blockchain ecosystem and that provide a specified use and offer utility to the holder thereof. Examples of the "utility" that is conveyed to a token holder may include (without limitation): access to certain benefits or goods on a blockchain platform, certain governance or voting abilities, discounts for certain services or transaction fees.

This white paper proposes a specific test to clarify and determine when a purported "utility token" should be considered a commodity, and not a security – in other words, when a utility token should be classified as a non-security commodity under the Commodity Exchange Act (the "CEA"), and subject to the jurisdiction of the Commodity Futures Trading Commission ("CFTC") as such. For purposes of this white paper, we refer to such a non-security commodity as a Utility Token (as defined below).

As described below, the CFTC has already acknowledged that digital assets generally are commodities under the CEA. The CFTC has also acknowledged that, under certain circumstances, a digital asset that is a commodity may also be a security. To be clear, a digital asset that would be considered a security by the SEC should not be considered a Utility Token, although securities law analyses (whether under the *Howey* test or any other test) are beyond the scope of this document.

B. Recommendations

1. Safe Harbor – Criteria for Utility Tokens

As used herein, a Utility Token (as defined below) shall be a non-security commodity, subject to the CFTC's jurisdiction. A given digital asset will be considered to be a Utility Token, if (and for so long as) it satisfies the following definition:

> Utility Token: The digital asset, whether in a primary issuance or secondary sale, must convey an immediately available, non-incidental consumptive use to the buyer, whether that consumptive use is a tangible or intangible product, service, discount, special access or other benefit (collectively referred to as "utility"), which may include certain governance and voting abilities, nascent products and services not yet in existence or the ability to access or use of any of the foregoing in the future, within the blockchain platform.

Defined terms:

- **"Primary issuance or secondary markets"** means that the above test applies equally to the primary issuance of the digital asset and any secondary sales. To the extent that any of the criteria set forth above and further defined below are not met at the time a digital asset sale is executed, the digital asset may lose its classification as a Utility Token. For example, if a DAO's token is a utility token by virtue of governance abilities, it could lose that classification if the DAO later excluded token holders from governance.
- **"Immediately available"** means the *utility* or the *right to the utility* must be conveyed to the buyer within a prompt, set period of time following the sale of the digital asset.
- **"Consumptive use"** means a product, service or other right or benefit, tangible or intangible, that is conveyed to the digital asset holder, and that does not include an equity or ownership right in the underlying blockchain platform.
- **"Nascent Products and Services"** means, in the case of a digital asset that conveys the right to the future access or use of a given utility that is not yet operational, such utility *may be nascent or not yet in existence* so long as the seller (upon primary issuance and at the time of each secondary sale) has a *legitimate, commercially reasonable* belief that the future utility will come to fruition within the specified timeframe. Examples include: digital assets that convey special access to a protocol that is still in development, or that convey a discount on transaction fees for a product that has not yet launched.
- **"Right to the Future Access or Use"** means that a right to use the utility at a specified point in the future, so long as such right vests immediately upon conveyance, may still be considered "immediately available" for purposes of the test set forth above. Examples include: digital assets that convey a discount on future ticket sales, or that convey the ability to vote on a future proposition. This is distinguishable from Nascent Products and Services, in that the right may be for future use, but the utility is currently operational.
- **"Non-incidental"** means the utility must be a *material purpose* of the digital asset. An expectation of profit by the buyer or seller of the digital asset does not negate this material purpose, so long as the buyer has a legitimate intent at the time of the sale to use the utility associated with the digital asset. Ultimately, a token holder may resell a utility token for a profit, and so long as the token holder is conveying the underlying utility, this should still be considered a utility token.
- **"Within the blockchain platform"** means that the utility in question must be used on or directly related to the blockchain platform on which it was issued.

The definition of Utility Token set forth above is intended to function as a safe harbor for a digital asset to constitute a non-security commodity and fall under the CFTC's jurisdiction (the "**Utility Token Safe Harbor**"). The Utility Token Safe Harbor is not intended to be, and is not, an exclusive safe harbor. A digital asset that does not satisfy all of the criteria set forth in the Utility Token definition set forth above may still be considered a utility token or another type of digital asset that is a non-security commodity that is subject to the CFTC's jurisdiction (e.g., Bitcoin and certain meme coins like DOGE, among others).

We note that staking is not explicitly addressed anywhere in the Utility Token Safe Harbor, and intentionally so. We acknowledge that some instances of digital assets that are used for staking can and should meet each of the criteria set forth above, while

other instances would likely fall outside the Utility Token Safe Harbor. Thus, staking is not dispositive that a token is a security or a non-security commodity, and a facts-and-circumstances analysis of staking is necessary to make this determination.

2. Publication on CFTC Website

The definition of Utility Token set forth above should be published as a brochure, primer or other document on the CFTC's Digital Asset information page on the CFTC website (i.e. https://www.cftc.gov/digitalassets/index.htm).

