Crypto Update

CAHILLNXT

Breaking Up Is Hard to Do: *Howey* and the SEC's Crypto Asset Classification Guidance

Introduction and Background

On March 17, 2026, the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC") jointly issued an interpretive release titled "*Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets*" (Release Nos. 33-11412 and 34-105020, the "Interpretation").[1] The Interpretation supersedes the 2019 Digital Asset Investment Contract Analysis Framework issued by the SEC staff (the "Staff") and reflects the materially changed regulatory posture of the SEC under Chairman Paul S. Atkins and the Crypto Task Force established in January 2025. In addition, in a sign of the new level of cooperation between the agencies, the CFTC stated that it will administer the Commodity Exchange Act (the "CEA") in a manner consistent with the Interpretation.

The Interpretation is the product of a sustained effort to move away from what several SEC commissioners and market participants had characterized as "regulation by enforcement," and toward a more structured, taxonomy-based regulatory framework. Drawing on extensive public input from issuers, investors, market intermediaries, and legal practitioners, and informed by the President's Working Group on Digital Asset Markets report published in July 2025, the Interpretation represents the SEC's most comprehensive statement to date on the application of the federal securities laws to crypto assets.

The Interpretation is consequential in several respects. It explicitly identifies sixteen prominent crypto assets, including Bitcoin, Ether, SOL, and XRP, as "digital commodities" that the SEC has determined are not securities and provides a new five-category taxonomy for crypto assets. It provides interpretive clarity that several activities relevant to the crypto ecosystem, including protocol mining, protocol staking, liquid staking, wrapping, and certain airdrop activities, when conducted in the manner identified by the SEC, do not constitute securities transactions.

The Interpretation also introduces a novel framework based on the concept that, once a non-security crypto asset has been offered and sold in an investment contract transaction, all future transactions in that crypto asset, even if engaged in by parties otherwise unrelated to the original investment contract transaction, will be considered by the SEC to be securities transactions, subject to compliance with the full suite of federal securities law regulation (including not only the registration requirements and liability provisions found in the Securities Act of 1933, as amended (the "Securities Act"), but also the broker-dealer, clearing agency and other regulatory mandates found in the Securities Exchange Act of 1934, as amended), until the crypto asset "separates" from the investment contract.

This alert summarizes the principal positions taken by the SEC in the Interpretation and identifies a number of significant open questions that market participants and their counsel will need to navigate, with particular emphasis on the Interpretation's treatment of issuer representations and promises as the operative trigger for the investment

contract status of transactions in non-security crypto assets. As with other kinds of break-ups, market participants may find navigating the separation of an investment contract from a related non-security crypto asset hard to do.

I. The Five-Category Taxonomy

The Interpretation classifies crypto assets into five categories based on their respective characteristics, uses and functions. Three of these categories are considered by the SEC not to be securities as a categorical matter. One category depends on the specific facts and circumstances of the instrument in question. The fifth category always constitutes a security.

A. Digital Commodities (Not Securities)

A digital commodity is a crypto asset whose value is intrinsically linked to the programmatic operation of a "functional" crypto system and subject to, presumably, third-party driven supply and demand dynamics, rather than to the essential managerial efforts of others.[2] A digital commodity does not convey rights to future income, profits, or assets of any business enterprise. The SEC provides a non-exhaustive list of digital commodities, including Bitcoin (BTC), Ether (ETH), Solana (SOL), XRP, Cardano (ADA), Chainlink (LINK), Dogecoin (DOGE), Avalanche (AVAX), Polkadot (DOT), and Stellar (XLM), among others.

The Interpretation makes clear that governance rights and gas fee mechanisms inherent to a functional crypto system do not alter a digital commodity's non-security status. The SEC also confirms, consistent with recent Staff statements, that digital commodities may serve as the basis for futures contracts listed on CFTC-regulated markets. Any non-security or non-stablecoin crypto asset—including each of the digital commodities named in the Interpretation—could qualify as a "commodity" under Section 1a(9) of CEA. The result is that CFTC jurisdiction will attach to these assets across a broad range of market activities, including derivatives markets, retail leveraged transactions, and anti-fraud and anti-manipulation enforcement in spot markets.

