

CRYPTO ASSETS

SEC Issues Helpful Guidance Regarding Treatment of Crypto Assets under Federal Securities Laws

By Spencer G. Feldman

On March 17, 2026, the Securities and Exchange Commission (SEC) published an interpretation classifying five types of crypto assets to assist with determining which ones constitute “securities” within the meaning of the US federal securities laws. While any offering and sale to investors of crypto assets deemed to be securities will require registration with the SEC pursuant to Section 5 of the Securities Act of 1933 or an available exemption such as Regulation D, this official guidance provides potential issuers with a roadmap to determine if that applies to them.

In a Fact Sheet accompanying the interpretation (available at SEC Release Nos. 33–11412; 34–105020; File No. S7–2026–09), the SEC stated that the purpose of the long-needed interpretation was to (1) provide a coherent taxonomy for digital assets, including digital commodities, tools and securities, (2) address how a non-security crypto asset may become part of an “investment contract” subject to securities regulation, and (3) clarify the application of federal securities laws to protocol mining, protocol staking and wrapping crypto activities.

The SEC’s interpretation was joined by the Commodity Futures Trading Commission (CFTC), which indicated that certain non-security crypto assets could meet the definition of a “commodity” and be governed under the Commodity Exchange Act of 1936.

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SEC’s Interpretation Provides a Coherent Framework Outside of Enforcement

Generally, the interpretation provides that, based on the SEC’s analysis of the attributes of five crypto asset categories, the SEC does not view “digital commodities,” “digital collectibles,” “digital tools” or stablecoins to be securities under the US federal securities laws. However, “digital securities” are considered by the SEC to be “investment contracts,” and therefore “securities,” as defined in Section 2(a)(1) of the Securities Act of 1933 and Section 3(a)(10) of the Securities Exchange Act of 1934. The determination of whether a digital security amounts to an investment contract involves the multi-factor *Howey* test (described below) to see if it represents (1) an investment of money, (2) in a common enterprise, (3) with profits to come from the efforts of others.

To provide clearer guidance to the crypto industry, the SEC classified crypto assets into five categories. The SEC defined “digital commodities” as crypto assets that are intrinsically linked to and derive their value from the programmatic operation of an already “functional” crypto ecosystem. These digital commodities already allow their owners to pay and receive transaction fees or carry governance rights like the ability vote for updates to the blockchain. “Digital collectibles,” by contrast, were defined as crypto assets that are designed to be collected and may represent or convey a limited license or intellectual property rights to artwork, music, videos, trading cards or digital representations, or references to Internet memes, characters, current events or trends.

The SEC indicated that, while digital collectibles may carry a programmed royalty that compensates a creator or prior owner without jeopardizing that

classification, if those rights are fractionalized as a business venture, the classification might change.

“Digital tools” were defined as crypto assets that perform a practical function (and their value is derived from that function), such as a membership, ticket, credential, title instrument or identity badge. “Stablecoins” were defined as payment stablecoin issued by a permitted payment stablecoin issuer that maintains a consistent value, often at \$1 by fully backing their supply. Helpfully, stablecoins have already been definitionally excluded from the definition of a security under the GENIUS Act, which was enacted last year.

None of these four crypto asset categories were found to meet the definition of a “security” under federal securities laws because they lack intrinsic economic properties or rights such as conveying some right to future income or profits from a business or providing them with voting rights.

Only “digital securities” (sometimes referred to as “tokenized securities”), defined as financial instruments where the record of ownership is maintained in whole or part on or through one or more cryptonetworks, were found to meet the test as securities. Harking back to the SEC’s 2017 investor bulletins at the time of initial coin offerings, the SEC made clear that the registration requirements under federal securities law apply to those who offer and sell securities in the United States, *regardless* of whether: (1) the issuing entity is a traditional company or a decentralized autonomous organization, (2) those securities are purchased using US dollars or virtual currencies, or (3) they are distributed in certificated form (off the blockchain) or through distributed ledger technology (on the blockchain).

