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VIA ELECTRONIC SUBMISSION

Crypto Task Force
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Blockchain Association Request for Interpretive Guidance

Ladies and Gentlemen:

We write on behalf of the Blockchain Association to request the issuance of interpretive guidance from the staff (the “Staff”) of the Securities and Exchange Commission (the “Commission”) regarding sales of non-fungible tokens (“NFTs”) as they pertain to the definition of a “security” under Section 2(a)(1) and the registration requirement under Section 5 of the Securities Act of 1933. We respectfully ask the Staff to agree that the offer and sale of NFTs in the ordinary course do not constitute the offer and sale of securities (and thus do not need to be registered with the Commission) when the NFTs have utility or consumptive value, establishing parity with the offer and sale of traditional art, collectibles, and other consumer goods and content. We propose a list of non-exclusive factors that should be considered when determining whether an NFT is being offered and sold as a security.

Clarifying guidance on this issue will promote innovation and benefit the marketplace, including content creators who make and sell digital art and other consumptive content using NFT technology. It will also protect the First Amendment rights of artists who wish to exercise their constitutional right to make and sell art, albeit in a cryptographic medium.

I. Background

A. The Blockchain Association

The Blockchain Association is the leading nonprofit membership organization dedicated to promoting a pro-innovation policy environment for the digital asset

economy.¹ The Association endeavors to achieve regulatory clarity and to educate policymakers, regulators, courts, and the public about how blockchain technology can pave the way for a more secure, competitive, and consumer-friendly digital marketplace. The Association represents over 120 member companies – including those creating and selling NFTs – reflecting the wide range of the dynamic blockchain industry, including software developers, infrastructure providers, exchanges, custodians, investors, and others supporting the public blockchain ecosystem.

B. NFTs: The Modern-Day, Digital Equivalent of Art, Collectibles, and Other Consumer Goods

NFTs are non-fungible digital assets recorded on a blockchain. Each NFT is minted with a unique identifier or serial number. Unlike fungible cryptocurrencies, each individual NFT is uniquely identifiable.

NFTs can provide their owners with a wide array of rights to digital and/or physical assets, including those that typically accompany ownership.² NFTs can typically be bought, sold, and traded on secondary markets or directly via peer-to-peer transactions, with ownership rights to the NFT being transferable by an owner to a buyer. NFT developers can incorporate into their NFTs' code rights management, automatic royalty payments assessed on secondary transfers, and many other features. These features "travel" with the NFT if it is transferred or sold to a new user.

NFTs may be used to convey ownership of physical or digital content, such as uniquely generated digital images, music, or collectibles. NFTs allow people to authenticate the ownership of the linked content in an automated, permissionless, and public way. Such NFTs are typically originally offered and sold by the creator of the underlying content to which the NFT relates. NFTs are sold through galleries, brokers, or other third parties (including NFT marketplaces like Magic Eden and OpenSea).

NFTs are being used by consumers across industries.³ For example, within the online gaming industry, NFTs enable players to own and trade in-game assets, characters, or land and gain access to exclusive content and features.⁴ They are also

¹ See Blockchain Association, <https://theblockchainassociation.org> (last visited June 19, 2025).

² See, e.g., Congressional Research Service, *Non-Fungible Tokens (NFTs)*, (Jul. 20, 2022), <https://crsreports.congress.gov/product/pdf/R/R47189>.

³ See Cem Dilmegani, *Top 10 NFT Use Cases in 2025*, AIMultiple Research (Apr. 24, 2025), <https://research.aimultiple.com/nft-use-cases>.

⁴ See *NFT Use Cases In Gaming*, Sequence (Dec. 16, 2024), <https://sequence.xyz/blog/nft-use-cases-in-gaming>.

used as tickets for events⁵ or a means to gain membership in a club, program, or service.⁶ NFTs are also being used to effectuate government operations,⁷ as well as the sale of real estate⁸ and all manner of tangible consumer goods, such as cars⁹ and wine.¹⁰ Ultimately, NFT technology can be applied to virtually any digital or tangible asset and has the potential to impact every industry – the only limits are those imposed by human imagination, or by law and regulation.

