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March 27, 2025

BY ELECTRONIC SUBMISSION

Crypto Task Force Chairman and Commissioner Hester M. Peirce
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0213

Re: Recommendations Regarding a Safe Harbor and Crowdfunding Regime for Collectible Tokens (NFTs)

Dear Crypto Task Force Chairman and Commissioner Peirce:

Andreessen Horowitz ("a16z" or "we") appreciates the opportunity to provide recommendations regarding (1) the circumstances under which transactions of collectible tokens—crypto assets[1] whose value, utility, or significance is primarily derived from being a record of ownership or rights with respect to a tangible or intangible good (commonly referred to as "non-fungible tokens" or "NFTs")—should be excluded from federal securities laws and (2) the creation of a new crowdfunding regime for creators (artists, musicians, etc.) undertaking creative endeavors using collectible tokens. We welcome opportunities to meet with Securities and Exchange Commission ("Commission") staff, answer any questions that the Commission may have, and discuss our proposal below in more detail.

Federal securities laws have limited application to collectible tokens—they do not extend to crypto assets that do not constitute securities under the Securities Act of 1933 or transactions of crypto assets that are not otherwise subject to federal securities laws. However, the analysis of when a transaction in a collectible token may be subject to securities laws can be subjective and difficult, creating uncertainty for creators and entrepreneurs and slowing the pace of innovation without providing investor protections. The purpose of this submission is to urge the Commission to resolve this uncertainty through two measures:

- First, the Commission should create a safe harbor (either through a Commission-level policy statement, by providing Commission-level guidance, or by adopting formal rules) that provides objective conditions under which ordinary transactions of collectible tokens are excluded from securities laws. The criteria for eligibility for the safe harbor should be based on the principle that if the asset does not give rise to the risks the federal securities laws are intended to address, the application of such laws is unwarranted and inappropriate. Not all transactions of collectible tokens will be able to avail themselves of the safe harbor. On the contrary, *only* those transactions of collectible tokens which *do not* engender the risks that Section 5 and other federal securities laws were designed to address should be eligible.[2]

[1] For the purposes of this discussion, by crypto assets, we mean a digital form of property that is recorded on, and can be possessed and transferred person-to-person, through the use of a blockchain network or other similar technology.

[2] In Section III, we have outlined a proposed three-part test to assess the eligibility for such a safe harbor for a given transaction of collectible tokens that we believe would exclude such transactions from federal securities laws. While the Commission currently does not have jurisdiction over transactions meeting such criteria (because federal

- Second, the Commission should establish new crowdfunding regulations for transactions of collectible tokens that are not eligible for the above safe harbor because they may engender the risks federal securities laws were intended to address, such as certain capital raising transactions of collectible tokens designed to attract investments for the funding of future creative endeavors. This crowdfunding pathway should be narrowly tailored to empower creators to create while mitigating risks to investors, collectors, and other market participants through the use of blockchain technology.

Through these two measures the Commission can establish clear limits with respect to the application of federal securities laws to transactions of collectible tokens, including crowdfunding transactions. By applying these measures prospectively *and* retroactively, to both existing works and future creative endeavors, the Commission can foster creative innovation and safeguard creators, collectors, and other market participants from becoming subject to the retroactive application of federal securities laws by regulators in the future. If effectively crafted, these measures would help fulfill the Commission's mandate of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, while also promoting responsible innovation in blockchain technology.

A16z is a venture capital firm that invests in seed, venture, and late-stage technology companies, focused on bio and healthcare, consumer, crypto, enterprise, fintech, and games. A16z currently has more than $74 billion in assets under management across multiple funds, with more than $7.6 billion in committed capital for crypto funds. In crypto, we primarily invest in companies using blockchain technology to develop protocols that people will be able to build upon to launch Internet businesses. Our funds typically have a 10-year time horizon, as we take a long-term view of our investments, and we do not speculate in short-term crypto asset price fluctuations.

I. Introduction

We strongly agree with the objectives of the Commission's Crypto Task Force ("Task Force") to provide guidance on the application of the federal securities laws to the crypto asset market and set forth practical policies for fostering innovation and safeguarding investors. As the Task Force executes its mandate, we recommend that it provide clarity on the application of securities laws to transactions of collectible tokens.

Though early in their development, collectible tokens already have a wide range of use cases. They are often issued in limited or otherwise well-defined editions and provide ownership of or specific rights to (such as intellectual property rights) works of art, musical compositions, collectible merchandise, and video game assets. Further, they are often used to represent tokenized tickets, event souvenirs, receipts for redeemable tangible items, and loyalty points. Many collectible tokens are simply digital proofs of ownership of existing goods like online imagery or digital swords that can be used in one or more video games. Their value is embedded in the asset itself to which the collectible token is linked—from being a record of ownership of a tangible or intangible good (or specific rights

securities laws are not implicated), we nonetheless believe a safe harbor could be useful for providing additional clarity without suggesting an expansion of federal securities regulation to cover such transactions. Importantly, the failure to meet the conditions specified should not create a presumption that any given transaction of a collectible token is subject to securities laws. Rather, such transactions should be assessed under traditional approaches to the application of federal securities laws.

