

SEC CHARTS COMPREHENSIVE CRYPTOCURRENCY/DIGITAL ASSET REGULATION COURSE

November 2025

I. Executive Summary

On November 12, 2025, Securities and Exchange Commission (“SEC”) Chairman Paul Atkins gave a speech outlining a comprehensive cryptocurrency/digital asset legal and regulatory scheme that he hopes the Congress and SEC will adopt. The Atkins speech on “Project Crypto” follows the SEC’s establishment of a Crypto Task Force earlier this year and, before that, years of inconclusive efforts to classify whether cryptocurrencies and other digital assets are securities, commodities or something else entirely, and how to regulate them accordingly to protect investors while not throttling the development of new technologies and products that promise to transform the financial world, with the possibility of fewer barriers to entry, greater liquidity and the overall democratizing and decentralizing of finance.

The SEC’s proposal and vision is built on earlier efforts. On the federal level, the GENIUS Act, enacted earlier this year, sets out a legal scheme for regulation of “stablecoins,” a kind of cryptocurrency in which the digital token or coin is pegged to an underlying asset, whether a fiat currency, like the Dollar or the Euro, or a commodity such as a precious metal like gold or silver. The peg to an underlying asset is intended to give a derivative-like valuation to the stablecoin and to reduce volatility compared to non-stablecoin cryptocurrencies like Bitcoin and Ethereum, which are not pegged to any underlying asset.

Aside from the GENIUS Act, a few cryptocurrency bills and one executive order have been introduced in Congress and by the former Biden administration. On the state level, several states have stolen the march on the federal government, notably Wyoming, which has pioneered American cryptocurrency/digital asset legislation, and which, as described below, appears to be the basis for much of Project Crypto’s vision. On the regulatory level, the SEC has, in the absence of specific legislation and without promulgating new crypto/digital-specific regulation, tried to shoehorn the new technologies into the existing regulatory paradigms, often through enforcement actions, which have at times been self-contradictory and incoherent. We’ll first review the Atkins proposal in Part II, what securities are and are not in Section III, to create a framework for analyzing how cryptocurrencies and other digital assets should be classified; then in Section IV review the GENIUS Act and Wyoming statutes as representative of the existing legal/regulatory structure and efforts to date. For further information, please see the client advisories and other resources on our website at [Kurtin PLLC Information Technologies, Blockchain & Internet](#) and [Kurtin PLLC Venture Capital & Private Equity](#).

II. The Atkins Proposals

In his November 12 speech, a copy of which can be found [Here](#). Chairman Atkins outlined a proposed comprehensive classification of cryptocurrencies and other digital assets for federal regulatory purposes, what he calls a “token taxonomy.” The speech does not represent SEC action, but an outline for the results that Atkins would like to achieve, both by Congressional legislative action and SEC regulatory action, in coordination with that of the Commodities Futures Trading Commission (“CFTC”), the U.S. commodities regulator. At the outset, Atkins states that he believes that most digital tokens trading today are not in and of themselves securities, although they may be sold as part of an investment contract that is a securities offering or sale. Atkins makes the point that the U.S. Supreme Court has insisted that in assessing what is a security, and what is a securities offering or sale, the substance and not the form of a transaction must be examined (see discussion of what is and is not a security and the difference between securities and commodities in Section III below).

The token taxonomy Atkins proposes, based on existing securities laws and bills currently before Congress, is as follows:

- “Digital Commodities,” or, alternatively, “Network Tokens” should not be considered securities. These Digital Commodities/Network Tokens are linked to and derive their value from the operation of a decentralized Blockchain network, rather than from the expectation of profits based on the managerial efforts of others (see discussion of *Howey* test of what a security is in Section III below). Digital Commodities/Network Tokens have commonly been called “Currency Tokens,” and would include cryptocurrencies like Bitcoin and Ethereum’s Ether that are traded on the Blockchain, but which are not pegged to any underlying fiat currency or hard asset like a precious metal. Bitcoin and Ether have been treated as commodities by the SEC and are theoretically subject to CFTC regulation. Offerings of Currency Tokens are called “ICOs,” (Initial Coin Offerings), and need not be offered in compliance with the securities laws and regulations, although, as always, the anti-fraud provisions of the securities laws and regulations apply. See our “How to Handle an Initial Coin Offering,” available at [Kurtin PLLC Raising Capital](#).
- “Digital Collectibles,” according to Chairman Atkins, also should not be considered securities. These Digital Collectables are often things like artwork, music, memes, videos, and tokens conveying property rights to them. As with Digital Commodities, Digital Collectables do not derive their value from the expectation of profits based on the managerial efforts of others. Digital