3. Incorporation of the Utility Token definition in future rulemaking

To the extent the CFTC undertakes any rulemaking related to utility tokens or other administrative actions (e.g., public information collection), the criteria set forth above should be considered in future CFTC actions, as the CFTC deems necessary and adequate.

4. Publication of a "whitelist" of Utility Tokens

A list of the Utility Tokens that the CFTC deems to have satisfied the Utility Token Safe Harbor should be published on the CFTC's Digital Asset information page on the CFTC website.

C. Practical Guidance

As a matter of best practices, the party that deployed the network protocol code or smart contract that created a digital asset, a token holder, or another interested party in the business of aggregating information about permissionless digital assets (the "information provider") should demonstrate that it falls within the Utility Token Safe Harbor set forth above by documenting how it meets each of the criteria, in a white paper or other policies and procedures. Specifically, an information provider might include language in its white paper that specifies the expected or intended uses of the digital asset, and how such benefits align with the "consumptive use" criteria above. Terms clarifying the specific abilities that are conveyed with the digital asset, along with an explicit statement that the digital asset does not confer any sort of equity rights in the underlying platform, are also indicia of fulfilling certain of the safe harbor criteria. Where the consumptive use is not yet available to the digital asset holder, a timeline of the expected buildout and plans for eventual future benefits of the digital asset should be included in the white paper.

II. Utility Tokens: Factors to Consider

A. *Goods and Services, Discounts, Special Access and Other Platform Benefits*

On-platform goods and services, fee discounts, special access to certain services and other on-platform benefits are the types of "special uses" that can be conveyed with a Utility Token. To the extent any one of these "utilities" is a material purpose of the utility token, for example as described in the token's white paper, the applicable digital asset generally should be considered a Utility Token, and, therefore, a non-security commodity, absent other factors that would negate this determination.

B. *Voting Rights and Governance*

Generally speaking, voting or governance rights of a blockchain platform should be considered as a type of "utility" that can be conveyed by a Utility Token, which render the Utility Token a non-security commodity. That said, these rights have special considerations following the CFTC's Ooki DAO enforcement action that should be emphasized as part of this classification exercise. There, the CFTC did not address its jurisdiction over the Ooki DAO governance tokens, or whether they would be considered as "commodities," but they did use an unprecedented state law theory of liability to determine that certain governance token holders would be held liable for the acts of the underlying DeFi platform.

C. *Timing Considerations*

Akin to the CFTC's "actual delivery" test for retail commodity transactions, a Utility Token will need to convey the utility or the right to the utility of the relevant product, service or other benefit to the token holder, such as the use of the blockchain network or a virtual machine on the network within a prompt, set period of time in order for the digital asset to fall under the definition of Utility Token and, therefore, be a non-security commodity.

D. *Use Outside of Platform*

Key to the factors set forth above and the definition of a "Utility Token" generally, the product, service or benefit conveyed to a digital asset holder must be available or used on the blockchain platform that issues the digital asset. Otherwise, with use outside its platform, the digital asset may look more like a medium of exchange (like Bitcoin) because it operates as a fungible payment mechanism. This may still be considered to be a non-security commodity, by the CFTC, but likely not a Utility Token.

E. *Ownership in Platform or Other Enterprise*

One bright-line test that may be useful to determine when a digital asset is not a Utility Token (and would not be a non-security commodity) is whether the digital asset conveys an ownership right (at the time of purchase or in the future) in the platform or enterprise that is issuing the token. Conveyance of an ownership stake alone, absent other factors, is not enough to pass the SEC's *Howey* test, but it may be a helpful threshold for excluding a digital asset from the definition of Utility Token, as well as indicating that

such digital asset generally would not be expected to constitute another form of non-security commodity. However, voting or governance rights to participate in the governance of a decentralized blockchain network, as noted in II.B. above, are part of the utility, and should be distinguished from corporate ownership rights.

F. *Resales / Secondary Markets*

If the resale of the digital asset conveys the ability or right to use the underlying utility (good, service, fee discount, special access, etc.), then such digital asset should continue to be considered a Utility Token and, therefore, a non-security commodity. If the resale conveys the value of the digital asset only, with no associated utility, then such digital asset no longer constitutes a Utility Token and might not be considered a non-security commodity (noting that other factors will need to be considered when determining such digital asset nonetheless may still be a non-security commodity, including whether such digital asset is a medium of exchange (for example, Bitcoin)).

G. *Expectation of Profit*

Although an expectation of profit is one of the hallmarks of the *Howey* test and is associated with many products that are deemed to be securities, this factor alone is not dispositive of whether a digital asset should be considered a Utility Token (or another form of non-security commodity). Ultimately, the holder of a digital asset that is a Utility Token may resell such digital asset for a profit, and so long as the digital asset holder is conveying the underlying utility as part of such resale, the digital asset should still be considered to be a Utility Token after giving effect to such resale.