therein)—rather than being created by or derived from the ongoing efforts of the collectible token's creator or any third party. This is not to say that collectible tokens cannot derive value from the ongoing efforts of any creator or third party, but that they have inherent *economic independence* separate and apart from such creator or third party. This means that collectible tokens generally do not have the inherent characteristics of securities and there should be a strong presumption against the application of federal securities laws to transactions of collectible tokens.[3]

Nevertheless, market participants currently confront substantial uncertainty in evaluating whether offers and sales of collectible tokens constitute securities transactions and thus require registration under Section 5 of the Securities Act of 1933 (the "Securities Act") and whether secondary transactions of such assets similarly implicate federal securities laws. Subjecting collectible tokens to registration is not only largely unnecessary, but would also cause the market in everyday goods and creative works such as watches, paintings, and collectibles—to borrow a phrase from Commissioner Peirce—"[...] to wither in the shadow of legal ambiguity." To her point, confusion about U.S. regulatory policy in this area has already led to many projects leaving the United States, effectively driving portions of the market for these collectibles offshore.

This uncertainty is in large part due to the chilling effect of uncontested enforcement actions against collectible token companies. In 2023, one such company settled rather than litigate Commission allegations that their token offerings were "[...] unregistered offering[s] of crypto asset securities in the form of purported non-fungible tokens."[4] In bringing this action, the Commission asserted that the collectible tokens in question were "[...] investment contracts and therefore securities."[5] But despite this averment, regulators, policymakers, and outside experts raised significant questions.[6] Commissioners Peirce and Uyeda dissented, writing that "The handful of company and purchaser statements cited by the order are not the kinds of promises that form an investment contract," and going on to elaborate that, "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."[7] Democratic Congressman Ritchie Torres (NY-15) agreed, attesting that through such charges former Commission Chairman Gensler was "[...] misclassifying collectibles, art, and tickets as securities."[8]

These assertions dovetail with Commission staff guidance, which suggests that a collectible token transaction may not fulfill one or more of the prongs of the *Howey* test. In its *Framework for "Investment Contract" Analysis of Digital Assets*, Commission staff clarified that price appreciation resulting from

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[3] Miles Jennings, Jai Ramaswamy, Scott Walker, Michele Korver, David Sverdlov, & Aiden Slavin, *SEC RFI: A Control-Based Decentralization Framework for Securities Laws,* a16z crypto (Mar. 13, 2025), https://a16zcrypto.com/posts/papers-journals-whitepapers/control-based-decentralization-framework-securities-laws/.

[4] U.S. Securities and Exchange Commission, SEC Charges Impact Theory, LLC with Conducting Unregistered Offering of Crypto Asset Securities (Aug. 28, 2023), https://www.sec.gov/newsroom/press-releases/2023-163.

[5] *Id.*

[6] Kate Knibbs, *Musician Sues SEC, Saying NFTs Are Art—Not Securities*, WIRED (Feb. 27, 2024), https://www.wired.com/story/jonathan-mann-brian-frye-sec-lawsuit-nfts-art-securities/.

[7] Hester M. Peirce & Mark T. Uyeda, Statement on Impact Theory Settlement, *U.S. Securities and Exchange Commission* (Aug. 28, 2023), https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-nft-082823 (dissenting statement).

[8] Rep. Ritchie Torres (@RepRitchie), *X* (Mar. 24, 2025, 4:34 PM), https://x.com/RepRitchie/status/1838652756246122507.

external market forces impacting the supply and demand for an underlying asset should not be considered "[...] 'profit' under the *Howey* test."[9] In other words, much like a work of art, simply because a collectible token appreciates in value does not mean that it satisfies the "expectation of profits based on the efforts of others" prong of the *Howey* test. Further, the Commission's approach has created significant perverse incentives because creators of collectible tokens can insulate themselves from regulatory scrutiny by failing to support or promote their work after the initial sale. The Commission's history of enforcement against creators of collectible tokens has left market participants with substantial uncertainty as to whether transactions in a given collectible token implicate federal securities laws. Moreover, they face a regulatory landscape that punishes them for undertaking efforts or planning to undertake efforts that may tangentially benefit tokenholders.

Recognizing this lack of clarity as well as the considerable benefits of collectible tokens (see Section II), recent legislative and regulatory efforts have endeavored to create rules that are fit-for-purpose: mitigating risks while facilitating innovation. H.R. 10544, the New Frontiers in Technology (NFT) Act, is a bipartisan bill that aims to specify the treatment of certain collectible tokens under the securities laws, clarifying that those that are developed primarily for personal, family, or household consumption and not marketed by an issuer or promoter primarily as an investment opportunity and that do not promise future actions explicitly designed to increase the value of the token should not be considered investment contracts.[10] H.R. 4763, the Financial Innovation and Technology for the 21st Century Act ("FIT21"), likewise proposes a study on collectible tokens in part to ascertain the similarities and differences between such tokens and other digital assets.[11] We also appreciate that, as part of its present Request for Information, the Task Force is seeking input about the security status of certain categories of crypto assets, including collectible tokens.[12] These domestic sentiments are also echoed internationally. In its *Future financial services regulatory regime for cryptoassets*, the UK HM Treasury concludes that digital assets "[...] that are more akin to digital collectibles or artwork than a financial service (in the general sense) or product should not be subject to financial services regulation."[13]