Collectables have commonly been called “Non-Fungible Tokens,” or “NFTs,” and are probably the Digital Asset class least like either a security or a commodity, and not suitable for regulation as either.

- “Digital Tools,” according to Atkins, also should not be considered securities. Digital Tools are tokens that evidence a membership, identification, ticket, credential or title instrument. Purchasers of Digital Tools are also not expecting profits from the managerial efforts of others. Digital Tools have commonly been called “Utility Tokens,” and function as a kind of scrip to gain access to a particular platform and proprietary asset but are not generally useable as a currency or fungible. A non-digital example might be an Apple Card or a library card.
- Tokenized Securities, the fourth and final category in the token taxonomy identified by Chairman Atkins, are and should continue to be considered securities. Tokenized Securities are representations of ownership in a financial instrument maintained on a Blockchain that fall squarely into the definition of securities, such as equity in another company or fund, debt, real estate or otherwise. Stablecoins, a kind of digital cryptocurrency pegged to the value of an underlying asset, such as a fiat currency or precious metal, should arguably fall into the category of Tokenized Securities, distinct from Digital Commodities. Tokenized Securities have commonly been called “Security Tokens.” Offerings of Security Tokens are called “STOs” (Security Token Offerings) and must be offered in compliance with securities laws and regulations. Unlike an ICO, an STO looks – or should look - much like a non-digital token securities offering, whether public or private.

Chairman Atkins again emphasizes that although the first three categories in his token taxonomy are not in and of themselves securities, they can become part of an investment contract in which the buyer’s expected profit is based on the managerial efforts of others, thereby satisfy the *Howey* test, and become securities, a process generally called “securitization.” The way that digital assets that were not themselves securities but which have become securities by reason of being part of an investment contract is for the investment contract to be discharged – its promises in the form of representations, warranties and covenants fulfilled – or for the investment contract to be terminated, severing the underlying digital asset from the investment contract and restoring the digital asset to non-securities status – “desecuritization.”

Atkins concludes by stating that he hopes that, in addition to legislation pending before Congress, the SEC will promulgate tailored securities regulations for digital token offerings, containing specific

exemptions for them. He also expresses his support for non-SEC-regulated crypto exchanges, even for trading of digital tokens that are securities and which have been offered in accordance with securities regulations, noting that anti-fraud provisions will continue to apply to investment contracts, even when the underlying digital token is not itself a security, and further that to the extent that digital tokens are commodities in interstate commerce, they will also be subject to CFTC regulation.

III. Types of Securities and Difference from Commodities

Securities. To understand the import of Chairman Atkins' speech and policy prescriptions, it is necessary to understand what securities and commodities are and are not.

Securities are intangible assets and evidence of some rights that can be asserted against their issuer company; a stock certificate, though tangible, is evidence of the ownership of an equity security, not the security itself. The same goes for a bond or debenture, evidence of ownership of a debt security, not the security itself. Securities are not tangible assets, like a car, a house or a collection of baseball cards, and the sale of such tangible assets is not the sale of a security. Nor are all intangible assets securities. For example, an intellectual property right, like a copyright, patent, or trademark, is intangible but is not a security, and the sale or licensing of an intellectual property right is not the sale of a security just as sale of a baseball card collection or a car is not the sale of a security.

In the U.S., an offering is of a security if it exhibits the hallmarks of a security pursuant to the classic *Howey* test cited in Chairman Atkins' speech, named after a 1946 U.S. Supreme Court case¹: being an "investment contract" as required by s. 2(a)(1) of the Securities Act of 1933 (the "Securities Act") by reason of being a contract for the (1) investment of money (2) in a common enterprise (3) with a reasonable expectation of profits (4) to be derived from the efforts of others. If the offering is of a security, it is regulated in its initial issuance and in resales or exchanges by the SEC.