For further clarity, the SEC addressed how a non-security crypto asset may become a security subject to the SEC’s registration requirements. For example, in the case of an initial coin offering, an issuer offers a crypto asset as an inducement for an investment of money in a common enterprise with *representations* or *promises* to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits. According to the

SEC’s recent interpretation, this categorization of a crypto asset as a “digital security” is based largely on how a project markets or promotes the crypto assets’ ability to generate profits based on managerial efforts.

Representations that could give rise to registration requirements could take the form of written or oral agreements, public communications through the issuer’s website or social media accounts, direct private communications between the issuer and purchasers, regulatory filings publicly available to purchasers or documents attributable to the issuer such as a whitepaper. Promises at or before the time of sale that communicate an actionable business plan can also appear to create a reasonable expectation of profit or equity-like upside, turning the asset into a “digital security.”

Additionally, the SEC clarified that common crypto asset activities like protocol mining, protocol staking and wrapping do not involve the offer or sale of a security if the initial token is a non-security.

This Is the SEC’s Most Explicit Attempt to Apply Traditional Frameworks to Crypto Assets Outside of Enforcement

The SEC has engaged with crypto assets for more than a decade but has not addressed the unique aspects of the crypto asset markets. Instead, often in enforcement actions, the SEC has looked to the test developed in 1947 by the US Supreme Court in *SEC v. W.J. Howey Co.* and its progeny to determine whether crypto assets, and transactions involving such assets, fall within the purview of the federal securities laws.

According to the SEC’s Fact Sheet, prior to 2025, the SEC failed to develop a tailored regulatory framework that accommodates crypto asset innovation and entrepreneurship and instead focused its resources on bringing enforcement actions, which created substantial uncertainty in a fast-growing asset class.

The apparent catalyst for the SEC’s recent interpretation appears to be both the dramatic rise (and volatility) of the global cryptocurrency market and

the continuing fast-paced evolution of emerging technologies and financial products, together with the willingness of Chairman Atkins and the ideas of Commissioner Hester Peirce to establish “clear lines” for digital asset oversight.

The SEC’s interpretation also complements Congressional efforts to codify a comprehensive crypto asset market framework into statute, known as the CLARITY Act, which is still working its way through the Senate.

SEC Plans to Continue to Issue New Regulations to Encourage Further Crypto Asset Innovation

SEC Chairman Paul S. Atkins announced in a speech at the DC Blockchain Summit on March 17, 2026, that the SEC plans to shortly release a proposed rule for public comment concerning potential safe harbors from SEC registration that would provide “crypto innovators” with additional pathways to raise capital.

The proposal would include a “startup exemption,” a “fundraising exemption” and an “investment contract safe harbor.” The startup exemption would provide a registration exemption for investment contract offerings involving crypto assets that could last up to four years and allow entrepreneurs to raise up to a defined offering of approximately \$5 million during the four-year period. The issuer would need to provide notice of the offering to the SEC when relying on the exemption and when the exemption was no longer applicable, and publicly disclose certain information about the investment contract and the underlying crypto asset.

The “fundraising exemption” would be a new offering exemption. Entrepreneurs could raise up to a maximum offering amount of approximately \$75 million during any 12-month period and require filing broader disclosure with the SEC including a discussion of the issuer’s financial condition and its financial statements. No mention has been made yet whether the offering would be limited only to accredited investors or whether state securities law preemption would apply.

Lastly, the proposal included an “investment contract safe harbor” from the definition of “security” for certain crypto assets. This safe harbor could apply once the issuer has completed or otherwise permanently ceased all essential managerial efforts that the issuer represented or promised that it would engage in the investment contract. This would provide an exit path for a sufficiently mature crypto asset to cease being regulated as a security.

Conclusion

Greater clarity regarding the treatment of crypto assets provided in the SEC’s interpretation is expected to help facilitate corporate finance transactions by providing issuers with new ways to fund projects through the launch of compliant digital tokens, including for real-world assets, and by providing investors with the benefit of the protections of the federal securities laws. Based on the size of the global cryptocurrency market, which reached a peak of over \$4.2 trillion in total market capitalization in late 2025, market participants should expect to see continued focus in this area from the SEC, CFTC, and Congress.