In line with these proposals, we strongly agree with Commissioner Peirce that creators deserve clear guidance about whether and how the securities laws may apply to collectible tokens.[14] To achieve this important goal, we recommend that the Commission create a safe harbor for offers and sales by

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[9] U.S. Securities and Exchange Commission, Framework for "Investment Contract" Analysis of Digital Assets, Division of Corporation Finance (Apr. 3, 2019), https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets.

[10] U.S. Representative William Timmons, NFT Guidance Act of 2024, U.S. House of Representatives (Dec. 20, 2024), https://timmons.house.gov/uploadedfiles/12.20.24_nft_bill_text.pdf.

[11] 118th Congress (2023-2025), *H.R.4763 - Financial Innovation and Technology for the 21st Century Act* (May 6, 2024), https://www.congress.gov/bill/118th-congress/house-bill/4763.

[12] Hester M. Peirce, There Must Be Some Way Out of Here, U.S. Securities and Exchange Commission (Feb. 21, 2025), https://www.sec.gov/newsroom/speeches-statements/peirce-statement-rfi-022125.

[13] His Majesty's Treasury, Future Financial Services Regulatory Regime for Cryptoassets: Response to the Consultation and Call for Evidence (Oct. 2023), https://assets.publishing.service.gov.uk/media/653bd1a180884d0013f71cca/Future_financial_services_regulatory_regime_for_cryptoassets_RESPONSE.pdf.

[14] Hester M. Peirce & Mark T. Uyeda, Statement on Stoner Cats Settlement, *U.S. Securities and Exchange Commission* (Sept. 13, 2023), https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-stonercats-091323 (dissenting statement).

creators of collectible tokens meeting certain conditions. Not all transactions of collectible tokens should be able to avail themselves of this safe harbor. On the contrary, *only* those offers and sales which *do not* engender the risks that Section 5 and the federal securities laws were designed to address should be eligible. Importantly, the failure to meet the conditions specified herein and qualify for the safe harbor should not create a presumption that any given transaction of a collectible token is subject to securities laws. Rather, such transactions should be assessed under traditional approaches to the application of federal securities laws.

For capital raising transactions for creative endeavors that *do* engender the risks that Section 5 and the federal securities laws were designed to address and are therefore not eligible for the safe harbor, the Commission should consider establishing a new, tailored crowdfunding regime for creators leveraging collectible tokens. Existing crowdfunding exemptions (Regulation Crowdfunding, Regulation A+, and Regulation D) are poorly suited for creative endeavors. Current exemptions were designed for businesses seeking investment capital, not for creators developing art and building communities around their work. These frameworks impose burdensome disclosure requirements that may be appropriate for startups with financial projections but are ill-suited for creative projects, where future success depends more on artistic vision and community engagement than financial performance. Unlike traditional businesses, artists generally do not have balance sheets, revenue forecasts, or material risks in the same way that companies do, making traditional securities disclosures an awkward and often unhelpful tool for addressing information asymmetries.

The emergence of AI-generated content is also rapidly changing the creative economy—an abundance of new artistic work will make it increasingly difficult for individual creators to stand out. As a result, success in this new landscape will likely depend on a creator's ability to foster a strong community around their work. A key mechanism for doing so is conveying ownership of creative works (or key rights therein) to fans, allowing them to participate in the cultural and economic life of an artist's creations. Collectible tokens offer an ideal vehicle for this by granting digital ownership of art, music, and other creative assets, enabling creators to connect and engage their communities in ways that traditional models do not allow. However, absent a clear crowdfunding framework tailored to these assets, creators confront confusion in identifying compliant ways to distribute these collectible tokens at scale. By creating a new, streamlined crowdfunding regime specific to collectible tokens, the SEC can foster legal clarity, reduce barriers for creators, and ensure consumer protections are appropriately balanced with the realities of the creator economy.

Importantly, the creation of this crowdfunding pathway should not establish a presumption that all capital-raising transactions for collectible tokens are subject to federal securities laws. Patronage of creators has long been appropriately outside of the scope of federal securities laws, and it should remain so. Likewise, digital collectibles that confer an interest in a particular good should generally not invoke the securities laws, subject to relevant facts and circumstances. However, where that activity goes beyond patronage and implicates an investment contract that engenders the risks that Section 5 and the federal securities laws were designed to address, the crowdfunding pathway should offer relief.