Five main types of securities have generally been considered securities under the *Howey* test: (A) Debt Securities, (B) Equity Securities, (C) Convertible Securities, (D) Derivative Securities, and (E) Asset-Backed Securities:

A. Debt Securities. A Debt Security is a loan, a promise by its issuer to repay the purchaser of the security, a lender, a fixed amount of borrowed principal plus interest by a set term or maturity date, after which they must be redeemed by the issuer. The Debt Security instrument can take three basic forms: (i)

¹ SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

long-term notes (notes with a maturity date of less than 9 months are generally considered commercial paper and not securities pursuant to a carve-out in s. 3(a)(3) of the Securities Act); (ii) bonds, long-term collateralized Debt Securities that may be issued by corporate or government Issuers; and (iii) debentures, long-term Debt Securities not backed by collateral. Bonds and debentures typically have a longer term than notes, usually five years or more. In addition to the Securities Act, certain Debt Security issuances must also comply with the Trust Indenture Act of 1939, which requires Debt Securities with a value of more than \$50 million to have a trustee appointed to protect security holders' interest and comply with other provisions. Unlike Equity Securities, Debt Securities do not dilute the issuer's equity ownership.

- B. Equity Securities. Equity Securities, unlike Debt Securities, represent a fractional ownership share in the issuer, the reason Equity Securities are called "shares" or "stock" and their holders "shareholders" or "stockholders." They are an identifiable percentage of ownership of the issuer and grant a right to a share of the proceeds upon sale of the issuer, or residual value upon liquidation of the issuer after payment of creditors. They also confer voting rights, to elect board of directors members, and otherwise. An issuer may pay dividends to its shareholders out of its profits but is not required to do so unless required to do so by its corporate charter. Shareholders may also benefit from an increase in the shares' value if they subsequently resell their shares, a "capital gain." Equity Securities come in two main classes: "Common Shares," and "Preferred Shares," which have various "preferences," or privileged attributes, compared to the Common Shares and which are therefore generally priced higher than Common Shares. For example, a preferred shareholder might be entitled to the preference of being paid back its equity before common shareholders in the event of the issuer's liquidation (but after creditors are paid). Preferred Share attributes may be heavily negotiated, whereas Common Shares are usually simple percentages of the issuer's value. It is more common for an issuer to have multiple classes, or at least series, of Preferred Shares than Common Shares. While Preferred Shares are classified as an Equity Security, they have many attributes of Debt Securities, such as a fixed interest rate, less volatility (owing to the liquidation preference), the afore-mentioned liquidation preference of being paid before Common Shareholders are paid, and others. Preferred Shares generally seek a less risky investment than Common Share purchasers and are in some ways more like debt lenders than equity shareholders.
- C. Convertible Securities. Convertible Securities can come in various types but usually mean either a Debt Security that is convertible into an Equity Security at a certain rate upon the occurrence of certain events, or a Preferred Share Equity Security that converts into a Common Share Equity Security, again at a certain rate upon the occurrence of certain events. Like Debt Securities, Convertible Securities

issued as debt generally do not dilute the Issuer's equity unless or until converted, which is why you will often see corporate capitalization tables calculated with Convertible Securities shown on an "as converted" basis, so that the effects of full potential dilution are shown. Often, for example, a Debt Security will be issued to a lender willing to fund a company's operations until a financing round, when the Debt Security converts into an Equity Security in the financing, usually at a discount to other investors in the round. As another example, Preferred Shares in an Issuer may be convertible into Common Shares at the time of an IPO or a sale of the issuer. Convertible securities come in types with differing attributes that are often heavily negotiated. A conversion feature of a Convertible Security may be convertible at the security holder's option, or it may be subject to "mandatory conversion," in which case the security holder does not have an option when the conversion-activating event occurs. A Convertible Security may feature both mandatory and optional conversion features. Securities having both debt and equity attributes like convertible debt or convertible Preferred Shares are sometimes called "hybrid" securities.

