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| Reply form  on the Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments for MiCA implementation |
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**Responding to this paper**

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 April 2024.**

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA\_QUESTION \_MIC3\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA\_MIC3\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_MIC3\_ABCD\_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open Consultations” -> Consultation Paper on guidelines on conditions and criteria for the classification of crypto-assets as financial instruments”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

# All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites crypto-assets issuers, crypto-asset service providers and financial entities dealing with crypto-assets as well as all stakeholders that have an interest in crypto-assets.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | Ubisoft Entertainment SA |
| Activity | Non-financial counterparty |
| Are you representing an association? |  |
| Country/Region | France |

**Questions**

1. **Do you agree with the suggested approach on providing general conditions and criteria by avoiding establishing a one-size-fits-all guidance on the concepts of financial instruments and crypto-assets or would you support the establishment of more concrete condition and criteria?**

<ESMA\_QUESTION\_MIC3\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_MIC3\_1>

1. **Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as transferable securities? Do you have any additional conditions and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.**

<ESMA\_QUESTION\_MIC3\_2>

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<ESMA\_QUESTION\_MIC3\_2>

1. **Based on your experience, how is the settlement process for derivatives conducted using crypto-assets or stablecoins? Please illustrate, if possible, your response with concrete examples**

<ESMA\_QUESTION\_MIC3\_3>

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<ESMA\_QUESTION\_MIC3\_3>

1. **Do you agree with the conditions and criteria to help the identification of crypto-assets qualifying as another financial instrument (i.e. a money market instrument, a unit in collective investment undertakings, a derivative or an emission allowance instrument)? Do you have any additional conditions, criteria and/or concrete examples to suggest?**

<ESMA\_QUESTION\_MIC3\_4>

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<ESMA\_QUESTION\_MIC3\_4>

1. **Do you agree with the suggested conditions and criteria to differentiate between MiFID II financial instruments and MiCA crypto-assets? Do you have concrete conditions and/or criteria to suggest that could be used in the Guidelines? Please illustrate, if possible, your response with concrete examples.**

<ESMA\_QUESTION\_MIC3\_5>

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<ESMA\_QUESTION\_MIC3\_5>

1. **Do you agree with the conditions and criteria proposed for NFTs in order to clarify the scope of crypto-assets that may fall under the MiCA regulation? Do you have any additional conditions and/or criteria to suggest? Please illustrate, if possible, your response with concrete examples.**

<ESMA\_QUESTION\_MIC3\_6>

**INTRODUCTION**

We welcome the opportunity to provide feedback to the European Securities and Markets Authority on the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments pursuant to Article 2(5) of the Market in Crypto-Assets regulation (“MiCA”).

Ubisoft[[1]](#footnote-2) is a leading entertainment and video game company that sees blockchain and non-fungible tokens (“NFTs”) as a key technology to develop unique experiences for our players by creating digital objects that possess significant meaning and utility for players.

In the entertainment and video-game sectors, NFTs are typically used as in-game collectible and playable items, such as skins, characters, avatars, cards or inventory items, and form an integral part of our games, enhancing players’ experience significantly. For example, in Ubisoft Quartz, the NFTs represented weapon skins, outfits and other tactical gear that players could use to equip their character and play within the game Ghost Recon Breakpoint. In Champions Tactics: Grimoria Chronicles, a blockchain-based, PVP game in development at Ubisoft, the first NFT collection offers pictures with unique visual traits, enabling players to customize their in-game profile and gain early-access to in-game playable NFTs.

As such NFTs offer real built-in utility in the game or platform they were originally issued in, and thanks to blockchain technology, they can also be transferred to other users and potentially even be used across different platforms or games. This interoperability allows NFTs to gain new or additional utilities across ecosystems.

In an increasingly digitized world, we see NFTs as part of the future of Europe’s creative industries, such as online entertainment and gaming – much like figurines, trading cards, or other merchandise were an integral part of yesterday's experience.

We support EU policymakers’ efforts to provide for an appropriate legislative framework around NFTs. Our industry is already subject to **extensive consumer protection, e-commerce, distance marketing and data privacy protection** requirements at both the European and national levels. However, we are concerned that ESMA’s present assessment might inadvertently and inappropriately subject the NFTs we create to financial-type regulation, which would neither be justified for our activities, nor offer any additional protection for NFT owners.

We wish to share our perspectives on the proposed guidelines – as we understand them –along with our rationale.