H. *Decentralization*

As set forth in the Financial Innovation and Technology for the 21st Century bill (H.R. 4763, the "FIT21 Bill"), which passed the House of Representatives on May 22, 2024, and other arenas, the extent to which a network is "decentralized" is a key factor in determining whether a digital asset associated with that network is a security or a non-security commodity. "Decentralization" itself would need to be defined (and the FIT21 Bill provides an excellent starting point for this) and could center on the requirement that no one person or group of persons exists that (i) has the unilateral authority to control or materially alter the functionality of the network, (ii) has the unilateral authority to restrict or prohibit a person from using the digital asset, deploying software the uses or integrates with the network, or operating a node or other part of the network's infrastructure, (iii) beneficially owns 20% of more of the units of the digital asset, or (iv) has the unilateral authority to direct the voting of 20% or more of the outstanding voting power of the digital asset or network governance system. Decentralization should be a positive factor in determining whether a digital asset is a non-security commodity, but need not be a necessary one (for example, the Utility Token Safe Harbor does not require decentralization).

III. Utility Token Case Studies

The following digital assets are examples of Utility Tokens that would meet the criteria of the Utility Token Safe Harbor set forth above. We note that the examples below are all ERC-20 tokens, but it is not a condition of the Utility Token Safe Harbor that a digital asset is created using the Ethereum blockchain. Any underlying blockchain platform is acceptable, so long as the criteria of the Utility Token Safe Harbor are otherwise met. As noted above, the digital assets industry will benefit greatly from the clarity that would come from the CFTC publishing a list of digital assets that meet the criteria of the Utility Token Safe Harbor (a so-called "whitelist").

A. Ether (ETH)

Ether ("ETH") is the native token of the Ethereum blockchain. ETH has consistently been held to be a commodity by both the CFTC and several courts.[1]

ETH's main functions are: (1) paying for transaction fees ("gas"), such as when sending ETH or other tokens on the Ethereum blockchain, when deploying smart contracts, or when otherwise interacting with smart contracts; and (2) serving as collateral for network validation through the blockchain's proof of stake consensus mechanism. ETH does not exist outside the Ethereum blockchain, although derivative products may exist.

While ETH was issued via an ICO, it has never been deemed a security, its white and yellow papers also contain no discussion of any expected profits, and it has otherwise already been deemed a commodity. Similarly, holding ETH does not inherently grant one any right to profits or an ownership stake in any legal entity.

Lastly, ETH is not pegged to any asset or algorithmically stabilized, so it does not serve as a stablecoin payment instrument.

B. Filecoin (FIL)

Filecoin ("FIL") is a layer 1 utility token that plays a critical role in the operation of the Filecoin decentralized storage network. FIL is the Filecoin network's native token, where storage providers, often small businesses, can "rent out" digital storage space to people who pay them to store their files (or pieces of their files). The Filecoin network automatically provides compensation for storage space, and a computer program regularly checks to ensure that a unique copy remains with the provider storing the files, a promise

[1] *CFTC v. HDR Global Trading Limited,* Civil Action No: 20-cv-8132 (S.D.N.Y. Oct. 1, 2020), available at https://storage.courtlistener.com/recap/gov.uscourts.nysd.545377/gov.uscourts.nysd.545377.1.0.pdf; *CFTC v. Laino Grp. Ltd.,* No. 4:20-cv-03317, 2021 WL 2886013 (S.D. Tex. June 30, 2021), available at https://www.cftc.gov/PressRoom/PressReleases/8408-21; In re iFinex Inc., BFXNA Inc., and BFXWW Inc., CFTC Docket No. 22-05 (Oct. 15, 2021), available at https://www.cftc.gov/PressRoom/PressReleases/8450-21; In re Tether Holdings, CFTC Docket No. 22-04 (Oct. 15, 2021), available at https://www.cftc.gov/PressRoom/PressReleases/8450-21; *CFTC v. Rashawn Russell*, Case 1:23-cv-02691 (S.D.N.Y. Apr. 11, 2023), available at https://storage.courtlistener.com/recap/gov.uscourts.nyed.495601/gov.uscourts.nyed.495601.1.0.pdf.

which is backed by FIL held as collateral. Thus, using the Filecoin token enables the network to operate in a manner that is peer-to-peer, instant, automatic, and trustless.

The Filecoin network consists of a decentralized network of independent participants and small businesses and serves as an affordable, open-source competitor to cloud storage solutions provided by big tech companies. The Filecoin network consists of thousands of independent storage provider systems, who have made over 50 million storage deals and 1 billion transactions. Together, they are contributing billions of gigabytes of capacity to the Filecoin network, enough to store all written works since the beginning of recorded history, many times over. They create a competitive environment by setting their own fees, setting the stage for cost-effective and highly customizable storage options.