II. Collectible Tokens Promote Innovation and Mitigate Risks

Before discussing how collectible tokens create opportunities for creators, entrepreneurs, collectors, and other market participants, we provide relevant general background information on this

technology. Collectible tokens are typically non-fungible given that they are often tied to a unique good (or instance of a good). As a result, they are in effect synonymous with "NFTs." NFTs evolved from early experiments with blockchain-based digital ownership before being formalized with the creation of the Ethereum ERC-721 Non-Fungible Token Standard in 2017, spurring innovation in digital art, collectibles, and web3 applications.[15] At its core, an NFT is simply a means of identifying and representing a unique asset. To achieve this, NFTs typically bear unique IDs, and often link to a URL containing metadata in JSON format. This metadata may also include one or more URLs to a digital file, such as an image. In other cases, the metadata (including the content of the NFT) is stored directly on the applicable blockchain to ensure the immutability of the NFT as a digital artifact. If the NFT links to (or directly includes the data for) an image, it is usually the "face" of the token, and is displayed by applications that assist users in discovering collectible tokens. As the token "lives" on a blockchain, its provenance and history are recorded, and if the blockchain is public, then this information is transparent to all. NFTs can be transferable or non-transferable. Their metadata and any linked digital file(s) are populated by their creator. Together, NFTs can certify authenticity, convey ownership or licensing rights, serve as credentials or identity verification, provide redemption rights for intangible or tangible goods, and more. Likewise, a collectible token's uses may change over time. The potential categories and use cases for such tokens are endless, much like a blank piece of paper.

The following categories are common examples of collectible tokens (note that some collectible tokens can be a combination of the examples below):[16]

- **Digital Art Collectible Tokens**: One of the most prevalent collectible token use cases, digital art collectible tokens can certify authenticity and ownership of drawings, paintings, graphic art, photos, video art, and more. These collectible tokens enable artists to designate ownership of an original work and empower collectors to display their art across multiple digital spaces.[17]
- **Music Collectible Tokens**: Musicians can generate collectible tokens linked to unique content, like a digital audio file, and attach relevant metadata, such as the name of their band. These collectible tokens allow musicians to exert greater control over how their work generates value and can allow fans to demonstrate their support for an artist.[18]
- **Online Game/Virtual World Collectible Tokens**: Collectible tokens can be used to establish and transfer ownership of in-game items (e.g., character outfits, in-game land, and in-game accessories). Unlike traditional digital game items, for which establishing ownership relies on private databases that a central controller can modify at will, collectible tokens allow for true ownership and control over in-game items, enabling holders to use, sell, or transfer them from game to game.
- **Sports Collectible Tokens**: Sports collectible tokens can grant their holder a limited, non-exclusive license to digital media, such as an image or video clip. In many cases, sports collectible tokens closely resemble physical collectibles (e.g., baseball cards), but can also be

[15] Ethereum Foundation, *ERC-721 Non-Fungible Token Standard, Ethereum Developer Documentation*, https://ethereum.org/en/developers/docs/standards/tokens/erc-721/.
[16] Note that there are many additional types of NFTs that can be used for many different types of applications (including identity, credentials, etc.). In this proposal, we have focused on NFTs relating to creative endeavors, formation of communities, and growing brands, as these are the areas where we have seen the most friction arise as a result of the regulatory uncertainty arising under federal securities laws.
[17] OpenSea, *What is an NFT*, OpenSea Learn (May 8, 2023), https://opensea.io/learn/what-are-nfts.
[18] OpenSea, *What are music NFTs?*, OpenSea Learn (Apr. 18, 2023), https://opensea.io/learn/what-are-music-nfts.

linked to commemorative memorabilia or voting rights to decide on, for example, a game's most valuable player, enabling fans to showcase their support for their team.

- **Physical Asset/Rights Collectible Tokens:** Collectible tokens grant their holder ownership of a physical asset (e.g., a Pokemon card) or the right to access one or more real-life events, resembling deposit receipts and tickets to movies or sporting events. These tokens can then act as a permanent and verifiable ownership or a souvenir for the holder to signify proof of attendance.

For creators and entrepreneurs, collectible tokens offer a variety of novel ways to engage with fans and customers. For example, creators can reward fans for their devotion or for attending events. Brand loyalty programs can leverage this technology to incentivize customers to perform certain actions, such as visiting a store or purchasing an item in exchange for a digital asset memorializing their action. They can also use collectible tokens to grant holders the opportunity to participate in special events. This has fostered dynamic, reciprocal relationships between creators and brands and their audiences, leading to deeper engagement. As a result, collectible tokens serve as a powerful tool for digital community- and brand-building, enabling the cultivation of a loyal community that is empowered to participate in—and help shape—a creator's or company's evolution.[19] Companies are already taking note; Nike and Reddit, for instance, have developed digital collectibles of their own.[20]

Importantly, collectible tokens provide significant benefits to collectors and market participants by enabling true digital ownership akin to physical goods. Because collectible tokens are stored on a blockchain, their ownership can be verified independently of any centralized intermediary. A user's wallet—not a third party—stores the collectible token, and only a user can decide what platforms have access to it and how it is used. This characteristic also enables cross-platform portability. For example, while players' items in traditional video games are limited to their closed-loop environment, collectible tokens enable web3 gamers to seamlessly port their assets from one virtual world to any other world that recognizes those assets. This is a significant paradigm shift: without blockchains, purchasers of digital goods (like assets in a video game) are just renting digital goods; blockchains enable them to become owners. And because this ownership enables interoperability, it also enables anyone to build systems that enhance the utility and value of a collectible token, not just the token's creator.