- D. Derivative Securities. A Derivative Security derives its value from that of an underlying security. Common Derivative Securities include "Options" and "Warrants," which give the holder the right, but not the obligation, to exchange the Derivative Security for the underlying security, and therefore play the market with the issuer's shares after acquisition. For example, a Preferred Share might be bundled with a Warrant to buy additional shares at a given price, which the Warrant holder will only exercise if the price, often called the "Strike Price" or "Exercise Price," is lower than the security's fair market value. When different securities, such as a Common Share and Preferred Share or Warrant, are sold in the same offering, they are usually referred to as a "Unit" of those securities, with the offering circular or prospectus identifying each security in the offered Units and their respective attributes. Options are usually classified as "call" options, giving the Option holder the right, but not the obligation, to buy more shares from the issuer by a certain date (the Option "Termination" or "Maturity" Date) at the Exercise Price or Strike Price, presumably because the shares to be purchased have become worth more than the Strike Price at which the Option holder is buying them (such options are called "in the money," while shares worth less than the Strike Price are called "underwater" and presumably won't be exercised by the Option holder). By contrast, "put" Options (less common than calls) give the Option holder the right, but not the obligation, to *sell* its shares to the issuer, and the dynamics are reversed: the Option holder will only want to exercise the put Option if the market value of shares in the issuer has gone down from the Strike Price at which the Option holder has the right to sell them back.

E. Asset-Backed Securities. Asset-backed securities are the result of a securitization process, whereby a bundle or basket of assets, which may or may not be securities themselves, are sold as a single security, whether as debt or equity, the point Chairman Atkins was making about digital tokens that are not securities in and of themselves being securitized by being the subject of an investment contract, and thereby become securities until the investment contract is discharged (performed) or terminated. Examples in the more familiar non-digital context are baskets of mortgages, baskets of insurance policies and similar assets. Investors would not be able to make reasonable investment decisions on the likelihood of a single, or even several, mortgages defaulting or life insurance policies having to pay out, because the sample size is too small, but bundled in large baskets, the law of large numbers means that the predictability required for informed investment decisions can be attained. The securitized assets can even be sliced up in “tranches” (French for “slices”), in which, for example, a tranche from the basket of mortgages deemed at higher risk of default can be sold to investors who have a higher appetite for risk, and who are paid a “Risk Premium” (they pay a lower price or receive more securities) than investors in a tranche of mortgages with less risk of default. This kind of slicing and dicing of tranches of securitized mortgages is often blamed as a major underlying cause of the 2008 - 2009 financial crisis; purchasers of tranches of securitized baskets of mortgages did not understand the risks they were taking.

Commodities. By comparison to securities, commodities are tangible goods that people can buy or sell. Examples are agricultural products, like orange juice, corn and pork bellies; metals, like gold and silver; and energy sources, like crude oil, liquid natural gas, and heating oil. In practice, the buying and selling of commodities in commodities exchanges is not done by paying cash and receiving the hard asset; when you purchase gold as a commodity, people do not come to deliver gold ingots that you store in the floor of your closet after reinforcing it; what are really bought and sold are contracts based on whether the buyer is betting that the price of the commodity will go up or down by the maturity date of the contract. Because the contract is based on the underlying value of the commodity, it is a derivative (of the commodity), just as an option or warrant is a derivative of an underlying security. In the case of commodities, however, the derivative contracts are called “futures” – bets on future price movements. Commodities in interstate commerce in the U.S. are regulated by the CFTC, in what is generally considered a less onerous regulatory regime than the SEC’s securities regulatory regime, in part because the CFTC has as its mission statement protection of the integrity of the U.S. derivatives markets, not the SEC’s specific mission of investor protection, which is why the crypto lobby has sought to have crypto regulated as commodities rather than securities, or not at all.

IV. Existing Legal/Regulatory Structure and Prior Legal/Regulatory Efforts

Prior to the SEC’s not-yet-enacted Project Crypto, there have been several federal and state initiatives to regulate cryptocurrencies and digital assets. We’ll review two of them here for insight as to how they might ultimately influence Project Crypto legislation and regulation: the federal GENIUS Act of 2025, and the Wyoming Digital Asset Laws.

