

SEC Interpretive Release Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets

On March 17, 2026, the Securities and Exchange Commission ("**SEC**") issued a long-awaited interpretive release on crypto assets. Since 2017, the SEC has applied the "Howey test" developed by the U.S. Supreme Court to determine whether transactions involving the offer and sale of digital assets or crypto asset are covered by the federal securities laws. However, as the SEC acknowledges in the release, applying the Howey test to crypto assets and transactions involving crypto assets can be challenging because of the varying degrees of control that persons or groups may have over crypto systems; the diversity of the types of crypto assets with varying characteristics, uses, and functionality; and the evolving nature of crypto assets and crypto systems. These unique attributes of crypto assets have prompted divergent views among market participants, financial regulators, and the courts over the application of the Howey test to crypto assets and transactions involving crypto assets, particularly with respect to secondary market transactions involving crypto assets. The SEC has been criticized by some for "regulation by enforcement" by pursuing enforcement actions against crypto asset issuers for alleged violations of the Federal securities laws rather than developing a tailored regulatory framework that accommodates crypto asset innovation and entrepreneurship. As part of its efforts under the current Chairman and Commission to provide greater clarity regarding crypto assets, the SEC issued the new guidance regarding the circumstances under which it will characterize crypto assets as securities and transactions involving crypto assets as securities transactions. The interpretation is intended to convey the SEC's views, informed by the extensive feedback SEC Commissioners and staff have received on these topics (including from the Crypto Task Force's roundtables, written input, and meetings), regarding how certain aspects of the Howey test apply to crypto assets and transactions involving crypto assets.

The definition of "security" includes an enumerated list of "the commonly known documents traded for speculation or investment," including "stock," "bond," and "note." It also includes instruments "of a more variable character," such as "investment contract," "certificate of interest or participation in a profit-sharing agreement," and "any interest or instrument commonly known as a security." In addition, the definition of "security" includes any "receipt for, guarantee of, or warrant or right to subscribe to or purchase" any of the financial instruments enumerated in the definition of "security." The Supreme Court has said that "[b]ecause securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not the name appended thereto," emphasizing that "form should be disregarded for substance, and the emphasis should be on economic reality." However, the SEC highlights that "Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud." Importantly, the Federal securities laws generally do not apply to items that are purchased for use or consumption, whether they are physical or digital.

The guidance notes that crypto assets encompass a broad range of instruments. The release analyzes five categories of crypto assets based on their characteristics, uses, and functions. In summary, the SEC confirmed that digital securities (also known as tokenized securities) that constitute financial instruments enumerated in the definition of "security" that are formatted 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 **are deemed to be securities**. The SEC noted that "a security is a security regardless of whether it is issued,

or otherwise represented, offchain or onchain. All devices and instruments that have the economic characteristics of a security are securities regardless of format or label."

In contrast, the guidance clarified that a number of other categories of crypto assets and related activities are NOT securities or do not constitute securities offerings based on their characteristics, uses, and functions, including each of the following:

- Digital Commodities - Crypto assets that are intrinsically linked to and derive their 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.
- Digital Collectibles - Crypto assets that are 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 or references to internet memes, characters, current events, or trends, among other things.
- Digital Tools - Crypto assets that perform a practical function, such as a membership, ticket, credential, title instrument, or identity badge.
- Stablecoins - Defined in the GENIUS Act as "payment stablecoin issued by a permitted payment stablecoin issuer."
- Protocol Mining, Staking & Wrapping - Protocol mining, protocol staking and the "wrapping" of non-security crypto assets, as such complex activities are described in the release, do not involve the offer and sale of a security.
- Airdrops - Certain crypto asset disseminations known as "airdrops" do not involve an "investment of money" under the Howey test.

The SEC guidance further clarified how an issuer markets and promotes a contract, transaction, or scheme is relevant to assessing whether the issuer is offering or selling an "investment contract," which is integral to the Howey test. When a crypto asset that would not otherwise be deemed a security is offered 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, this would be deemed an "investment contract" and therefore would constitute a security. For example, while a digital collectible on its own would not be deemed a security, the offer and sale of a digital collectible that enables individuals to acquire a fractional ownership interest of a single digital 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 and, therefore, may be offered and sold as an investment contract.

The SEC noted that whether it would be reasonable for a purchaser to expect profits based on representations or promises to engage in essential managerial efforts depends on the specific facts and circumstances taken as a whole, under which those representations and promises are made. Accordingly, the SEC release provided important guidance on the nature of the representations or promises necessary to form an investment contract, including the source of the representations or promises, the medium by which they are communicated, and the level of detail they must provide. For example, representations made by third parties or unaffiliated proponents of the relevant crypto assets would generally not constitute a promise by the issuer to induce an investment of money. Neither would an issuer's post-sale representations convert a prior sale into an offer or sale of an investment contract.

Moreover, the SEC further confirmed that a non-security crypto asset that was offered and sold subject to an investment contract does not necessarily remain subject to the associated investment contract, and

thereby subject to the Federal securities laws, in perpetuity. Such asset would cease to be deemed a security when the investment contract terminates because either the issuer has fulfilled its representations or promises or the issuer has failed to satisfy its representations or promises. Nevertheless, the SEC cautioned that if the issuer makes material misstatements or omissions in connection with the creation of the associated investment contract or at any time during the existence of that investment contract, the issuer 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 and that investment contract ceases to exist.

While this new guidance provides helpful clarification regarding certain digital assets that can reasonably be excluded from the definition of security for purposes of reporting under an adviser's code of ethics, the full analysis is still very nuanced. Accordingly, advisers and their employees that actively engage in investing in crypto assets should review the guidance carefully and consult with counsel before concluding that their activities are not covered by the Federal securities laws.

See SEC Release - <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>