

# SEC and CFTC Issue Landmark Joint Interpretation on Crypto Asset Classification

## Client Alerts

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On March 17, 2026, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) jointly issued a landmark interpretation regarding the application of the federal securities laws to certain types of crypto assets and transactions involving crypto assets.

The Interpretation builds on the joint SEC-CFTC Project Crypto initiative and the Memorandum of Understanding announced earlier this week and reflects the agencies' close coordination and the administration's stated commitment to using existing regulatory authority to provide the "fulsome regulatory clarity that best keeps blockchain-based innovation within the United States."

## Key Features of the Interpretation:

- Binding on SEC and CFTC, unlike prior Staff guidance.
- Provides a token taxonomy clarifying that multiple types of crypto assets are not securities.
- Identifies 18 major cryptocurrencies as examples of digital commodities.
- Recognizes that digital commodities may be sold in "investment contract" transactions that fall within securities laws under Howey but clarifies and limits when SEC will deem the sale of a digital commodity to qualify.

## Practice Tips:

- Many aspects of the Interpretation mirror policy positions taken in draft market structure legislation.
- The list of enumerated digital commodities directly contradicts prior SEC enforcement actions that had construed these same tokens as securities.
- The Interpretation offers a very narrow definition of decentralization.

## Background

The SEC has engaged with crypto assets for more than a decade, beginning with the 2017 DAO Report, in which it determined that tokens issued by the DAO were offered and sold as investment contracts and therefore securities under the federal securities laws. In the years that followed, the SEC undertook a broad spectrum of actions related to crypto assets, primarily based on its interpretation that certain crypto assets could be treated as securities under the “Howey test”—which defines an “investment contract” as a contract, transaction, or scheme involving an investment of money in a common enterprise with an expectation of profits derived from the efforts of others. Most of that action came through enforcement actions rather than rulemaking, in a practice critics described as “regulation by enforcement.”

The Interpretation reflects the current administration’s wholesale departure from that prior approach, by providing an actionable taxonomy to distinguish between digital commodities and securities, as a crucial step toward a more clear and consistent framework for regulation of crypto assets. Unlike prior speeches and statements by Commission Staff, the Interpretation is a formal agency action binding on both the SEC and CFTC, though absent legislation it could be modified by the agencies under a future administration. As a result, SEC Commissioner Paul Atkins has joined many industry participants in calling for Congressional action to provide more durable clarity for the industry.

### **A New Taxonomy: Five Categories of Crypto Assets**

Central to the Interpretation is a new five-part taxonomy for crypto assets designed to expressly carve out four categories of crypto assets that are *not* securities, as distinct from the one category that clearly is a security:

- (i) digital commodities – NOT securities
- (ii) digital collectibles – NOT securities
- (iii) digital tools – NOT securities
- (iv) stablecoins – NOT securities
- (v) digital securities – YES securities

The “digital securities” category is narrowly drawn to address tokenized versions of conventional financial instruments already enumerated in the statutory definition of “security” (such as a stock or bond), in recognition of the fact that such conventional securities instruments do not lose their securities status merely because they are “formatted as or represented by a crypto asset.”

The Interpretation also recognizes that other categories of digital commodities may be sold as part of “investment contract” transactions that fall within the securities laws under the Howey test but seeks to clarify and limit the circumstances to which that may apply.

## **Digital Commodities**

A digital commodity is a crypto asset that “is intrinsically linked to and derives its value from the programmatic operation of a crypto system that is ‘functional,’ as well as supply and demand dynamics, rather than from the expectation of profits from the essential managerial efforts of others.” Critically, a digital commodity “does not have intrinsic economic properties or rights, such as generating a passive yield or conveying rights to future income, profits, or assets of a business enterprise.”

The Interpretation names sixteen specific tokens as digital commodities, including Bitcoin (BTC), Ether (ETH), Solana (SOL), and XRP, compiled based on tokens that underlie a futures contract that has been made available to trade on a designated contract market operating under the regulatory oversight of the CFTC, implicitly recognizing that those products are based on the determination that the underlying token was a commodity and not a security. The Interpretation also makes clear that the list is not exhaustive, and that it is not necessary to underlie a futures contract to be deemed a digital commodity, identifying two additional crypto assets as examples of digital commodities for which there is not a corresponding futures contract.

The Interpretation notes that the list is grounded in the SEC’s “understanding of their characteristics, terms, and functions as of the date of this Interpretation.” As a result, those tokens provide an analytical benchmark against which to compare the features and functions of other tokens.

