

## SEC says Bitcoin and Ether are not Securities

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“I believe every ICO I’ve seen is a security and we have jurisdiction and our federal securities laws apply.” Clayton, J., Testimony, Sen. Banking, Housing and Urban Affairs Committee (Feb. 6, 2018).

This was SEC Chairman Jay Clayton’s testimony on February 6, 2018 to the Senate Banking Committee in a hearing on the SEC oversight of virtual currencies. The Chair’s sentiments in February were in line with the SEC’s historic approach to asserting jurisdiction over the nascent cryptocurrency marketplace. Beginning as early as 2013, the SEC began issuing investor alerts asserting the Commission’s jurisdiction over cryptocurrencies that functioned as securities. SEC Investor Alert, Ponzi Schemes Using Virtual Currencies, July 1, 2013. This early assertion of jurisdiction has been confirmed through the SEC’s position in the DAO Report, and reinforced through multiple SEC enforcement actions.

Four months after the Chair’s comments before the Senate Banking Committee, there are signs that the SEC is refining its opinion on the extent of its jurisdiction. Last week, Chairman Clayton stated that Bitcoin and cryptocurrencies like Bitcoin are not securities. See link [here](#). This in itself is not particularly progressive. Bitcoin has widely been considered only an asset used as a store of value or method of payment, and it was never subject to an ICO. The CFTC has already claimed Bitcoin as a commodity, and even called it a currency (though in a twist of regulatory nuance it is not a “foreign” currency). See *In re Coinflip, Inc.*, CFTC No. 15-29 (Sept. 17, 2015), See *In re BFXNA Inc., d/b/a Bitfinex*, CFTC No. 16-19 (Jun. 2, 2016). Nevertheless Clayton’s recent comments are some of the most concrete “no action” language the market has heard from the SEC regarding cryptocurrencies.

Last week, there was even more interesting news. William Hinman, the Director of the Division of Corporation Finance, in prepared remarks stated that “based on my understanding of the present state of Ether, the Ethereum network and its decentralized structure, current offers and sales of Ether are not securities transactions.” Full speech available [here](#). Behind Bitcoin, Ether is the next largest traded cryptocurrency by volume (see market cap statistics [here](#)), and many other cryptocurrencies utilize the Ethereum structure and employ Ether as a method of payment or investment. With Clayton

and Hinman's comments the SEC is providing the market some needed clarity on the Commission's jurisdictional limits. As expected, the market reacted positively to news, with Ether's price rising 10% intra-day, and Bitcoin rising 6%.

Hinman's speech is significant for another reason. Ether started out as an ICO. Development of the Ethereum network was funded by participants purchasing Ether. Over time, however, Ether's characteristics have changed; it is produced exclusively through mining efforts, and the network it operates on is decentralized. Ether has essentially morphed into a method of payment more akin to Bitcoin. Hinman addresses this change in his speech, and concedes that coins can change over time from an ICO to a currency. He specifically emphasizes "that the analysis of whether something is a security is not static and does not strictly inhere to the instrument."

It is uncertain how the SEC would seek to regulate a security that, over time, transforms into a currency or from a currency into a security, but this concession from the Commission is important for the crypto space as it provides some needed guidance to the marketplace.

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National Law Review, Volume VIII, Number 169

Source URL: <https://natlawreview.com/article/sec-says-bitcoin-and-ether-are-not-securities>