A. The Genius Act. In July 2025, the first U.S. federal cryptocurrency legislation, the “GENIUS Act of 2025” (for Guiding and Establishing National Innovation for U.S. Stablecoins of 2025”) was enacted. The GENIUS Act is intended for the regulation of stablecoins pegged to the U.S. dollar. In brief, the GENIUS Act sets out a definition of “payment stablecoins” as digital assets issued for payment or settlement (including as margin or collateral) and redeemable at a predetermined fixed amount (for example, 1 stablecoin for 1 U.S. dollar). Stablecoin issuers will be required to hold at least 1 U.S. dollar as liquid capital reserves for every U.S. dollar stablecoin issued, and the reserve assets may only be used to redeem stablecoins and other specified purposes. Issuers must apply to state or federal regulators for authorization to issue stablecoins, and non-U.S. issuers may qualify, if operating under a comparable regulatory authority in their own jurisdiction. Auditing, periodic reporting and disclosure standards are also specified. Issuers are also subject to the Bank Secrecy Act and will be subject to tailored anti-money laundering rules. Finally, the GENIUS Act provides that payment stablecoins, as defined in the Act, are not securities and therefore can be traded on cryptocurrency exchanges without securities registration and are not federally insured, which issuers are prohibited from misrepresenting. The GENIUS Act will take effect 18 months after passage or 120 days after passage after publication of final regulations in the Federal Register. Our client advisory on the GENIUS Act with greater detail and a link to the Act’s text can be found [Here](#).

B. Wyoming Cryptocurrency and Digital Asset Legislation.

Since 2019, Wyoming has developed a cutting-edge regime for investment in crypto/digital assets and Decentralized Autonomous Organizations (“DAOs”), Blockchain-based decentralized entities that make and implement decisions using “smart contracts,” software code that executes programmed actions when data inputs are given and which can record the DAO’s ownership interests, governance structure and voting rights on the blockchain. See our “Forming Crypto/Digital Asset Funds,” available at [Kurtin PLLC Information Technologies, Blockchain & Internet](#).

The 2019 Wyoming Digital Asset Statute (W.S. 34-29-101 *et seq.*) (the “WY Digital Asset Law”), as amended, defines an umbrella category of all digital assets, and then sets out subcategories:

- “Digital Asset” as “a representation of economic, proprietary or access rights that is stored in a computer readable format and is either a digital consumer asset, digital security or virtual currency;”
- “Digital Consumer Asset” as a Digital Asset “used or bought primarily for consumptive, personal or household purposes,” including open Blockchain tokens constituting intangible personal property and any other Digital Asset not constituting a Digital Security or a Virtual Currency;
- “Digital Security” as a Digital Asset that constitutes a security, as defined in the WY Statutes, but excluding Digital Consumer Assets and Virtual Currency; and
- “Virtual Currency” as a Digital Asset “used as a medium of exchange, unit of account or store of value” AND not recognized as legal tender by the United States (in other words, the Presidential Executive Order inquiry into, among other things, creating a “digital dollar” would not be Virtual Currency under the WY Digital Asset Statute (see, “U.S. Executive Order Issued to Develop Cryptocurrency/Digital Asset Regulatory Framework,” March 10, 2022, available at [Kurtin PLLC Information Technologies, Blockchain & Internet](#)).

The WY Digital Asset Law is clearly part of the inspiration for Chairman Atkins’ token taxonomy, and makes clear that the definitions of “Digital Consumer Asset,” “Digital Security” and “Virtual Currency” are mutually exclusive; all are “Digital Assets,” but none are more than one of the subcategories at a time, with Digital Consumer Assets forming the residue category for Digital Assets not fitting into the Digital Security or Virtual Currency categories. The WY Digital Asset Statute was amended by adding a new section 106, called the “WY Utility Token Act,” classifying open Blockchain tokens whose primary purpose was consumptive (i.e., not as a currency or medium of exchange, etc.) as intangible personal property and therefore a Digital Asset.

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