Creators also stand to benefit from enforceable digital property rights. Indeed, they may even need them given the challenges that are likely to arise from other emerging technologies. Perhaps no field will be more affected by the rise of artificial intelligence (AI) than the creative industries. Consider a music producer: if an AI system is capable of generating—near-instantaneously—a catalog of compositions in response to simple user-prompts, why engage a human music producer? Such services are developing across the creative industries, with AI systems authoring stories, editing films, and

[19] As Harvard Business School Professor and a16z Research Partner Scott Duke Kominers concludes, they " [...] will usher in the next generation of customer loyalty programs, creating structures that benefit both businesses and consumers in new ways [...] And they can transform simply owning a product into a close-knit community experience."
Scott Duke Kominers & Steve Kaczynski, The NFT Staircase, *a16z crypto* (Oct. 7, 2023), https://a16zcrypto.com/posts/article/the-nft-staircase/.

[20] Steve Kaczynski & Scott Duke Kominers, The Everything Token: How NFTs and Web3 Will Transform the Way We Buy, Sell, and Create (Penguin Publishing Group, 2024).

generating unique visual compositions.[21] AI tools like DALL-E, Midjourney, and Stable Diffusion are already changing how designers, filmmakers, and other creatives work.[22] Yet despite training on works produced by human creators, many AI models do not compensate artists for their contributions. The generative system Midjourney, for example, does not remunerate, or even credit, its sources.[23] As AI systems continue to increase in utility and sophistication, a new method is required to ensure that content providers can benefit from these technologies and are properly recognized and compensated for their work.

Collectible tokens offer a solution to this economic imbalance. They not only allow creators to build direct relationships with their audiences and reduce dependence on intermediaries, but also enable them to unlock new economic opportunities.[24] Such tokens can be deployed to uniquely identify an artist's work online, ensuring that artists are credited and paid whenever their work is used. In this way, blockchain-based networks can facilitate a process by which AI models can access valuable training data and artists can be compensated for the use of their work. Such a system could also offer readily customizable terms to ensure that creators' unique needs are fulfilled. For example, artists could customize the extent to which their work may be remixed, and enforce those rules through blockchain smart contracts and copyright restrictions.

Further, collectible tokens enable *economic independence* from their creator. Like physical collectibles, a collectible token can utilize blockchain technology and onchain licenses to grant true and enforceable ownership over a digital asset that is not dependent on third-party maintenance or discretion.[25] For example, those ownership rights may include intellectual property rights that can provide economic value separate and apart from the collectible token creator's or any third party's efforts, such as standardized royalty rights to streaming revenues for a completed song. In addition, and unlike traditional intellectual property arrangements, blockchain-based collectible tokens can be designed to derive value autonomously through decentralized and programmatic blockchain systems. For example, onchain content distribution protocols, including web3 social media platforms, could enable collectible tokens to accrue value based on engagement, usage, or algorithmic reward mechanisms, all without human control or subjective decision-making. Similarly, marketplaces for music could develop where market participants speculate on the potential popularity of a given song, with trading fees directly accruing to the owners of the collectible tokens that represent ownership of such song. Because these economic dynamics operate transparently and autonomously onchain, they mitigate risks of manipulation, asymmetric access to information, and conflicts of interest, ensuring that collectible tokens function as independent, market-driven assets rather than financial instruments tied to issuer discretion and control.[26]

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[21] Oxford Internet Institute, *AI and the Arts: How Machine Learning is Changing Artistic Work* (Feb. 4, 2022), https://www.oii.ox.ac.uk/wp-content/uploads/2022/03/040222-AI-and-the-Arts_FINAL.pdf.
[22] Kevin Roose, *A.I.-Generated Art Is Already Transforming Creative Work*, New York Times (Oct. 21, 2022), https://www.nytimes.com/2022/10/21/technology/ai-generated-art-jobs-dall-e-2.html.
[23] Chris Dixon, *Read Write Own: Building the Next Era of the Internet*, Random House (2024).
[24] Chris Dixon, *NFTs and a Thousand True Fans*, cdixon.org (Feb. 27, 2021), https://cdixon.org/2021/02/27/NFTs-and-a-thousand-true-fans.
[25] Miles Jennings & Chris Dixon, *The Can't Be Evil NFT Licenses,* a16z crypto (Aug. 31, 2022), https://a16zcrypto.com/posts/article/introducing-nft-licenses/.
[26] Importantly, the economic independence of a collectible token could be undermined in cases where the creator retains mechanisms of control. With respect to intellectual property rights, if a creator retains the ability to determine or change the intellectual property rights associated with a collectible token, the creator could substantially impair