The Filecoin protocol allows smart contracts and user programmability through the Filecoin Virtual Machine (FVM), creating opportunities for a range of use cases. Like ETH, FIL can be used for gas fees when deploying or using these smart contracts.

The Filecoin network is useful because it can help ensure that important data is stored permanently, on many devices around the world. Each piece of content has a unique identifier, which, when searched for, will pull the content from anywhere in the world where it is stored. This means that the availability of information is not dependent on any one entity or company. This utility is showcased by some of the important information stored through Filecoin. For example, the network has copies of open datasets created by NASA, NIH, the National Weather Service, and US Geological Survey. Filecoin also stores large genomic, geospatial, satellite, and climate datasets, from institutions like the University of Maryland, the University of Utah, Berkeley's Underground Physics Group, and the ATLAS Experiment at CERN.

Like ETH, FIL is tradable in secondary sales on many major exchanges, in the U.S. and around the world, allowing the market to set the prices for its utility. FIL does not represent any ownership stake or right to participate in the corporate decisions of the entity that deployed the FIL token contract or any other legal entity, nor does owning FIL tokens entitle holders to any profits. Also like ETH, the FIL token is not pegged to any asset or algorithmically stabilized, and it does not serve as a stablecoin payment instrument.

C. Floki (FLOKI)

Floki ("FLOKI") is an ERC-20 and BEP-20 utility token in the Floki ecosystem, with its main application being in an NFT gaming metaverse called Valhalla, a play-to-earn gaming metaverse.

FLOKI is used to pay for all buy and sell transaction fees solely within the Floki ecosystem, which is 0.3% of each transaction. As part of a play-to-earn system, players also earn FLOKI as they play in Valhalla, such as for gardening, in battles, or selling items they collect. Part of its utility is also being used to purchase virtual goods in Valhalla. Lastly, FLOKI will token-gate certain activities in Floki University and FlokiPlaces Marketplace which are a crypto-education program and online marketplace, respectively.

FLOKI has not been deemed a security, and since it is ERC-20 and BEP-20 compliant, it is tradeable on several exchanges, making these secondary sales less likely to be deemed security transactions (as per the recent XRP-related decision in the Southern District of NY, discussed below). FLOKI otherwise does not represent any shareholding, participation, right, title, or interest in the entity that deployed the FLOKI token contract, nor does it entitle holders to any profits in any entity.

Similar to ETH, FLOKI is not a medium of exchange accepted by the general public, nor is it designed or intended to be used as payment for any goods or services that are not exclusively within the Floki ecosystem, unlike stablecoins.

D. Geod (GEOD)

GEOD token is an ERC-20 token based on GEODNET, a public blockchain-based and token-incentivized network. GEODNET seeks to create a reliable alternative to current global navigation satellite systems ("GNSS") through distributed consensus and reward technologies in the form of blockchain and tokens. GEOD token is issued based on proof of location and proof of accuracy for GNSS miners and proof of stake for service validator nodes.

GEODNET consists of physical and virtual nodes that interact with each other and the blockchain. The physical nodes are GNSS reference stations that generate GNSS observation data. This physical node is a piece of hardware that is set up at a person's house or place of business and contributes GNSS reference station data to the network. The virtual nodes are the validator nodes and service nodes. Validator nodes independently verify measurement quality, confirm authenticity, and detect intentional manipulation, while service nodes are used to export miner data. GEOD tokens are used to incentivize the contributions of all of these nodes.

Similar to the tokens mentioned above, GEOD token does not represent any shareholding, participation, right, title, or interest in the entity that deployed the GEOD token. GEOD is used as an incentive method to build, expand and maintain the GEODNET network. In the future, GEOD tokens will be exchangeable for GEODNET data services via blockchain transactions.

IV. Classifying Digital Assets: Security vs. Non-Security Commodities

Definition of "Commodity" under the Commodity Exchange Act

Assessing whether a digital asset is a non-security commodity is dependent on the facts and circumstances of that particular token. The Commodity Exchange Act ("CEA") establishes the statutory framework under which the U.S. Commodity Futures Trading Commission ("CFTC") operates. It grants the CFTC regulatory authority over certain types of derivatives transactions and certain leveraged off-exchange retail transactions, as well as enforcement authority with respect to fraud and manipulation involving certain types of cash markets. The scope of the CFTC's jurisdiction depends, in large part, on whether the transaction or market involves a "commodity."