⁵ See Dmitry K., *NFT Tickets in 2025: Top Platforms, Festival Expansions & How to Get Started*, ND Labs (Apr. 29, 2025), <https://ndlabs.dev/nft-tickets>; *Avalanche to Power SI Tickets' NFT Platform, Box Office, Avalanche* (Feb. 19, 2024), <https://www.avax.network/about/blog/avalanche-to-power-si-tickets-nft-platform-box-office>.

⁶ See Melissa McCart, *Behind the Curtain of New York's First Members-Only, NFT Restaurant*, Eater (Sep. 24, 2024), <https://ny.eater.com/2024/9/24/24253337/flyfish-club-nft-gary-vaynerchuk-josh-capon-david-rodo-litz-conor-hanlon>.

⁷ See *California DMV Makes History, Digitizes 42 Million Car Titles on Avalanche Blockchain*, Avalanche, (Jul. 30, 2024), <https://www.avax.network/about/blog/california-dmv-makes-history-digitizes-42-million-car-titles-on-avalanche-blockchain>; *\$240B in Real Estate Is Coming On-Chain with Balcony and Avalanche*, Avalanche (May 28, 2025), <https://www.avax.network/about/blog/240b-in-real-estate-is-coming-on-chain-with-balcony-and-avalanche>.

⁸ See Morgan Chittum, *A Real Estate-Backed NFT Sold For \$653,000*, Blockworks (Feb. 14, 2022), <https://blockworks.co/news/a-real-estate-backed-nft-sold-for-653000>.

⁹ See Michael Wayland, *Alfa Romeo Unveils New Electric-Hybrid SUV With NFT, Blockchain Technology*, CNBC (Feb. 8, 2022), <https://www.cnbc.com/2022/02/08/new-alfa-romeo-suv-equipped-with-nft-blockchain-technology.html>.

¹⁰ *The NFT Platform Uniting the Wine Industry*, Wine Spectator (last visited Jun. 19, 2025), <https://www.winespectator.com/pages/the-nft-platform-uniting-the-wine-industry>.

NFTs representing ownership of digital content are commonly sold and valued just like physical consumer goods.¹¹ For example, Christie's¹² and Sotheby's¹³, the two most renowned art auction houses, sell NFTs that represent ownership in digital art in the same way that they do tangible art. Like traditional consumer goods (including art and collectibles), the value of an NFT can vary and fluctuate. The price of each individual NFT (even those by the same creator and within the same collection) depends on consumer preferences, sentiment, subjective tastes, trends, rarity, perceptions of exclusivity, and other factors – essentially, the desirability of the specific NFT. Thus, each NFT owner can profit and sustain losses independent of the fortunes of others.

II. Discussion

A. Legal Framework

The Securities Act of 1933 prohibits the sale of unregistered securities, including “investment contracts,” unless an exemption applies. Under the test established by *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), an investment contract, for purposes of the Securities Act, means a contract, transaction or scheme whereby a person (1) invests money (2) in a common enterprise and (3) is led to expect profits solely from the efforts of the promoter or a third party. *Id.* at 298-99. However, the definition of an investment contract does not encompass all transactions involving a thing that a person purchases with the hope it will increase in value. See *id.* Further, when a purchaser is “motivated by a desire to use or consume the item purchased,” rather than “solely by the prospects of a return . . . the securities laws do not apply.” *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852-53 (1975). In order to discern a buyer’s motivations, courts analyze “what the purchasers were offered or promised” and thus were “led to expect.” *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009) (quoting *Howey*, 328 U.S. 293 at 298-99).

¹¹ Brief for Paradigm Operations LP as Amicus Curiae, *Mann v. SEC*, No. 2:24-cv-01881 (GGG) (KWR) (E. D. La., 2024) (ECF 28).

¹² Christie’s reported selling \$150 million worth of NFTs in 2021. Carla Mozée, *Christie’s sold \$150 million of NFTs in 2021, with the auction house on track for \$7.1 billion in sales for the year* (Dec. 21, 2021), [https://markets.businessinsider.com/news/currencies/christies-nft-sales-total-beeple-auction-crypt-o-cryptopunks-2021-12#:~:text=Christie%E2%80%99s%20sold%20\\$150%20million%20of%20NFTs%20in; see also Digital Art & NFTs, Christie’s, https://www.christies.com/en/events/digital-art-and-nfts/overview](https://markets.businessinsider.com/news/currencies/christies-nft-sales-total-beeple-auction-crypt-o-cryptopunks-2021-12#:~:text=Christie%E2%80%99s%20sold%20$150%20million%20of%20NFTs%20in; see also Digital Art & NFTs, Christie’s, https://www.christies.com/en/events/digital-art-and-nfts/overview) (last visited June 19, 2025).