For the foregoing reasons, transactions in collectible tokens likely do not constitute securities transactions and regulation should not disincentivize their use. The Commission's aforementioned enforcement actions risk precisely this outcome, chilling growth in the creative industries. As we discussed in our response to the present Request for Information,[27] the Commission's approach is also at odds with its approach to traditional industries—just as the buyer of a vintage car in a dealership does not enter into a securities transaction, neither should the purchaser of a unique digital vehicle in a video game. Indeed, even if the gamemaker endeavors to create new highways in the virtual world and increase its number of drivers, tangentially leading to this virtual car appreciating in value and enabling the owner to resell it to another player at a higher price, federal securities laws generally should not apply simply because the actions of the gamemaker to create a fun and engaging game had the effect of increasing the car's value. To apply federal securities laws in these situations is impractical and unnecessary. It is hard to imagine gameplayers deciding to purchase a virtual good for use in their favorite games on the basis of a securities law mandated prospectus. Further, these types of transactions have long been excluded from federal securities laws—extending them now merely because the technology that underlies them is different risks stifling innovation and ordinary digital commerce.

A better approach is possible. Because collectible tokens have intrinsic and embedded value, and because blockchains guarantee digital property rights over collectible tokens, collectible tokens can be designed so that they are not controlled by their creators—their creators cannot unilaterally affect or structure the risks of such assets in a manner that warrants the application of federal securities laws (see Section III).[28] This is similar to real world collectibles, but it is a dramatic improvement from non-blockchain digital collectibles (e.g., movie access licenses purchased through Apple, song access licenses purchased through Spotify, game assets purchased from Fortnite, etc.), where the user can only ever rent, not truly own, their digital property.

In accordance with the core principle set forth in our response to the present Request for Information, when control is eliminated (as may be the case with collectible tokens), the application of securities laws should be limited, when control is present (as may be the case with creators seeking to fund creative endeavors), traditional (but modernized) approaches should be used. Following this principle, the Commission should, under the circumstances detailed in Sections III and IV below, exclude collectible tokens from registration requirements under federal securities laws.

III. Safe Harbor Proposal: Conditions Under Which Collectible Token Transactions Should be Excluded

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the value of the token. For example, if the inherent value of a collectible token arises from the owner's ability to use the intellectual property associated with the token for commercial purposes, any ability of the creator to remove such commercial rights could significantly impact the economic value of the collectible token. For this reason, it is critical that where the value of a collectible token is derived from intellectual property rights associated with the token or other economic mechanisms, that such mechanisms are not subject to unilateral control by the creator.

[27] Jennings, Ramaswamy, Walker, Korver, Sverdlov, & Slavin, *supra* note 3.

[28] Dennis S. Corgill, *Securities as Investments at Risk*, 67 Tul. L. Rev. 861 (1992), https://www.tulanelawreview.org/pub/volume67/issue4/securities-as-investments-at-risk.

While collectible tokens provide significant benefits for creators, entrepreneurs, collectors, and other market participants, transactions in these crypto assets may admittedly still pose risks. As such, only transactions that do not give rise to the risks that the federal securities laws intend to address should be eligible for the safe harbor under consideration.

A three-part test can be used to assess whether an exclusion would be appropriate for a given transaction of collectible tokens. The safe harbor should require that: (1) the transaction is of a collectible token; (2) the transaction does not involve the creation of any post-sale interests in the creator or any third party; and (3) the transaction is not marketed or promoted by the creator or its designees as an investment opportunity that suggests purchasers should expect financial returns based on the ongoing efforts of the creator or any third party.

Only those collectible token transactions that meet each of these requirements should be eligible for the safe harbor. Where these criteria are met, the safe harbor should apply to transactions of collectible tokens, regardless of whether they were issued before or after the creation of the safe harbor, meaning that it should apply both prospectively and retroactively, including to pre-existing collectible tokens. Further, the safe harbor should specify that secondary market transactions of collectible tokens continue to be excluded from the application of federal securities laws, absent a significant change in circumstances following the qualifying distribution that materially alters the "economic reality" of ongoing transactions in the previously distributed assets. Importantly, the failure to meet these conditions and qualify for the safe harbor should not create a presumption that transactions in a given collectible token are subject to securities laws. Rather, such transactions should be assessed under traditional approaches to the application of federal securities.

Each condition for the safe harbor is discussed in detail below.

A. Collectible Tokens

As an initial matter, only crypto assets that are genuinely designed and structured as collectible tokens should be eligible for this safe harbor. To qualify, a collectible token must derive its value, utility, or significance from being a record of ownership of a tangible or intangible good. This necessitates that the collectible token: (1) represents a unique, identifiable asset (or instance of an asset); and (2) confers actual ownership over the asset it represents (alternatively, where a collectible token represents a set of specific rights in an existing asset, it must confer those actual specific rights). First, in order to be unique and identifiable, the object must be a specific, clearly defined, non-fungible asset (or instance of such asset), like a digital artwork or a digital item in a video game. The asset must be distinguishable from others, and verifiable onchain. Second, in order to confer ownership, the valid owner must receive clear, perpetual, and enforceable digital property rights to the object (such as the right to display the object in virtual galleries, or rights under copyright to use, reproduce, distribute, or create derivative works of the object) onchain.[29]

Digital collectibles that meet the foregoing requirements have intrinsic value or utility, meaning that their value or utility is inherently not dependent upon or controlled by any third party. This makes them fundamentally different from ordinary securities, where value is inherently dependent upon and

[29] Jennings & Dixon, *supra* note 25.

controlled by a third party, like the creator. In other words, they are *economically independent* of any third party.[30] As a result, where collectible tokens have value or utility at the time of an offer and sale, the risks intended to be addressed by federal securities laws are significantly reduced and the application of such laws is not warranted. For example, if the digital collectible is a digital character, digital item, or plot of digital land intended to provide utility within a video game, then if that character, item, or land is usable in the game at the time of sale, the application of federal securities laws is unwarranted.