The CEA defines "commodity" to mean:

> wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions (as provided by section 13-1 of this title) and motion picture box office receipts (or any index, measure, value, or data related to such receipts), and all services, rights, and interests (except motion picture box office receipts, or any index, measure, value or data related to such receipts) in which contracts for future delivery are presently or in the future dealt in.[2]

The CEA definition is composed of two parts: (1) a narrowly enumerated list of agricultural commodities; and (2) broad categories of goods, articles, services, rights, and interests. The open-ended second part of the definition of "commodity" provides the CFTC with substantial latitude in determining whether something is a commodity, and consequently determining the scope of its authority. Although there are significant outstanding issues regarding interpretations from the CFTC and the courts of what the second part of the CEA definition encompasses, the term is generally understood to cover securities, foreign currencies, and other financial assets, and is not limited to tangible (*i.e.*, physical) commodities.

The CFTC has asserted that virtual currencies generally are commodities, irrespective of whether they also may be securities. The CFTC's first assertion of jurisdiction over virtual currencies, by virtue of their authority over commodities, was in a settlement order against Coinflip, Inc. in 2015.[3] The CFTC based its assertion on the fact that the open-ended second part of the CEA's definition of

[2] 7 U.S.C. § 1a(9).
[3] *See In the Matter of Coinflip, Inc.*, CFTC No. 15-29, [2015-2016 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 33,538, at 77,855 (Sept. 17, 2015) (stating that "Bitcoin and other virtual currencies are encompassed in the [commodity] definition and properly defined as commodities.").

commodity—specifically the portion regarding "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in"—was "broad".[4]

Since then, the CFTC has consistently affirmed its assertion of jurisdiction over virtual currencies through public statements made by CFTC Commissioners[5]; an interpretation of the "actual delivery" exception to regulation of leveraged retail commodity transactions[6]; CFTC staff guidance[7]; and other enforcement actions, in both administrative and civil cases.[8] For example, the CFTC states in its final interpretive guidance "Retail Commodity Transactions Involving Virtual Currency," that it "considers virtual currency to be a commodity as defined under Section 1a(9) of the [CEA], like many other intangible commodities that the [CFTC] has previously recognized (*e.g.*, renewable energy credits and emission allowances, certain indices, and certain debt instruments, among others)" and that virtual currencies are, therefore, "subject to applicable provisions of the CEA and [CFTC Regulations]."[9]

In *CFTC v. McDonnell*, the U.S. District Court for the Eastern District of New York held that "virtual currencies can be regulated by the CFTC as a commodity" because they "fall well-within the common definition of 'commodity' as well as the CEA's definition of commodities."[10] Significantly, the court found that virtual currencies were "'goods' exchanged in a market for a uniform quality and value," falling within the "all other goods and articles…in which contracts for future delivery are presently or in the future dealt in" portion of the CEA's definition.[11] Therefore, both the CFTC and certain district courts agree that virtual currencies are commodities,

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[4] *Id.* (quoting 7 U.S.C. § 1a(9); citing *Bd. of Trade of City of Chi. v. SEC*, 677 F.2d 1137, 1142 (7th Cir. 1982)).
[5] *See, e.g.*, *The Commodity Futures Trading Commission: Effective Enforcement and the Future of Derivatives Regulation: Hearing before the S. Comm. on Agric., Nutrition & Forestry*, 113th Cong. 20 (2014) (statement of Timothy Massad, Chairman, CFTC) (stating "the CFTC's jurisdiction with respect to virtual currencies will depend on the facts and circumstances pertaining to any particular activity in question [but] derivative contracts based on a virtual currency represent one area with our responsibility.")
[6] *See* Retail Commodity Transactions Involving Certain Digital Assets, 85 Fed. Reg. 37,734 (June 24, 2020) (final interpretative guidance) (interpreting 17 C.F.R. pt. 1).
[7] *See*, *e.g.*, CFTC Staff Advisory No. 18-14, Advisory with respect to Virtual Currency Derivative Product Listings (May 21, 2018) (stating that "the CFTC found that bitcoin and other virtual currencies are properly defined as commodities"); CFTC, Customer Advisory: Beware Virtual Currency Pump-and-Dump Schemes (Feb. 15, 2018) (stating that "the CFTC maintains general anti-fraud and manipulation enforcement authority over virtual currency cash markets as a commodity in interstate commerce"); CFTC, CFTC Backgrounder on Oversight of and Approach to Virtual Currency Futures Markets (Jan. 4, 2018) (stating that "in 2014, the CFTC declared virtual currencies to be a 'commodity' subject to oversight under its authority under the Commodity Exchange Act"); CFTC, Customer Advisory: Understand the Risks of Virtual Currency Trading (Dec. 15, 2017) (stating that "Bitcoin and other virtual currencies have been determined to be commodities under the Commodity Exchange Act"); CFTC, CFTC Backgrounder on Self-Certified Contracts for Bitcoin Products (Dec. 1, 2017) (stating that "the CFTC first found that Bitcoin and other virtual currencies are properly defined as commodities in 2015").
[8] *See, e.g.*, *CFTC v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) (hereinafter *McDonnell*); *CFTC v. My Big Coin Pay, Inc.,* 334 F.Supp.2d 492,494 (D. Mass 2018); *CFTC v. Gelfman Blueprint, Inc.*, No. 1:17-cv-07181 (S.D.N.Y. Sept. 21, 2017); *In re BFXNA Inc.*, CFTC No. 16-19, [2016–2017 Transfer Binder] Comm. Fut. L. Rep. (CCH) (June 2, 2016); *In the Matter of TeraExchange LLC*, CFTC No. 15-33, [2015–2016 Transfer Binder] Comm. Fut. L. Rep. (CCH) (Sept. 24, 2015).
[9] Retail Commodity Transactions Involving Virtual Currency, Final Interpretive Guidance, 85 Fed. Reg. 37,734, 37,741 (June 24, 2020).
[10] *McDonnell* at 228.
[11] *Id.*