¹³ As of May 2023, Sotheby’s had generated more than \$100 million in NFT sales. See Richard Whiddington, *Sotheby’s Has Launched a Secondary Marketplace for NFTs, Allowing Artists to Sell Digital Works Directly to Collectors*, ARTNET (May 3, 2023), <https://news.artnet.com/market/sothebys-secondary-marketplace-2294615>; see also *Digital Art, Sotheby’s*, <https://www.sothebys.com/en/departments/digital-art> (last visited June 19, 2025).

B. Prior SEC Involvement in the NFT Space

Before August 2023, the Commission had not issued any formal guidance regarding the sale of NFTs or taken any public action against creator-sellers of NFTs. However, between August 2023 and September 2024, the Commission brought three enforcement actions charging NFT creators with violations of the Securities Act for offering and selling NFTs as investment contract securities without registering with the SEC. These enforcement actions were settled and resulted in orders that expressed the SEC's stance that creators of NFTs engage in the offer and sale of investment contract securities when they set out to sell their work – at least when accompanied by royalties and marketing statements discussing their current and future endeavors, their subjective hopes for the value of their projects, or their use of profits from the NFT sales to financially support themselves and their endeavors.

First, on August 28, 2023, the Commission announced settled charges with Impact Theory, LLC, a media and entertainment company, for allegedly offering and selling unregistered securities in the form of NFTs—the Commission referred to them as “purported NFTs”—called Founder’s Keys (“KeyNFTs”). See *In the Matter of Impact Theory, LLC*, Securities Act Rel. No. 11226 (Aug. 28, 2023) (“*Impact Theory*”). KeyNFTs were offered and sold in three “tiers,” and each KeyNFT contained a digital graphic with a combination of four out of 50 possible symbols. The Commission alleged that Impact Theory’s public statements invited potential investors to view the purchase of a KeyNFT as an investment in a business. Particularly, the Commission cited Impact Theory’s statements that the future value of KeyNFTs would be much higher than the purchase price, and that Impact Theory was “trying to build the next Disney” and would deliver “tremendous value” to KeyNFT purchasers if successful. The Commission further claimed that Impact Theory said it would use proceeds from the offering for “development,” “bringing on more team,” and “creating more projects,” and that, consistent with such statements, Impact Theory collected the proceeds from the KeyNFT sales in a single crypto asset wallet and used a portion of the proceeds to pay vendors providing services related to Impact Theory’s business. The Commission also indicated that Impact Theory made public statements regarding secondary market platforms where KeyNFTs could be traded, and programmed the smart contract for the KeyNFTs so that the company would receive a 10% royalty on each secondary market sale. Based on these facts, the Commission determined that KeyNFTs were offered and sold as *Howey* investment contracts, and therefore securities.

SEC Commissioners Peirce and Uyeda issued a dissent to the Commission’s Order in *Impact Theory*.¹⁴ In their dissent, they emphasized that “the NFTs were not shares of a company and did not generate any type of dividend for the purchasers,” and

¹⁴ SEC Comm’rs Hester M. Peirce and Mark T. Uyeda, *NFTs & the SEC: Statement on Impact Theory, LLC* (Aug. 28, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-nft-082823>.

“[t]he handful of company and purchaser statements cited by the order are not the kinds of promises that form an investment contract. We do 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.”