Conversely, where a collectible token has no intrinsic value or utility, its value could be entirely dependent upon and controlled by a third party, in which case more traditional (but modernized) approaches to the application of federal securities laws is warranted (such as the crowdfunding pathway proposed in Section IV). In such cases, it may be necessary to evaluate the "economic reality" of any offer and sale of the collectible token by a creator.

B. Limitation on Post-Sale Interests in the Creator or Any Third Party

In order to mitigate the risk that transactions of a collectible token do implicate an investment scheme, offers and sales of a collectible token should only qualify for the safe harbor if they do not accompany the granting to the purchaser of a post-sale interest (a right, title, or interest) in the creator itself or any third party. Even where an offer and sale relates to a collectible token that has intrinsic value or utility, if that offer or sale is accompanied by post-sale interests in the creator or any third party, the risk profile of the transaction is fundamentally altered. In particular, such post-interests may create an "economic reality" that fosters a reasonable expectation of profits to be derived from the efforts of others, introducing precisely the risks that the federal securities laws are designed to address. These include exposing purchasers to potential misrepresentations, creating reliance on the creator's performance, and giving rise to information asymmetries.

Post-sale interests blur the line between the simple exchange of a collectible token and an investment scheme, making it impossible to objectively discern whether the collectible token's value or utility is derived from the intrinsic properties of the asset or if it is derived from the promise of profits derived from ongoing efforts. In the latter case, purchasers may reasonably expect continued efforts by the creator or a third party to enhance the value of their token or the project to which the token relates, which is a hallmark of an investment contract under *Howey*. That is not to say that the presence of post-sale interests *will* always implicate *Howey,* but post-sale interests could undermine the economic independence of the collectible token.

Given that collectible tokens often confer intellectual property rights to the owner, as explained above, it is important to distinguish such interests in existing objects, which bolster the economic independence of the asset, from post-sale interests in a creator or third party, which potentially undermine it. For example, a collectible token that grants the owner the right to stream and remix a song, with royalties accruing to the tokenholder, bolster the economic independence of the collectible token. Whereas a collectible token that grants the owner a share of all revenue of the artist's future performance revenue undermines that independence. Consequently, only where post-sale interests are granted in the *creator* or *any third party* (as opposed to rights to use and exploit an existing object), traditional (but

[30] Jennings, Ramaswamy, Walker, Korver, Sverdlov, & Slavin, *supra* note 3.

modernized) approaches to the application of federal securities laws and subjective analysis of risks are likely warranted.

Given the foregoing, only transactions involving collectible tokens that do not create post-sale interests in the creator or any third party provide the level of objectivity regarding the underlying value or utility of the collectible token that should make them eligible for a clearly delineated safe harbor. Where these lines are blurred, more subjective assessments are necessary.

C. Limitations on Marketing & Promotional Activity

Just as the presence of post-sale interests may critically alter purchaser expectations with respect to the purchase of a collectible token, so too may the manner in which it is marketed and promoted. Fundamentally, federal securities laws are not intended to prohibit speculation. Rather, they are intended to mitigate risks associated with investments.[31]

Where the offer and sale of a collectible token is marketed or promoted by the creator or its designees as an investment opportunity from which purchasers should expect financial returns based on the ongoing efforts of the creator or any third party, federal securities laws may be warranted as purchasers may form expectations of profits that closely resemble the criteria addressed in the *Howey* test. If safe harbor protections were extended to collectible tokens marketed in this way, creators could similarly bypass regulatory scrutiny while still engaging in conduct that closely resembles a securities offering merely by engaging in "collectible token-theatre." However, where offers and sales of collectible tokens satisfy the above criteria of this safe harbor (intrinsic value or utility and no post-sale interests) and where offers and sales are not marketed or promoted in this manner, a strong case can be made that any expectation of profits based on the efforts of the creator or any third party is not reasonable and, accordingly, a securities transaction is not present. Importantly, the granting of intellectual property rights and the existence of onchain economic mechanisms that may yield financial returns to the owner of a collectible token and its existing linked object independently of the efforts of the creator or any third party bolster, rather than undermine, this argument.