either because they fall under the scope of the "all services, rights, and interests" provision or the "all other goods and articles" provision of the CEA's definition.

Distinguishing Between Different Types of Commodities Under the CEA

The CEA makes distinctions based on the type or classification of a commodity (*e.g.*, securities, foreign currencies, non-financial commodities, agricultural commodities, excluded commodities, and exempt commodities each have different regulatory treatments under the CEA and CFTC Regulations). Whether a virtual currency is classified as a security or non-security commodity is particularly important, as this classification will determine whether the CFTC, the U.S. Securities and Exchange Commission ("SEC"), or both agencies jointly have jurisdiction over the virtual currency. The distinction between securities and non-security commodities is also important for determining whether the CFTC or the SEC has authority over the cash market trading activities involving a virtual currency.

In February 2020, in response to a request by Judge Castel, the Southern District of New York judge presiding over the *SEC v. Telegram* case, the CFTC's Office of General Counsel filed a letter[12] in which it stated plainly, "Digital currencies are commodities."

> "*The following represent the views of the CFTC's Office of General Counsel, and not necessarily of the CFTC itself or of any individual Commissioner, but our views are relatively straightforward: Digital currency is a commodity. See, e.g., CFTC v. My Big Coin Pay, Inc., 334 F. Supp. 3d 492, 495-98 (D. Mass. 2018) (citing cases); In re BFXNA Inc. d/b/a Bitfinex, CFTC Dkt. No. 16-19, 2016 WL 3137612, at *5 (CFTC June 2, 2016) ("Bitcoin and other virtual currencies are ... properly defined as commodities.").*[1]
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> *However, the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1-26, provides that many securities are commodities to which the securities laws apply. Thus, any given digital asset may or may not be subject to the securities laws, but that does not depend on whether the asset is a commodity. It depends on whether the asset is a "security" within the meaning of the '33 Act itself.*[2]
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> [1] *Terminology in this space is evolving and has sometimes lagged behind the technology. In the past, the CFTC has used the term "virtual currency," defined as "any digital representation of value (a 'digital asset') that functions as a medium of exchange, and any other digital unit of account that is used as a form of a currency (i.e., transferred from one party to another as a medium of exchange); may be manifested through units, tokens, or coins, among other things; and may be distributed by way of digital 'smart contracts,' among other structures." Retail Commodity Transactions Involving Virtual Currency. 82 Fed. Reg. 60,335, 60,338 (Proposed Dec. 20, 2017). Telegram here uses the term "digital currency," which is sometimes used as a synonym for "virtual currency." Id. at 60,338 n.46. That is the*

[12] https://www.docdroid.net/okmUUBS/cftc-letter-in-telegram-case-pdf#page=3

definition we ascribe for purposes of this submission, but we do not intend it to limit the universe of what may be a "commodity" under the CEA. Other fungible digital assets may be commodities as well. See generally 7 U.S.C. § 1a(9) (defining "commodity").

[2] *It is possible that an asset that is a commodity may be a security at one point in time, but not another. For example, a digital asset created as an investment contract may mature to become a simple store of value or means of exchange, the holders of which are no longer relying on the efforts of others to obtain a profit. SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (stating the elements of an "investment contract")."*

SEC Perspectives

While it did not directly address the definition of a "commodity," the recent ruling in *Securities and Exchange Commission v. Ripple Labs, Inc., Bradley Garlinghouse and Christian A. Larsen* is worth considering. In that decision, Judge Analisa Torres held that XRP, when sold directly to purchasers on exchanges as "blind bid/ask" transactions (among certain other factors), did not constitute the offer and sale of investment contracts.[13] Critically, the Court ruled that XRP (the digital asset virtual currency that is the native token on the Ripple network), as a digital token, is not in and of itself a "contract, transaction[,] or scheme" that embodies the *Howey* test[14] requirements of an investment contract.[15] Importantly, Judge Torres affirmed that the *Howey* test was the appropriate test to determine whether a digital asset should be classified as a security. Judge Torres ruled that "that Ripple's XRP sales on public cryptocurrency exchanges were not offers of securities under the law, because purchasers did not have a reasonable expectation of profit tied to Ripple's efforts."[16]