**THE PROPOSED GUIDELINES EXCEED ESMA’S MANDATE WITHOUT ADDING CLARITY**

ESMA, along with other European Supervisory Authorities (“ESAs”), was tasked with preparing the technical standards and guidelines detailing the application of MiCA to issuers, offerors, and service providers of crypto assets. This mandate[[2]](#footnote-3) includes issuing guidelines on the **conditions for the qualification of crypto assets, including NFTs[[3]](#footnote-4), as financial instruments under the Markets in Financial Instruments Directive II (MiFID II).**

While the draft guidelines establish a framework for classifying crypto assets as financial instruments, **they fail to address the specific conditions under which NFTs might also be classified as such**. Instead, ESMA introduces criteria and conditions for classifying NFTs as crypto assets under MiCA, thereby exceeding its explicit mandate. This approach not only pre-empts but also encroaches upon the European Commission’s comprehensive assessment of the NFT market developments, which aims to assess the need and feasibility of regulating NFT offerors and related service providers[[4]](#footnote-5).

Additionally, Guideline 8 fails to clarify the provisions in MiCA by adding broad and inclusive language that can be interpretated differently by NCAs.

**A reversal on the exclusion of NFTs within MiCA**

We believe the current draft guidelines fail to align with MiCA’s intended scope, potentially capturing most, if not all, NFTs – for the following reasons:

* **NFT value interdependency:** The guideline's reliance on value interdependency, as currently drafted, overlooks the intrinsic nature of NFTs. Unlike fungible tokens, which share “**common**” trading price set on the relevant exchange/trading platform, NFT’s **merely have a “selling price”. Their value is set individually by the owner**, influenced by both subjective elements (like personal and emotional value) and objective factors (such as scarcity, utilities, attributes, visual appeal). For instance, in the video game industry, NFTs’ value is derived from the experiential, progression and personal engagement of the player. As such, NFTs’ value evolves over time[[5]](#footnote-6). This dynamic valuation considers the full context in which an NFT operates, including its interactive digital environment and the player’s influence on its characteristics. While the market value of similar NFTs may influence an owner’s pricing decisions, **only the holder independently sets the selling price**. Therefore, value interdependency may be a relevant indicator of fungibility if it refers to a “**common price**”. Otherwise, it risks mislabeling NFTs as fungible, due to perceived value similarities, despite their inherent non-interchangeability.
* **Visual uniqueness and series:** Limited editions items, from digital garment to collectibles and paintings are common across the creative industries, including art, video game and fashion. For instance, video games frequently offer players access to similar weapons, characters, skins etc. Similarly, even though NFT profile pictures in a collection appear visually similar, their unique details and subjective appreciation will make them non readily interchangeable. In that sense, MiCA only provides that large series or collections may be an indicator of fungibility[[6]](#footnote-7). However, the size of a collection or series should only be considered an indicator of fungibility when weighed against the relevant market it addresses. For example, the size of a collection of 10,000 art pieces addressing a small collector market will be a much stronger sign of fungibility than the same number of in-game swords intended for a game with a 3,000,000-player base.
* **Uniqueness of rights**: The guidelines are ambiguous on whether NFTs need to offer unique rights or utility in addition to visual uniqueness. If considered cumulative, these criteria could unnecessarily broaden the scope of MiCA to capture NFT collections that otherwise offer visual and value uniqueness. Although NFTs may offer the same rights, such as in-game use or ownership of limited art piece, their significance and utility can differ for each user. For example, in video games, a collection of characters, weapons etc. might possess similar attributes and grant identical rights (e.g., the right to play in the game). However, and as outlined above, the specific right and utility of such NFTs can be unique to each player and evolve over time, based on the player’s progression and engagement and other owned NFTs. Similarly, in the art industry, even though owners of digital art by the same artist have identical rights to display their collection, each piece remains unique and cannot be considered interchangeable. Therefore, assessing the uniqueness of NFT rights or utilities requires a holistic approach of the user’s experience (cf. footnote 5). This is why MiCA looks at the uniqueness of rights only as an alternative criterion, rather than a cumulative one. Only when the assets represented are neither unique nor non-fungible should the rights themselves be unique and non-fungible for the NFT to qualify as such[[7]](#footnote-8).