Importantly, the CFTC's anti-fraud and anti-manipulation authority applies to spot market transactions in digital commodities notwithstanding the current absence of comprehensive CFTC market oversight authority over spot markets generally. Market participants transacting in digital commodity spot markets—including both centralized and decentralized crypto asset exchange platforms—should be aware that this enforcement authority is not contingent on the existence of a derivatives nexus and that the CFTC has previously exercised it in connection with spot transactions involving digital commodities.

B. Digital Collectibles (Not Securities)

Digital collectibles include non-fungible tokens, meme coins, fan tokens, in-game items, and similar assets whose value derives from artistic, entertainment, social, or cultural significance. Digital collectibles do not convey any rights in a business enterprise, and their value is determined by supply and demand rather than by the managerial efforts of any issuer.

The SEC addresses meme coins directly, characterizing them as collectibles rather than securities notwithstanding their potential for significant price volatility.

Although digital collectibles as classified by the Interpretation are not securities, market participants should be aware that digital collectibles may, depending on their specific characteristics, qualify as "commodities" under the CEA, with the consequence that the CFTC's anti-fraud and anti-manipulation authority under the CEA may apply to transactions in such assets. The CFTC has previously exercised this authority in the context of crypto assets that were not securities and the Interpretation's classification of an asset as a digital collectible does not insulate market

participants from CFTC enforcement with respect to fraudulent or manipulative conduct in connection with transactions in those assets.

The Interpretation does, however, carve out one important exception: consistent with past SEC practice involving physical collectibles, *fractionalized* digital collectibles may constitute securities where the fractionalization entails essential managerial efforts from which purchasers would reasonably expect to derive profits.

C. Digital Tools (Not Securities)

Digital tools are functional-use tokens designed to perform a specific practical purpose, such as membership credentials, identity badges, event tickets, or title instruments. The SEC analogizes digital tools to physical utilities such as museum memberships or professional certifications. The expectation is that the value of these assets will derive from practical utility rather than from any expectation of profit, and they are not intended to convey any interest in a business enterprise. However, where a digital tool is created in a finite supply and promoted to emphasize that scarcity, it is possible that a court may look more deeply at the circumstances of any sale of such assets.

D. Stablecoins (Facts and Circumstances Dependent)

The Interpretation addresses stablecoins in two sub-categories. First, "payment stablecoins" issued by a "permitted payment stablecoin issuer" as defined in the Guiding and Establishing National Innovation for U.S. Stablecoins Act (the "GENIUS Act")[3] will be categorically excluded from the definition of "security" by operation of statute upon the GENIUS Act becoming effective. Issuers of such stablecoins are prohibited from paying any form of interest or yield to holders.

Second, pending the effectiveness of the GENIUS Act, the SEC adopts the position set forth in the Division of Corporation Finance's April 2025 Staff statement and interprets that fully backed, non-yielding fiat-redeemable "Covered Stablecoins" do not constitute securities. Stablecoins that fall outside either of these categories remain subject to a facts-and-circumstances analysis under applicable law.

E. Digital Securities (Always Securities)

Tokenized versions of traditional securities, including stocks, bonds, and other financial instruments enumerated in the statutory definition of "security," are securities regardless of whether they are represented on-chain. The SEC notes that the structure of tokenized securities may vary and that the rights conveyed to on-chain holders may differ materially from those of holders of the corresponding off-chain instrument.

II. Investment Contracts: Issuer Representations and Promises as the Operative Trigger

The Interpretation's most significant contribution is its articulation of when, in the SEC's view, a non-security crypto asset becomes subject to an investment contract under the *Howey* test.[4] The SEC centers its analysis on a single operative concept: whether an "issuer", any of the issuer's affiliates or agents, or a "promoter" (collectively referred to in the Interpretation and herein as the "issuer") has made representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to profit.