## **Digital Collectibles**

A digital collectible is a crypto asset “designed to be collected and/or used” and may represent or convey rights to artwork, music, videos, trading cards, in-game items, or digital representations of internet memes, characters, current events, or trends. The Interpretation confirms that meme coins—which it describes as “a type of crypto asset inspired by internet memes, characters, current events, or trends for which the creator seeks to attract an enthusiastic online community”—are digital collectibles and not securities, consistent with prior staff guidance. Named examples include CryptoPunks and Chromie Squiggles.

One nuance worth flagging: a digital collectible that is fractionalized—or that otherwise enables individuals to acquire a fractional ownership interest in a single collectible—“could constitute the offer or sale of a security” because it may involve essential managerial efforts from which a purchaser would reasonably expect to derive profits. Fractional NFT structures warrant careful review.

## **Digital Tools**

A digital tool is a crypto asset that “performs a practical function, such as a membership, ticket, credential, title instrument, or identity badge.” Digital tools are often non-transferrable or “soul-bound.” The Interpretation confirms that digital tools are not securities.

## **Stablecoins**

The Interpretation addresses stablecoins in two parts. *First*, the GENIUS Act—enacted in July 2025—excludes “payment stablecoins issued by a permitted payment stablecoin issuer” from the definition of “security” by statute. *Second*, “Covered Stablecoins” as described in the SEC staff’s April 2025 statement are deemed not to involve the offer and sale of securities. Stablecoins that do not fit either category may still be securities depending on the facts and circumstances.

## **Digital Securities**

A digital security is a financial instrument enumerated in the definition of “security” that is “formatted as or represented by a crypto asset, where the record of ownership is maintained in whole or in part on or through one or more crypto networks.” The Interpretation confirms that a security is a security “regardless of whether it is issued, or otherwise represented, offchain or onchain.”

## **When *Howey* Met Clarity: How a Non-Security Crypto Asset Becomes Subject to an Investment Contract.**

Section IV of the Interpretation addresses one of the most consequential questions in crypto law: when does the offer and sale of a non-security crypto asset become subject to an investment contract, and thus subject to the federal securities laws?

The answer turns on application of the *Howey* test to assess whether an issuer offers the asset “by inducing 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.”

Crucial to the SEC’s Interpretation is the recognition that “the fact that a non-security crypto asset is subject to an investment contract does not transform the non-security crypto asset itself into a security” and, therefore, whether secondary market transactions are securities transactions will depend on whether “purchasers would reasonably expect such representations or promises to remain connected to the non-security crypto asset.” If so, the secondary market transactions would either have to be registered or qualify for an exemption.

This leaves at least two fundamental questions, both of which the Interpretation seeks to clarify: (1) what sort of representations or promises will trigger securities classification, and (2) when does that classification follow the token in subsequent transactions, and for how long?

### **1. What Representations Give Rise to an Investment Contract?**

While the *Howey* test will always require analysis of each specific set of facts and circumstances, the Interpretation provides detailed—and practical—guidance on what kinds of communications and conduct are likely to give rise to an investment contract, and what are not, summarized in the following chart:

#### **Investment Contract Analysis: Key Indicators**

Nature of the	Investment Contract
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<b>Statement / Representation</b>	<b>More Likely</b>	<b>Less Likely</b>
<b>Source</b>	Explicit representations made by or on behalf of the issuer	Representations made by unaffiliated third parties (e.g., community members) not authorized by the issuer
<b>Method</b>	Issuer’s website or official social media accounts; direct private communications to purchasers; regulatory filings; whitepapers clearly attributable to the issuer	Informal third-party commentary; statements not clearly attributable to the issuer or made through channels the issuer has not established for regular communication
<b>Timing</b>	Representations conveyed to purchasers prior to or contemporaneously with the offer or sale	Post-sale representations or promises (which “would not convert the prior sale into an offer or sale of an investment contract”)
<b>Content</b>	Explicit, detailed representations about essential managerial efforts, containing milestones, timelines, personnel information, sources of funding, and an explanation of how holders will profit	Vague or general statements that are aspirational or non-specific as to the managerial efforts to be undertaken and “contain no semblance of an actionable business plan, such as those lacking milestones, funding, or other plans for needed resources”

## 2. When Does the Investment Contract Follow the Token?

The Interpretation also addresses when a non-security crypto asset that was previously subject to an investment contract ceases to be so—a fundamental question for determining how to treat tokens in the secondary market and one that may have a critical impact on how to frame any representations made by a token issuer or promoter.