Next, less than a month later, on September 13, 2023, the Commission announced settled charges with Stoner Cats 2, LLC for allegedly offering and selling securities in the form of “Stoner Cats” NFTs in order to finance the production of an animated web series called Stoner Cats. *In the Matter of Stoner Cats 2, LLC*, Securities Act Rel. No. 11233 (Sept. 13, 2023) (“*Stoner Cats*”). Each Stoner Cats NFT consisted of a uniquely generated image of one of the Stoner Cats characters. They provided holders with exclusive access to view the Stoner Cats web series and an online Discord community, as well as access to future content that would be developed in coming years. The Commission found that SC2 “offered and sold the Stoner Cats NFTs as an investment into SC2’s efforts to create this content.” Like it did in the *Impact Theory* action, the Commission cited SC2’s media campaign and public statements made to promote the NFTs before and after the offering. According to the SEC, SC2’s statements, which highlighted the benefits of owning Stoner Cats NFTs and the team’s ability to successfully complete the project, “tied the success of the show to the value of the NFTs and thus led investors reasonably to expect to profit from the managerial and entrepreneurial efforts of SC2.” The Commission also emphasized that SC2 configured Stoner Cats NFTs so that it received a 2.5% royalty for each trade on a secondary market, which the Commission said encouraged secondary sales and helped to assure purchasers that SC2 remained committed to the show after the offering. The Commission claimed that SC2 made public statements explicitly encouraging and praising secondary market sales. The Commission ultimately found that the Stoner Cats NFTs were offered and sold as *Howey* investment contracts, and therefore securities.

Like they did in *Impact Theory*, Commissioners Peirce and Uyeda filed a dissent to the Commission’s Order in *Stoner Cats*, stating that “[t]he application of the *Howey* investment contract analysis in this matter lacks any meaningful limiting principle” and “carries implications for creators of all kinds.”¹⁵ They observed:

Were we to apply the securities laws to physical collectibles in the same way we apply them to NFTs, artists’ creativity would wither in the shadow of legal ambiguity. Rather than arbitrarily bringing enforcement actions against NFT projects, we ought to lay out some clear guidelines for artists and other creators who want to experiment with NFTs as a way to support their creative efforts and build their fan communities.

...

¹⁵ SEC Comm’rs Hester M. Peirce and Mark T. Uyeda, *Collecting Enforcement Actions: Statement on Stoner Cats 2, LLC* (Sept. 13, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-stonercats-09132>.

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 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.

About a year later, on September 16, 2024 the Commission announced settled charges with Flyfish Club, LLC for allegedly offering and selling securities in the form of Flyfish NFTs in order to fund the construction and operation of a members-only dining club called Flyfish Club. *In the Matter of Flyfish Club, LLC*, Securities Act Rel. No. 11305 (Sept. 16, 2024) (“Flyfish Club”). Flyfish NFTs provided holders with the exclusive means of obtaining membership in the club. There were two tiers of Flyfish NFTs (providing two different levels of access to the club), each of which was linked to artwork of sushi. The Commission alleged that Flyfish led investors to expect profits from the entrepreneurial and managerial expertise of Flyfish and its principles in building and running the restaurant by making statements linking the value of the Flyfish NFTs to the success of the restaurant and suggesting that purchasers could profit from leasing or reselling their NFTs on the secondary market. The Commission also emphasized that Flyfish promoted and facilitated secondary market sales for which they received 10% royalty payments. The Commission ultimately found that the Stoner Cats NFTs were offered and sold as *Howey* investment contracts, and therefore securities.

Commissioners Peirce and Uyeda again filed a dissent, expressing their view that “the NFTs here are utility tokens, not securities, and statements by the founders and NFT purchasers that a successful restaurant would cause the NFT price to rise do not change that. While a member potentially could earn a profit by leasing or selling her token, the NFT has a concrete use: you need it to eat at the Flyfish Club. . . . *Howey* is inapt because holders of Flyfish NFTs had a reasonable expectation of obtaining in the future wonderful culinary experiences and other exclusive membership experiences based on the managerial and entrepreneurial efforts of Flyfish and its principals.”¹⁶ They also observed: “NFTs offer a promising way to allow creative people—such as chefs, musicians, or visual artists—to monetize their talent and a potentially efficient way for selling access to experiences and communities. Experiments like Flyfish Club are not a threat to the American investor. Creative people should be able to experiment with NFTs without having to consult a high-priced tea-leaf reader—ahem, lawyer.”

¹⁶ SEC Comm’rs Hester M. Peirce and Mark T. Uyeda, *Omakase: Statement on In the Matter of Flyfish Club, LLC* (Sept. 16, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-flyfish-091624>.