Given the foregoing, the safe-harbor should attempt to objectively classify communications in terms of their likelihood of fostering speculation or inducing investment and require compliance with clear marketing and promotional restrictions. The establishment of such restrictions is not without precedent—so called "quiet period" rules are well understood in traditional capital markets. In crafting such restrictions, the Commission should seek to provide objective and easily understandable rules, while applying anti-fraud protections and ensuring consistent treatment with comparable economic arrangements beyond blockchains. We believe these rules should incorporate the following:

- Allowances for fair representations of a collectible token's artistic or consumptive value or utility, or of the efforts of the creator to create such collectible token prior to sale.
- Allowances for factual ordinary-course updates that may be relevant to the intrinsic value or utility of the collectible token, including updates to underlying digital worlds in which the collectible token may have utility, or discussions of intellectual property rights and onchain and

[31] *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975) (holding that an instrument must have investment characteristics in order to qualify as a security).

programmatic economic mechanisms that may accrue value to the collectible token independently of the efforts of the creator or any third party.
- Allowances for claims that the importance of the work to which the collectible token is linked may grow with time.
- Allowances for factual representations of the ability of collectors to purchase the collectible token via secondary markets.
- Prohibitions on promotional statements and solicitations that discuss potential financial profit, economic returns, or efforts to create secondary market liquidity.
- Prohibitions on forecasting price targets for the collectible token.
- Allowance for mass advertisements or general public statements consistent with the foregoing.

For the avoidance of doubt, nothing in the safe harbor should be interpreted to prohibit the normal promotional activities that are commonplace in the creative professions. Musicians hold concerts and participate in TV interviews; artists and galleries hold receptions, publish books, sponsor museum exhibitions; authors conduct book tours; video game manufacturers launch advertising campaigns; clothing manufacturers create and promote rare and often valuable limited editions of shoes, t-shirts, bags, and other objects. The effect of such activities may be to make artwork more valuable, but these activities do not transform such assets into securities. Indeed, categorizing them as such would risk undermining the marketplace in everyday goods and creative works.

The same principle should apply for special benefits that may be part of the "utility" in the form of promotional benefits that accompany collectible tokens. Many individuals and companies provide utility to highly engaged community members or customers, including the ability to transfer these benefits at times (e.g. to bring a "plus one" to the special collector dinner with the artist), without giving rise to even remote consideration of there being an offer and sale of securities or the applicability of SEC jurisdiction.

By restricting how collectible tokens are marketed, without unduly restricting common promotional practices from the non-digital world, safe harbor eligibility can be preserved for genuine projects, reducing the risk of regulatory arbitrage and maintaining a clear distinction between collectible tokens and securities.

IV. Crowdfunding Proposal: Conditions Under Which Creators Should Be Able to Raise Capital for Creative Endeavors

As discussed above, creators may wish to utilize collectible tokens to attract investment and raise capital to fund creative endeavors. In certain instances, these transactions may engender the risks that Section 5 and the federal securities laws were designed to address, and may not be eligible for the above safe harbor. As a result, the Commission should consider establishing a new tailored crowdfunding regime for creators. A new and compliant pathway for funding this type of creative activity is appropriate given that current crowdfunding requirements were designed for conventional securities offerings and have onerous requirements that are neither relevant nor helpful to investors investing in creative endeavors. For example, Regulation CF requires ongoing business, capital structure, risk, and financial disclosures that are not relevant to creative endeavors.

A crowdfunding pathway tailored for collectible tokens could leverage the criteria of the safe harbor described above, and, as such, would more effectively foster capital formation from the public. In particular, the crowdfunding regulations applicable to collectible tokens should require that: (1) the asset to be delivered to the investor in exchange for the investment must be a collectible token; (2) the transaction must not involve the creation of any post-sale interests in the creator or any third party, other than a right to the delivery of the collectible token and associated object(s); and (3) the transaction is not marketed or promoted as an investment opportunity that suggests purchasers should expect financial returns based upon the efforts of the creator or any third party beyond the delivery of the collectible token and the creator's efforts to build a reputation and following.

In addition, the Commission should consider additional criteria for the crowdfunding pathway in order to protect investors, including:

- Disclosure requirements regarding the nature of the ownership rights conferred to the owner of the collectible token, including a description of any intellectual property rights;
- Appropriate guardrails limiting the amount that may be raised in the aggregate per annum and from any individual pursuant to such pathway, consistent with and appropriately tailored in light of limits in existing crowdfunding exemptions;
- Mandatory rights of redemption for investors during a short specified period of time following investment; and
- Limitations on the breadth and scope of any offering—a creator offering a collectible token representative of all future creative endeavors over their lifetime strongly resembles a post-sale interest in the creator, whereas a collectible token representative of a single creative endeavor (a song or album or painting) does not.

The popularity of platforms like Kickstarter demonstrates that there is strong demand for patronage-based crowdfunding, but these models typically stop short of offering fans any lasting economic participation. By leveraging collectible tokens and a tailored crowdfunding pathway, creators could be empowered to not only raise funds but also deliver real economic value to supporters through verifiable ownership, transferable rights, and participation in the success of the creative work itself—all while preserving appropriate safeguards for investor protection.

* * * *

We greatly appreciate the opportunity to provide comments on these important matters, and we welcome engagement with the Commission on these issues.

Respectfully submitted,

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