

To the Point

SEC clarifies how federal securities laws apply to crypto assets and related transactions

The interpretation clarifies the application of the definition of a security to certain types of crypto assets.

What you need to know

- ▶ The SEC and the CFTC jointly issued an interpretive release clarifying how federal securities laws apply to certain types of crypto assets and to transactions involving crypto assets.
- ▶ The interpretation represents the first Commission-level action on the regulatory treatment of crypto assets and aims to reduce uncertainty in areas that were previously addressed with enforcement actions and SEC staff guidance.
- ▶ The interpretation articulates the SEC's views on when crypto assets are securities and when transactions involving crypto assets are subject to federal securities laws. It does not modify or replace existing laws or legal precedent.
- ▶ The interpretation is effective immediately. The SEC has solicited public comment on the interpretation and said it may revise or expand it based on feedback received.

Overview

The Securities and Exchange Commission (SEC or Commission) and the Commodity Futures Trading Commission (CFTC) jointly issued an **interpretative release** (the interpretation) clarifying how federal securities laws apply to certain types of crypto assets and transactions involving crypto assets. The interpretation is part of the SEC's ongoing coordination with the CFTC to oversee crypto markets.



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The interpretation relies on the definition of a crypto asset by the Guiding and Establishing National Innovation for US Stablecoins Act (GENIUS Act) as any digital representation of value that is recorded on a cryptographically secured distributed ledger.

Although the interpretation does not modify or replace existing laws or legal precedent, it articulates the SEC's views on when crypto assets are securities, when transactions involving crypto assets constitute securities transactions and when common crypto-related activities fall outside the scope of the federal securities laws.

The interpretive release says that the CFTC and its staff will administer the Commodity Exchange Act consistent with the interpretation and that certain non-security crypto assets (i.e., crypto assets that are not securities) could meet the Commodity Exchange Act's definition of a commodity. The interpretation does not alter the respective statutory authorities of the SEC or CFTC.

The interpretation is effective immediately and supersedes prior SEC staff guidance on digital assets and transactions involving digital assets, including the SEC staff's **framework** for investment contract analysis of digital assets. The SEC has solicited public comment on the interpretation and indicated it may revise or expand it based on the feedback received.

Definition of a security

The interpretation notes that the definition of a security¹ includes a list of commonly known financial instruments (e.g., stocks, bonds, notes) and instruments of a more variable character (e.g., investment contracts). It also notes that the SEC and federal courts have typically evaluated the security status of crypto assets and crypto asset transactions under an investment contract model (i.e., the Howey test).

The Howey test is the binding legal precedent to determine whether a contract, transaction or scheme is an investment contract and, therefore, a security. It 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.²

The interpretation affirms the use of the Howey test and provides the Commission's views on how certain aspects of the test apply to crypto assets and certain transactions involving crypto assets.

Classification of crypto assets

The interpretation classifies and provides examples of crypto assets in five categories based on the Commission's understanding of their characteristics, uses and functions. It recognizes that certain crypto assets may fall outside of or have hybrid characteristics that place them in more than one of the following categories:

- ▶ Digital commodities:³ Crypto assets that are intrinsically linked to and derive value from the programmatic operation of a crypto system that is "functional,"⁴ as well as supply and demand dynamics, rather than from the expectation of profits from the essential managerial efforts of others (e.g., Bitcoin (BTC), Ether (ETH), Solana (SOL), XRP (XRP))
- ▶ Digital collectibles: Crypto assets designed to be collected and/or used and that 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 (e.g., CryptoPunks, dogwifhat (WIF), Fan Tokens)
- ▶ Digital tools: Crypto assets that perform a practical function, such as a membership, ticket, credential, title instrument or identity badge (e.g., Ethereum Name Service domain names, CoinDesk's "Microcosms" Non-fungible Token (NFT) Consensus Ticket)

- ▶ Stablecoins: Crypto assets designed to maintain a stable value relative to a reference asset like the US dollar
- ▶ Digital securities (i.e., tokenized securities):⁵ Financial instruments enumerated in the definition of a security that are 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

Digital commodities, digital collectibles⁶ and digital tools are generally not securities. Stablecoins may be securities (except for payment stablecoins issued by a permitted payment stablecoin issuer, as defined in the GENIUS Act, and certain stablecoins addressed in the SEC staff's [statement on stablecoins](#)), and digital securities are securities.

Non-security crypto assets subject to an investment contract

The interpretation notes that a non-security crypto asset may be offered or sold pursuant to an investment contract (a security) without the asset itself being transformed into a security.