The SEC's analysis and conclusion in *Impact Theory*, *Stoner Cats*, and *Flyfish Club* were ultimately incorrect because the NFTs at issue had consumptive use¹⁷ and were not accompanied by marketing statements that gave rise to a commitment or obligation to take efforts to increase the value of the NFTs or generate profits for the purchasers.

More recently, Commissioners Peirce expressed her view that many NFTs are not securities, including those attached to royalties:

Many [NFTs] ... are not securities, including NFTs designed to compensate their creators over time. These NFTs are powered by smart contracts, which can be programmed to transmit automatically a portion of the sale price of an NFT to the creator of the artwork as a royalty each time that it is re-sold. Just as streaming platforms pay royalties to the creator of a song or video each time a user plays it, an NFT can enable artists to benefit from the appreciation in the value of their work after its initial sale. This 'creator royalty' feature of certain NFTs does not provide to the NFT owner rights or an interest in any business enterprise or 'the kinds of profits traditionally associated with securities.'

Crypto assets that do not represent economic rights or an interest in a business entity or other promisor (including an ownership or debt interest, revenue share, or entitlement to any interest or dividend payment) and are solely for use or consumption should not be subject to the federal securities laws. The analysis does not change even if purchasers are speculating on an increase in the future value of the crypto asset.¹⁸

In this speech, Commissioner Peirce observed the need for "useful guidance" and "clarity about which crypto assets are securities." We seek to propose such guidance regarding the sale of NFTs.

C. Proposed Guidance

We respectfully request that the Staff concur with our view that NFTs with utility or consumptive value do not constitute securities when they are offered and sold in the ordinary course merely because they are accompanied by royalties and/or marketing

¹⁷ For the avoidance of doubt, the term "consumptive use" does not mean that the NFT is fully "consumed" or "used up." A "consumptive use" is any utility for the NFT that is not an investment objective. Such consumptive use can be, for example, fully consumptive, such as a one-time admission ticket or purchase coupon that extinguishes the NFT; partially consumptive, such as a membership pass entitling the holder to certain perquisites or other rights; aesthetically consumptive, such as a pure piece of digital artwork; some combination of the above, or a slew of other uses.

¹⁸ SEC Comm'r Hester M. Peirce, *New Paradigm: Remarks at SEC Speak*, (May 19, 2025), https://www.sec.gov/newsroom/speeches-statements/peirce-remarks-sec-speaks-051925-new-paradigm-remarks-sec-speaks#_ftnref33.

statements.¹⁹ Instead, the following non-exclusive factors should be considered in determining whether a NFT is a security:

1. Does the NFT have utility or consumptive value at the time it is offered for sale insofar as purchasers can reasonably be expected to purchase it with a desire to use or consume it rather than solely to make a profit? **If so, there is a presumption that the NFT is not a security.**

While nobody gets a “free pass” from the securities laws, the securities laws should be applied to NFTs with utility or consumptive value in the same way they are applied to physical, non-cryptographic consumer goods or content. The Commission has not considered paintings, watches, or sneakers to be investment contract securities just because some people buy them with the hopes of reselling them at a profit.²⁰ Moreover, the securities laws should be applied – or not applied, as the case may be – to preserve, support, and incentivize content creators’ efforts to create, innovate, sell their work, and build a fan base.

NFTs can give purchasers access (sometimes exclusive access) to a concrete good or service. For example, Flyfish NFTs were needed to access and dine at the Flyfish restaurant, and Stoner Cats NFTs were needed to access and watch a web series. Other NFTs might serve as event tickets, enable access to online games, or provide ownership rights to visual art. Such NFTs are not investment contracts just because some purchasers may buy them in order to resell them for a profit rather than to use them (such as to actually dine at Flyfish’s restaurant or watch the Stoner Cats web series), just like a physical event ticket sold by a musician and physical print sold by an artist are not securities just because a purchaser may buy them with the hopes of reselling them for a profit rather than an intent to attend the concert or display the print on his or her wall.²¹

¹⁹ As discussed below, the securities analysis depends on: (1) whether the NFT has utility or consumptive value, (2) whether the NFT resembles stock or another type of security enumerated in the 1933 Act or 1934 Act (other than an investment contract), and (3) the type of statements made by creator-sellers.