In essence, MiCA seeks to regulate crypto assets that are readily interchangeable, likely to have a financial use, while recognizing that NFTs, due to their unique nature and lower risk profile, do not pose the same risks as fungible crypto assets. This distinction was crucial in excluding NFTs from MiCA’s scope. We support this perspective and believe that Guideline 8:

* exceeds ESMA’s mandate under Article 2(5) of MiCA by addressing when NFTs qualify as crypto assets rather than as financial instruments,
* does not clarify when NFTs shall be deemed to have a financial use (which is the specific risks that MiCA aimed to address), leading to **major** **legal ambiguity in** Europe’s regulatory treatment of NFTs,
* may disproportionately impact sectors **like gaming and entertainment, which do not present the same risks**,
* in its current drafting, could in practice lead to a one-size-fits-all approach as the conditions to be excluded from MiCA would be too restrictive (therefore capturing nearly all NFTs),
* risks stifling innovation in a burgeoning industry, crucial to Europe's ambition to lead in policy frameworks for emerging technologies, Virtual Reality and The Metaverse. Regulatory agility, innovation-friendly policies and a commitment to a dynamic and inclusive digital economy, are essential for Europe to leverage its strengths and experiences and maintain competitive in the digital age.

**RECOMMENDED PATH FORWARD**

For the reasons outlined above, we recommend that Guideline 8 be excluded from the set of guidelines determining the qualification of crypto assets as financial instruments.

While we recognize that consumer protection is of utmost importance to foster innovation in a safe environment, we encourage ESMA to wait for the European Commission’s comprehensive assessment of the NFT market developments, so that any further guidelines and/or regulation are well-considered and align with the Commission’s findings.

It is, therefore, paramount that EU policymakers, NFT market participants and other stakeholders work together to explore the evolving landscape of NFTs and accurately assess their diverse applications, potential financial uses and associated risks – as foreseen by MiCA. Such collaboration is essential to ensure that regulatory approaches remain effective, proportionate, and adaptable to emerging trends and technologies.

Should ESMA insist on addressing the qualification of NFTs as crypto assets under the current draft guidelines, it is crucial to carefully consider their intrinsic characteristics, functions, and the intended utility. While unicity can be a key factor, the way NFTs are designed and used, in practice, should also play a role. Particularly in the gaming and entertainment sectors, NFTs use cases are fundamentally like any other consumer product and should not be regulated as financial products merely because they leverage blockchain technology. This is the approach adopted by the Financial Action Task Force (“FATF”) in their guidelines on virtual assets and virtual asset service providers: NFTs “***that are in practice used as collectibles rather than as payment or investment instruments***”[[8]](#footnote-9) do not fall under the FATF definition of “Virtual Assets”. We support the FATF’s functional and technologically neutral approach, which reserves financial regulations to genuine financial products.

In-game NFTs and collectibles are designed for and used by regular consumers who are already safeguarded by a comprehensive framework of legal and regulatory protection. We urge ESMA to adopt a functional and “*in concreto*” approach in tailoring the guidelines, to reflect the unique characteristics and/or rights of NFTs, taking into account their strong potential in fostering creativity, innovation and cultural expression.

Therefore, to align with both MiCA and the FATF principles and to maintain the EU’s competitive edge, we consider the following adjustments to Guideline 8 (in *blue)*are indispensable:

***PROPOSED AMENDMENTS***

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***Guideline 8 – Conditions and criteria attached to NFTs***

***67.*** *In assessing the uniqueness and non-fungibility of a crypto-asset, such crypto-asset may be considered as unique and not fungible if its characteristics and/or the rights it provides distinguish it from the other tokens**issued by the same (and any other) issuer. ~~In essence, a crypto-asset that lacks genuine uniqueness due to the presence of comparable and interchangeable attributes should fall within MiCA’s regulatory purview.~~  In conducting this assessment,* *national competent authorities should adopt a case-by-case “in concreto” approach based on a range of indicators including (but not limited to) intrinsic characteristics of a given NFT, its utility function and the overall digital experience in which the NFTs are embedded. Crypto-assets that are unique and not fungible with other crypto-assets and that are in practice used as collectibles or consumer goods rather than as payment or investment instruments should not fall within MiCA’s regulatory purview.*

***68.*** *It is important to distinguish between truly unique crypto-assets and those that might appear unique due to specific technical identifiers or standards. In that sense, the criterion of uniqueness should not solely rely on the crypto-asset’s technical specificities. The attribution of a unique identifier to a crypto-asset does not automatically qualify a crypto-asset as non fungible. The technical features (e.g. token identification code, unique token ID) and standards used (e.g. ERC-721 standard, BEP-721 standard) could remain one of the indicators to be taken into account ~~an indicator~~ but should not be determinative for national competent authorities and market participants when assessing the fungibility and uniqueness of a given crypto-asset.*