The interpretation says a non-security crypto asset becomes subject to an investment contract when an issuer⁷ offers the asset by inducing a purchaser to invest money in a common enterprise with representations or promises to undertake essential managerial efforts⁸ from which a purchaser would reasonably expect to derive profits.

The interpretation clarifies 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 indefinitely. The SEC said it would expect a non-security crypto asset to not be subject to an investment contract when any of the following are present:

- ▶ The issuer has fulfilled its representations or promises to engage in essential managerial efforts, even if it continues to provide non-essential managerial efforts with respect to the non-security crypto asset or an associated crypto system or other software project
- ▶ A purchaser would not reasonably expect the issuer to be able to fulfill or to continue to engage in the essential managerial efforts it represented or promised it would undertake⁹

The interpretation emphasizes that the separability of a non-security crypto asset from the associated investment contract does not affect the application of the federal securities laws to that investment contract. For example, the offer and sale of a non-security crypto asset pursuant to an unregistered, non-exempt investment contract violates the Securities Act of 1933 (Securities Act) even if the asset later separates from the investment contract and the investment contract ceases to exist.

Application of federal securities laws to certain crypto asset transactions

The interpretation clarifies that the following transactions (in the manner and under the circumstances described in the interpretation) do not need to be registered with the Commission under the Securities Act or qualify for an available exemption from registration:

- ▶ Protocol mining activities (i.e., self- or solo mining and mining pool)
- ▶ Protocol staking activities (i.e., self- or solo staking, self-custodial staking directly with a third party, custodial arrangement and liquid staking)
- ▶ Offer and sale of a staking receipt token that is a receipt for a non-security crypto asset not subject to an investment contract¹⁰

A non-security crypto asset may be offered or sold pursuant to an investment contract (a security) without the asset itself being transformed into a security.

- ▶ Offer and sale of a redeemable wrapped token that is a receipt for a non-security crypto asset not subject to an investment contract¹⁰
- ▶ Airdrops of non-security crypto assets to recipients who do not provide the issuer with money, goods, services or other consideration in exchange for the asset

Next steps

Market participants should engage with legal counsel to determine the applicability of federal securities laws to crypto assets and transactions involving crypto assets and monitor future rulemaking or guidance as the SEC continues to develop its regulatory framework for crypto assets.

Endnotes:

- ¹ Section 2(a)(1) of the Securities Act of 1933 and section 3(a)(10) of the Securities Exchange Act of 1934.
- ² *SEC v. W.J. Howey Co.*, 328 US 293 (1946).
- ³ The interpretation uses the term “commodity” in an economic and commercial sense (i.e., assets that are fungible, have utility and whose value is determined by supply and demand). However, it indicates that any non-security crypto asset, other than a “payment stablecoin issued by a permitted payment stablecoin issuer,” as such terms are defined in the GENIUS Act, could meet the definition of “commodity” under the Commodity Exchange Act.
- ⁴ The interpretation says a crypto system is “functional” if the system’s native crypto asset can be used on the system in accordance with the programmatic utility of the system. The term “native” in the context of a crypto asset refers to a crypto asset generated for use on a particular crypto system.
- ⁵ Tokenization is the process of creating a digital representation of a tangible or intangible asset using blockchain or similar distributed ledger technology. The interpretation further categorizes tokenized securities into (1) securities tokenized by or on behalf of the issuers of such securities and (2) securities tokenized by third parties unaffiliated with the issuers of such securities, which may involve the third party issuing a separate security that derives its value from or is otherwise linked to the subject security.
- ⁶ The offer and sale of a digital collectible that either is fractionalized or otherwise enables individuals to acquire a fractional ownership interest of a single digital collectible could constitute the offer or sale of a security.
- ⁷ Including affiliates and agents of the issuer or a promoter.
- ⁸ Representations or promises to engage in essential managerial efforts could, for example, relate to developing certain functionalities or features for the non-security crypto asset, associated crypto system or other software project, achieving certain software development milestones on a roadmap or open-sourcing-related computer code. Whether an issuer fulfills its representations or promises to engage in essential managerial efforts depends on how the issuer defines or otherwise describes such efforts in marketing and promoting the investment contract.
- ⁹ For example, an issuer may publicly announce that it will no longer perform the essential managerial efforts it represented or promised it would undertake (effectively abandoning the development of a crypto system).
- ¹⁰ In contrast, the offer or sale of a staking receipt token or a redeemable wrapped token that is a receipt for a digital security or a non-security crypto asset subject to an investment contract is an offer or sale of a security and requires registration if an exemption is not available.

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