²⁰ See SEC Comm’rs Hester M. Peirce and Mark T. Uyeda, *NFTs & the SEC: Statement on Impact Theory, LLC, supra*.

²¹ The presumption does not operate in both directions, however. Just because an NFT has financial or resale value, and a purchaser may be motivated by the potential for profit rather than its consumptive use, does not mean that the NFT should be presumed to be a security.

2. Does the NFT resemble “all of the usual characteristics of stock,” including ownership or interest in a company, *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), or another type of security enumerated in the 1933 Act or 1934 Act other than an investment contract? **If so, there is a presumption that the NFT is a security.**

NFTs typically represent ownership to a physical or digital asset (like art, collectibles, or other consumer goods). They do not automatically or typically entitle holders to company profits or dividends. For example, purchasers of Flyfish NFTs were not entitled to a portion of the restaurant’s profits.

However, NFTs are, at heart, software – composable and malleable. So, NFTs can be programmed to resemble shares of a company, to automatically pay dividend payments, or to provide other economic rights or interests in a business entity.²² Ultimately, form will not be placed over function. Where NFTs are structured and programmed to closely resemble stock or other types of securities, they will naturally be regulated as such.

Some NFTs carry both non-securities characteristics (such as membership to a club or admission to an event, or just pure artistic expression) as well as a more securities-like component, such as economic rights that might appreciate in value. In such cases, again, form should not be placed over function. Where a NFT carries a far greater value in its securities-like functions, a transaction regarding that NFT may (perhaps) be considered in some part a securities transaction. An example may be the sale of fractional NFTs, where buyers purchase fractional ownership interests in a single NFT – depending on whether the fractional NFTs have consumptive value and the type of statements made by the creator-sellers. For example, if the fractional NFT provides consumptive value to each fractional owner (e.g., each is provided access to an online game) and the creator-seller does not make a clear commitment to take specific action to generate profit for purchasers from the purchase of the particular NFT, such as a commitment to engage in profit-sharing or revenue-sharing with purchasers (see Section II.C.3, *infra*), the fractional NFT is not a security.

Ultimately, where the non-investment features of an NFT arguably outweigh any investment features, the Commission should presume, unless and until unambiguously shown otherwise, that the NFT is not a security. There will always be “edge cases,” requiring a facts-and-circumstances analysis. But, unless the NFT clearly resembles traditional stock or another type of security named in the 1933 Act or 1934 Act (other than

²² Post-sale economic interests in an NFT itself (e.g., the right to resale royalties) are distinct from post-sale interests in the NFT creator or third-party entity (e.g., the right to a share of the creator’s future revenue). Only the latter may be sufficient to give rise to a reasonable expectation of profits to be derived from the efforts of others. See Section II.C.3, *infra*.

an investment contract), the presumption should be that NFTs are not securities, and transactions involving NFTs are not securities transactions, until shown otherwise.

3. Do the statements made by the creator-sellers promise purchasers their ongoing efforts to generate profits for the purchasers? **If not, the statements do not give rise to a purchasers' reasonable expectation of profits based on the creator-sellers' managerial and entrepreneurial efforts.**

In a true *Howey*-type investment contract, an investor's expectations are straightforward: the issuer will do things in order to try to make the investment increase in value. However, purchasers of NFTs, like purchasers of artwork, collectibles, and other consumer goods and content, are not automatically or typically entitled to any ongoing efforts from the creator-sellers; there are not intrinsically any guarantees or conditions on what the creator-sellers may or may not do. Purchasers may hope or believe that the creators are going to increase the value of the NFTs by promoting their work and creating more content. The creators may intend to do so and publicly or privately discuss their intent to do so, but that does not mean the creator is committed or obliged to do so, or that the purchaser is entitled to count on him or her doing so.

So, the key question is: what statements are sufficient to create a reliance on the efforts of others?

Statements discussing the creator-sellers themselves, the NFTs, and the creator-sellers' subjective beliefs and hopes regarding their value are **not** sufficient. This includes statements regarding the tangible benefits of owning an NFT, e.g., accessing content, gaining admission to an establishment or event, or obtaining other participation benefits. This also includes statements highlighting the skills and experience of their creator(s) or team.