While the SEC may file an appeal after the conclusion of the *Ripple Labs* trial (currently scheduled for April 23 2024), at present, XRP, when sold directly to purchasers on exchanges as "blind bid/ask" transactions and meeting certain other factors discussed in the original *Ripple Labs* decision, is not considered (at least by one federal court) to be a security and not subject to the SEC's jurisdiction. For now, this bolsters the argument that secondary sales of XRP and certain other digital assets should be considered as non-security commodities.

The *Ripple Labs* case and other SEC enforcement actions also demonstrate a widely-held view that a digital asset itself is not a security, it is the unique offer and sale of the digital asset that creates the security. More specifically, the *Ripple Labs* court discussed the concept of a digital asset being a mere part of the overall "contract, transaction[,] or scheme." The court noted that "[e]ven if XRP exhibits certain characteristics of a commodity or a currency, it may nonetheless be offered or sold as an investment contract."

[13] *See SEC v. Ripple Labs, Inc., Bradley Garlinghouse, and Christian A. Larsen*, 20 Civ. 10832 (S.D.N.Y. 2023).
[14] The requirements of the *Howey* test include whether there was (i) an investment of money in a (ii) common enterprise (iii) with a reasonable expectation of profits (iv) to be derived from the efforts of others.
[15] *See SEC v. Ripple Labs, Inc.* at 11.
[16] Jody Godoy, Ripple Labs notches landmark win in SEC case over XRP currency, Reuters, Jul. 13, 2023, available at https://www.reuters.com/legal/us-judge-says-sec-lawsuit-vs-ripple-labs-can-proceed-trial-some-claims-2023-07-13/.

Indeed, ordinary assets "like gold, silver, and sugar—may be sold as investment contracts, depending on the circumstances of those sales."[17]

Another helpful description differentiating the token from the investment contract comes from SEC's case against Telegram.[18] In that case, Telegram argued that "Grams[, a token], as distinct from the Gram Purchase Agreements, must be evaluated under *Howey* when the Grams come into existence with the launch of the TON Blockchain."[19] The U.S. District Court for the Southern District of New York outright rejected the idea that Grams, as the subject of an investment contract, is the security. The court held that the security in that case was "not simply the Gram," but the "scheme … that consists of the full set of contracts, expectations, and understandings centered on the sales and distribution of the Gram." The court concluded that "*Howey* requires an examination of the entirety of the parties' understandings and expectations."[20]

[17] *See SEC v. Ripple Labs, Inc.*
[18] *SEC v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020).
[19] *Id.* at 379.
[20] *Id.*

V. International Perspectives on Utility Tokens

Certain other jurisdictions have laws and guidance on "utility tokens," or are in the process of formulating their laws and guidance on this. There is no clear consensus, some countries may treat "utility tokens" as either securities or payment tokens, or may treat them as entirely separate products. However, generally, whether a crypto asset qualifies as a "utility token" depends on whether it provides access to goods or services, and does not otherwise qualify as a security or aid in money services (such as payments). The United Kingdom, for example, views "utility tokens" as those that are not security or payment ("e-money") tokens, and that "can be redeemed for access to a specific product or service that is typically provided using a DLT platform." Austria and Singapore follow similar approaches, what is dispositive is that the token does not constitute a security or aids in money services, and that they grant access to goods or services. Switzerland guidance and the EU's crypto asset law (MiCA) has a slightly modified definition, utility tokens must be "*only intended* to provide access to a good or a service supplied by its issuer." Thus, the intent of the token's issuance is dispositive to its classification.

Examples of other jurisdictions' approaches to classifying utility tokens are set forth below.

A. Australia

The Australian Securities and Investments Commission ("ASIC") analyzed utility tokens in the context of ICOs. It concluded that a utility token may be considered a regulated "financial product".[21] "It is important to always consider the particular rights and features of an individual ICO or crypto-asset in relation to Australian law to determine whether it is regulated as a financial product . . . ." Thus, utility tokens may also be security-like products, they are not mutually exclusive under ASIC's guidance.

B. Austria

The Austrian Financial Market Authority ("FMA") noted that utility tokens "provide the holder with a benefit with regard to a specific product or a service. Frequently they permit access to a digital platform operated by the issuer, which may be used in a specific fashion by the holder of the utility token."[22] The FMA concluded that utility tokens are not usually regulated if they: (1) are merely used for voting but with no ownership/claim of the protocol; (2) only grant access; and (3) are not used as a form of payment. "If the token can only be used for designing a product or a service and is not associated with any other claims or if the token only grants access to a product or a service, without simultaneously serving a purpose for payment, then there is usually not any linkage under supervisory law."