***69.*** *For a crypto-asset to be considered unique, its value should be intrinsically connected to its individual attributes and/or the specific utility it confers to its holder. A key aspect that ~~should~~ could be considered is the value interdependency that may exist between NFTs, or which determines if the value of one crypto-asset ~~influences~~ is tied to the valuation of another, possibly indicating a lack of uniqueness. For example, an NFT representing a piece of digital artwork may lose its uniqueness if it is part of a larger collection, and its value is identical with ~~to influenced by~~ other crypto-assets in the series. To express it differently, if the valuation of a crypto-asset originates from a common trading price, defined as “the unique reference trading price for a given asset class at which, at any point in time, a buyer can buy and a seller can sell”, ~~comparison~~ between crypto-assets possessing comparable attributes that could possibly make them interchangeable, the crypto-asset ~~should~~ may not be exempted from MiCA. Therefore, the notions of uniqueness and fungibility within the meaning of MiCA seemed to be detached from that of negotiability on a secondary market.*

***70.*** *NFTs that are part of a series, or a collection ~~can~~ could possibly be qualified as crypto-assets in the meaning of MiCA if they are readily and at all times interchangeable. Such crypto-assets could be considered as readily and at all times interchangeable in practice if they share ~~equivalent~~ identical characteristics and can be mutually substituted. ~~This can occur in scenarios where the market views certain NFTs as having similar value despite unique attributes.~~ The existence of a series or a collection - and more precisely its size - could ~~should~~ thus be considered as an indicator of fungibility without being an overriding criterion[[9]](#footnote-10).*

***~~71.~~*** *~~For instance, in the case of a collection of NFTs where the uniqueness of each cryptoasset can be questioned (e.g. several NFTs representing the same image with minor modifications) this collection should fall under MiCA. On the other hand, in the case of a series of NFTs in the manner of a series of numbered serigraphs or pictures, the numbering of which would have an impact on the value and uniqueness of the NFTs, these cryptoassets could be seen as a series of crypto-assets that are non-fungible.~~*

***72.*** *In addition, the utility function of NFTs can also play a role. In some cases, NFTs might confer similar utility or access rights. Owning an NFT might grant access to exclusive events or benefits. Here, the specific attributes of the NFT may be assessed in light of ~~become less relevant compared to~~the utility it provides, and should be assessed on a case-by-case basis ~~making different NFTs functionally interchangeable for practical purposes.~~*

***73.*** *Fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible. Such fractional parts involve dividing a NFT into several other crypto-assets, allowing multiple investors to collectively own a portion of such fractional-NFT. It differs from a collection of NFTs in that each fraction of a fractionalised NFT represents a fractional ownership of the NFT. It would be thus possible to reconstitute the entire NFT by holding all the fractional parts. The outcome this operation of fractionalisation may consist for each fraction to possess identical attributes and inherently devoid of uniqueness. The “interdependent value test” could help in the classification of these types of crypto-assets.*

***74.*** *It should be noted that by 30 December 2024, the European Commission shall submit a report to the European Parliament and Council detailing crypto-asset advancements, focusing on the market evolution of unique and non-fungible assets and evaluating the need for their regulatory oversight.*

***Annex II - Draft Guidelines on the classification of crypto-assets as financial instruments***

***134****. National competent authorities and market participants should consider that to be unique, NFTs should be considered distinct and irreplaceable where their characteristics and/or the rights they provide are not identical to the other crypto-assets issued by the same (or any other) issuer.*

***135****. National competent authorities and market participants should not base the classification of a crypto-asset as unique and non-fungible solely on its technical specificities, such as the attribution of a unique identifier or the use of specific technical features and standards. In conducting this assessment,* *national competent authorities should adopt a case-by-case “in concreto” approach based on a range of indicators including (but not limited to) intrinsic characteristics of a given NFT, its utility function and the overall digital experience in which the NFTs are embedded.*

***136****. An “interdependent value test” is one of the indicators that may be taken into account ~~should be conducted~~ by national competent authorities and market participants as part of their assessment in order to classify a crypto-asset as unique and non-fungible considering: (i) if the value of the crypto-asset primarily stems from the unique characteristics of each individual asset and/or the utility/benefits it offers to its holder; (ii) the extent to which the existence of a common trading price could be seen as an indication of the fact that the value of given crypto-asset is tied to the value of another possibly indicating a lack of uniqueness; ~~interconnection of various types of crypto-assets influences the value of one another in such a way that the NFT has no value of its own that would be decorrelated from the other NFTs in the series;~~ as well as (iii) the unique characteristics that distinguish these crypto-assets from others.*