A non-security crypto asset separates from an associated investment contract in at least two principal circumstances:

- *First*, when “the issuer has fulfilled its representations or promises to engage in essential managerial efforts”—for example, by completing development milestones, open-sourcing code, or achieving functionality—purchasers “no longer have any reasonable expectations of profits to be derived from those efforts.” The issuer should publicly disclose completion of those efforts to lock in this result.

- *Second*, where a sufficiently long period of time has passed, and “it has become clear to investors that the issuer has neither conducted the essential managerial efforts it represented or promised it would undertake nor indicated that it still intends to conduct such efforts”—including where the issuer publicly abandons the project—the investment contract ceases to exist.

Importantly, separation does not eliminate prior liability. An issuer that failed to register an offering that was required to be registered, or that made material misstatements in connection with the investment contract, “may be subject to liability under the anti-fraud provisions of the Federal securities laws for such conduct, even if the non-security crypto asset subsequently separates from the associated investment contract.”

### **Protocol Mining, Protocol Staking, and Wrapping**

The Interpretation also addresses three specific crypto asset activities, to make clear that none of these activities necessarily trigger investment contract classification.

#### **Protocol Mining**

The Interpretation concludes that self (or solo) mining and pool mining of digital commodities on proof-of-work networks do not involve the offer and sale of a security. Miners are “merely engaging in an administrative or ministerial activity to secure the PoW Network, validate transactions and add new blocks, and receive rewards.” This is consistent with prior SEC staff guidance but now carries the weight of a formal Commission interpretation.

#### **Protocol Staking**

The Interpretation similarly concludes that Protocol Staking Activities—including self-staking, self-custodial staking with a third party, custodial arrangements, and liquid staking—do not involve the offer and sale of a security, provided the activities conform to the descriptions in the Interpretation. The Interpretation also addresses Staking Receipt Tokens in liquid staking arrangements, concluding that such tokens are receipts for the underlying digital commodity and not themselves securities, provided the underlying commodity is a non-security crypto asset not subject to an investment contract.

Service providers should note that the Interpretation defines a specific set of “Ancillary Services”—including slashing coverage, early unbonding, and aggregation of digital commodities—that are also administrative or ministerial in nature and do not give rise to securities transactions. Arrangements that fall outside the Interpretation’s described parameters, including arrangements where a custodian or liquid staking provider guarantees or sets fixed reward amounts, are expressly outside the scope of this guidance.

#### **Wrapping**

The Interpretation concludes that the offer or sale of a Redeemable Wrapped Token that is a receipt for a non-security crypto asset not subject to an investment contract does not involve the offer and

sale of a security. As with staking receipt tokens, the analysis turns on the nature of the underlying asset.

## **Implications for Market Participants**

The Interpretation provides a number of practical takeaways for crypto projects and secondary market participants:

The Interpretation provides a practical roadmap for token projects to carefully manage the representations that they make in order to more readily control what representations the SEC may construe as an investment contract and under what circumstances that investment contract will be deemed fulfilled or otherwise expired. For example, projects should make clear who is authorized to speak on their behalf, and which channels of communication are considered official versus informal. Doing so should provide some measure of comfort that off-hand statements in unofficial channels will not be used against them. And to the extent official concrete promises are made, they should be framed in such a way as to make it readily ascertainable when they have been fulfilled or otherwise expired.

The list of enumerated tokens encompasses a wide range of tokens that incorporate a variety of tokenomic incentive structures, providing a substantial baseline against which to compare other tokens. Of course, token characteristics can change over time, so one should be careful not to distinguish the features of those tokens as of the date of Interpretation and not only at some earlier or later stage of their development.

The SEC provides a narrow definition of decentralization for the limited purpose of this Interpretation, referring to a “decentralized” crypto system as one that “functions and operates autonomously with no person, entity, or group of persons or entities having operational, economic, or voting control.” Many projects that market themselves as decentralized—but retain meaningful developer, foundation, or governance token holder influence—will not meet that standard. That said, the Interpretation does not purport to require any level of decentralization, and more remains to be done in determining what is “sufficiently decentralized” and where that concept retains relevance in the broader classification scheme.

The Interpretation is not a blanket exemption. The “minimum effective dose” of regulation does not mean no enforcement. The Interpretation is explicit that the SEC will continue to enforce the anti-fraud provisions of the federal securities laws, and that prior violations of the registration requirements are not cured by a subsequent separation from the investment contract.

Jenner & Block’s Fintech and Crypto Assets and Markets and Trading practices are available to assist clients in assessing the implications of this Interpretation for their token structures, communications practices, staking and mining programs, and overall regulatory posture.

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