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[21] ASIC, Crypto-assets (last accessed Feb. 27, 2024) available at https://asic.gov.au/regulatory-resources/digital-transformation/initial-coin-offerings-and-crypto-currency/#what.

[22] FMA, ICOs (last accessed Feb. 27, 2024) available at https://www.fma.gv.at/en/fintech-point-of-contact-sandbox/fintech-navigator/initial-coin-offerings/.

C. Canada

The Canadian Securities Administrators ("CSA") issued a Notice in 2018 on utility tokens, describing them as "an industry term often used to refer to a token that has one or more specific functions, such as allowing its holder to access or purchase services or assets based on blockchain technology." They note that "[t]he fact that a token has a utility is not, on its own, determinative as to whether an offering involves the distribution of a security." The CSA goes on to give various examples of when a utility token rises to the level of an investment contract security, using reasoning that is largely aligned with the SEC's *Howey* test.[23] Thus, Canada aligns with Australia in viewing utility tokens as possibly constituting securities, they are not mutually exclusive.

D. European Union

Under the EU's Markets in Crypto Assets Regulation ("MiCA"), a utility token is a "type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer."[24] The EU's crypto asset law has special provisions for utility tokens, such as exempting digital assets that "provid[e] access to a good or service that exists or is in operation" from certain regulations. There are other specific provisions for referencing utility tokens in white papers.[25] Similar UK guidance, MiCA does not apply to "financial instruments" (i.e., securities), so a utility token cannot be a security. Moreover, although MiCA does apply to e-money tokens (i.e., stablecoin payment tokens), it does not include such tokens in the definition of "utility token."

E. Singapore

Without defining "utility token," the Monetary Authority of Singapore ("MAS") addressed them in its ICO guidelines. When utility tokens are merely used to grant access or payments on the platform, they are not a regulated "capital market product." MAS gave an example of when a token is not regulated: "A holder of Token A will only have rights to access and use Company A's platform, and the right to use Token A to pay for rental of computing power provided by other users. Token A will not provide its holder any other

[23] Canadian Securities Administrators Staff Notice 46-308, "Securities Law Implications for Offerings of Tokens."
[24] EUR-Lex, Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (Text with EEA relevance) (last accessed Feb. 27, 2024) available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32023R1114.
[25] *Id.* "Where the offer to the public of the crypto-asset other than an asset-referenced token or e-money token concerns a utility token providing access to goods and services that do not yet exist or are not yet in operation, the duration of the offer to the public as described in the crypto-asset white paper shall not exceed 12 months from the date of publication of the crypto-asset white paper." MiCA also requires a statement "where the offer to the public concerns a utility token, that utility token may not be exchangeable against the good or service promised in the crypto-asset white paper, especially in the case of a failure or discontinuation of the crypto-asset project." Lastly, when the offer involves a "utility token providing access to goods and services that do not yet exist or are not yet in operation, changes made in the modified crypto-asset white paper and, where applicable, the modified marketing communications, shall not extend the time limit of 12 months referred to in Article 4(6)."

rights or functions attached to it. Hence, Token A will not constitute capital markets products under the SFA."[26] Thus, utility tokens may also qualify as securities, unless they meet certain tests proposed by MAS.

F. Switzerland

Concerning utility tokens in ICOs, the Swiss Financial Market Supervisory Authority ("FINMA") defined them in alignment with the EU: "tokens which are intended to provide access digitally to an application or service by means of a blockchain-based infrastructure."[27] FINMA exempts utility tokens from security status "only if their sole purpose is to confer digital access rights to an application or service and if the utility token can already be used in this way at the point of issue. If a utility token functions solely or partially as an investment in economic terms, FINMA will treat such tokens as securities (i.e. in the same way as asset tokens)."

G. United Kingdom

The UK Financial Conduct Authority ("FCA") has stated: "Any tokens that are not security tokens or e-money tokens are unregulated tokens. This category includes utility tokens which can be redeemed for access to a specific product or service that is typically provided using a DLT platform."[28] Utility tokens are distinct from security tokens, e-money tokens, and unregulated cryptocurrencies used as a medium of exchange (BTC, LTC, etc.).

[26] MAS, A Guide to Digital Token Offerings (last updated May 26, 2020) available at https://www.mas.gov.sg/-/media/MAS/Sectors/Guidance/Guide-to-Digital-Token-Offerings-26-May-2020.pdf.
[27] FINMA, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs) (Feb. 16, 208) available at https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf?sc_lang=en&hash=83EE49D77DA54DD079F314D9EDCBDC3D.
[28] Financial Conduct Authority, Cryptoassets: our work (last accessed Feb. 27, 2024) available at https://www.fca.org.uk/firms/cryptoassets.