***~~137~~****~~. National competent authorities and market participants should consider that despite their inherent non-fungible nature, certain NFTs may be part of a group of crypto-assets exhibiting interconnected value dynamics. This interconnectedness should become a factor when these crypto-assets influence each other’s value, thereby challenging their perceived “uniqueness”.~~*

***138****. When evaluating the uniqueness of a crypto-asset, NCAs may consider ~~should focus on~~ the features that contribute to its distinct value. If a crypto-asset's value ~~ation largely~~ solely stems from its comparability to others with similar attributes, rendering them readily and at all times interchangeable, it could possibly ~~should~~ not warrant an exemption under MiCA.*

***139****. The assessment of uniqueness and fungibility in the context of MiCA should be considered independently of the asset's negotiability on secondary markets. The ability to trade a crypto-asset on such markets does not inherently affect its classification under MiCA as unique or non-unique. ~~NFTs that are issued "in a large series or collection" could possibly, on a case-by-case basis, may be considered fungible and thereby covered by MiCA.~~*

***140****. National competent authorities and market participants should also consider that fractionalised NFT (F-NFTs) may be qualified as a crypto-asset within the meaning of MiCA . As part of their assessment, national competent authorities and market participants should consider whether the crypto-assets represent a partial ownership stake in a single unique and non-fungible token; if fractional parts of a unique and non-fungible crypto-asset, when considered separately, are also deemed unique and non-fungible; whether these fractional parts share identical attributes or characteristics; and the possibility of reconstructing complete ownership of the unique and non-fungible token by aggregating all its fractional components.*

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As the consultation process progresses, we encourage ESMA to engage in further dialogue with industry stakeholders, including developers, creators, and users of NFTs. Such engagement is essential to ensure that regulations reflect market developments, protect consumers effectively, and promote Europe as a leader in the global digital economy.

Ubisoft remains committed to contributing to this dialogue and to developing innovative digital experiences that are safe, enjoyable, and beneficial for our players. We look forward to continuing to work with regulators and other stakeholders to achieve these shared objectives.

<ESMA\_QUESTION\_MIC3\_6>

1. **Do you agree with the conditions and criteria proposed for hybrid-type tokens? Do you have any additional conditions and/or criteria to suggest that could be used in the Guidelines?  Please illustrate, if possible, your response with concrete examples.**

<ESMA\_QUESTION\_MIC3\_7>

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<ESMA\_QUESTION\_MIC3\_7>

1. Ubisoft is one of the world’s leading creators, publishers and distributors of video games. Founded in 1986, its international headquarters are located in France and the group employs more than 19,000 people in over 50 countries around the world, including more than 10,000 Iin 17 countries across Europe. For more information about Ubisoft, see [here](https://www.ubisoft.com/en-us/company/about-us/). [↑](#footnote-ref-2)
2. See Article 2(5) of MiCA: “By 18 months after the date of entry into force of this Regulation, ESMA shall, for the purposes of paragraph 4, point (a), of this Article issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010 on the conditions and criteria for the qualification of crypto-assets as financial instruments.” [↑](#footnote-ref-3)
3. See Recital 14 of MiCA [↑](#footnote-ref-4)
4. See Article 142(2)(d) of MiCA [↑](#footnote-ref-5)
5. For example, two different weapons powerful enough to kill the final boss may have comparable value, but one may be more valuable to a player depending on the other in-game items in their inventory, their playing preferences and progression etc. In trading card games, players aim to win by crafting a deck that leverages card synergies. The effectiveness of these card combinations depends on the game’s evolving “meta”, which changes as players experiment with new strategies and cards. The value of cards with similar attributes can fluctuate based on the shifting meta and the characteristics of other cards, as determined by the players. Thus, shared value or attributes do not render NFTs readily interchangeable, as each retains unicity in the distinct utility the owner imparts on them. [↑](#footnote-ref-6)
6. See Recital 11 of MiCA. [↑](#footnote-ref-7)
7. See Recital 11 of MiCA “The assets **or** rights represented should also be unique and non-fungible in order for the crypto-asset to be considered unique and non-fungible.” [↑](#footnote-ref-8)
8. Financial Action Task Force – Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Assets Service Providers - <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Updated-Guidance-VA-VASP.pdf.coredownload.inline.pdf> [↑](#footnote-ref-9)
9. *In assessing fungibility, the size of the series or collection should be weighed against the targeted market.* [↑](#footnote-ref-10)