Statements discussing the NFTs' resale potential and highlighting that their resale value is linked to the success of the creator-seller and their other/future work are also **not** sufficient. This includes statements regarding the resale of NFTs, given that traditional art, collectibles, and other consumer goods tend to have an active resale market as well.

Promises to continue creating content and building their brand, and/or promises that such activities will increase the NFTs' value, are also **not** sufficient. This includes statements describing NFTs as "a tremendous way for our community to capture tremendous value," saying that "there is a lot of cool things coming," or indicating that NFT proceeds will be used for "development," "bringing on more team," or "creating more projects."²³

²³ *Impact Theory* ¶¶ 6(B), 7(B), 7(C).

By contrast, statements making a clear commitment to take specific action to generate and distribute profit to purchasers based on their purchase of the particular NFTs in question (i.e., “to generate value for the person who provided the money” for the NFT) **may be** sufficient.²⁴ Such statements may include **(a)** statements by seller-creators that they will reinvest proceeds from the NFT sales back into their business specifically in order to generate a flow of dividends or other profits for NFT holders; or **(b)** statements by seller-creators that make a commitment to engage in profit-sharing or revenue-sharing with purchasers.

It is possible that creator-sellers put into the marketplace a bevy of messages, some of which sound like statements making a clear commitment to take specific action to generate profit for purchasers, and other statements that appear to disclaim any such responsibility. Unlike professionals in the securities world, who are presumably familiar with securities laws generally and may have access to sophisticated counsel for communications content screening, the Commission should not presume that artists and other content creators will make such distinctions, particularly when unguided by securities professionals. NFT creators should not be disallowed or disincentivized from utilizing the marketing tools and strategies available to other types of content creators. Thus, in such cases of “mixed messages,” the Commission should presume that the creator is issuing art or other consumptive content, and not an investment contract, absent strong supporting evidence to the contrary.

D. Special Considerations of the First Amendment

The proposed guidance is drafted with attention to the critical First Amendment issues at stake. The First Amendment is technology-neutral and applies to all forms of creative expression,²⁵ including creative expression sold for profit, protecting an artist’s right to sell their artwork.²⁶ There is no First Amendment right to violate federal securities laws. However, requiring NFT artists and other content creators to register their work

²⁴ SEC Comm’r Hester M. Peirce, *New Paradigm: Remarks at SEC Speak*, *supra*.

²⁵ See *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (“All manner of speech – from ‘pictures, films, paintings, drawings, and engravings,’ to ‘oral utterance and the printed word’ – qualify for the First Amendment’s protections; no less can hold true when it comes to speech ... conveyed over the Internet.”) (quoting *Kaplan v. California*, 413 U.S. 115, 119-20 (1973)); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (“[W]hatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

²⁶ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“Speech likewise is protected even though it is carried in a form that is ‘sold’ for profit.”).

prior to public distribution may constitute an unlawful prior restraint on artistic and creative expression.²⁷

The investment contract test established by *Howey* is “flexible” and based on “economic reality.” *Howey*, 328 U.S. at 298-99. Very often, this has meant the Commission arguing for an *expansion* of the principles of the securities laws. However, in the context of NFT sales, the economic reality is often an artist or other content creator trying to sell their work in the fundamentally the same way art has always been sold, albeit in a cryptographic medium. When such First Amendment concerns are implicated, the *Howey* test should “flex” to be applied more narrowly or conservatively, to avoid imposing a prior restraint on artists.

III. Conclusion

On behalf of the Blockchain Association, we respectfully request that the Staff concur with our proposed interpretive guidance. The Blockchain Association welcomes the opportunity to discuss this request further with the Staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'Summer Mersinger', with a long, sweeping horizontal line extending to the right.

Summer Mersinger, CEO

cc: Jason Gottlieb, Esq. and Rachel Fleder, Esq. (Morrison Cohen LLP)

²⁷ See *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451-52 (1938) (ordinance requiring people to obtain a permit before distributing materials was an invalid prior restraint); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 802 (1988) (law requiring fundraisers to obtain a license before fundraising imposed an unlawful prior restraint because “delay compel[ed] the speaker’s silence”); see also *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”).