This analytical framework represents a meaningful departure from what had been perceived as the current SEC position – that not only are most crypto assets themselves not securities, but also that most transactions in crypto assets (other than certain fundraising investment contract transactions) are not securities transactions. The Interpretation re-orients the inquiry primarily toward what communications were made, through which channels, and at what point in time relative to a sale of a crypto asset and extends the idea that secondary activity in non-security crypto assets may still be considered to be subject to the full range of federal securities regulation due to unfulfilled representations or promises previously made by an "issuer." This shift carries significant practical implications for

issuers considering how to structure and present their offerings and for other market participants when setting up their trading strategies and practices.

A. The SEC's View on the "Attachment" of Investment Contract Status to a Crypto Asset

Under the Interpretation, a non-security crypto asset becomes subject to an investment contract when three elements are present: (1) an investment of money, (2) in a common enterprise and (3) representations or promises by the issuer to undertake essential managerial efforts from which purchasers reasonably expect to derive profits. The SEC identifies several factors that bear on whether a purchaser's profit expectation is "reasonable" within the meaning of *Howey*.

- *Source*: Representations must originate from, or be authorized by, the issuer. Statements by unaffiliated third parties, including community advocates, ecosystem proponents, or secondary market participants, are not attributed to the issuer unless they were authorized and conveyed on the issuer's behalf.
- *Timing*: Representations must be made prior to or contemporaneously with the offer or sale. Statements made after a transaction is completed cannot retroactively convert that transaction into the offer or sale of a security.
- *Channel*: Representations conveyed through official channels, including the issuer's website, official social media accounts, regulatory filings, direct communications with purchasers, or clearly attributable documents such as a whitepaper, carry significant weight. The treatment of statements made through other means depends on the breadth of their dissemination and the issuer's established communication practices.
- *Specificity*: Explicit and detailed commitments, including milestones, timelines, personnel, and funding plans, are more likely to give rise to a reasonable expectation of profit as opposed to vague or aspirational statements that lack a discernible action plan.

The Interpretation's approach to the application of the *Howey* test to specific fundraising transactions is very much aligned with prior SEC positions and the existing case law. What has changed, however, is the novel position that the investment contract resulting from the initial sale of a non-security crypto asset can "attach" to the asset in a way that causes secondary market activity in that asset also to fall within federal securities law jurisdiction. As a practical matter, this is not dissimilar to asserting that the crypto asset itself is a security.

The Interpretation makes clear that, going forward, the SEC and its staff will administer the federal securities laws in a manner consistent with the Interpretation, including with respect to the SEC's enforcement actions. Because the Interpretation is effective immediately, market participants will want to evaluate whether any of their secondary market activity in crypto assets is implicated by this position.

B. The "Separation" of an Investment Contract from a Crypto Asset

The SEC's conclusion that an investment contract can "attach" to a non-security crypto asset necessitates the adoption of a corollary concept – that the asset can "separate" from the investment contract, with the result that transactions involving the asset cease to be subject to the federal securities laws. The SEC identifies two principal pathways through which this separation may occur.

- *Fulfillment*: Once an issuer has fulfilled the essential managerial efforts it represented or promised to undertake, such as achieving a functional launch, completing a stated development roadmap, or open-sourcing relevant code, the investment contract ceases to exist. Purchasers no longer hold a reasonable expectation of profits derived from those efforts, and subsequent sales of the asset do not constitute securities transactions.

- *Abandonment or Failure*: If a sufficient period of time has elapsed without meaningful progress toward the promised efforts, or if the issuer publicly and unambiguously announces that it will not complete those efforts, purchasers can no longer reasonably expect performance, and the investment contract terminates accordingly.

A critical limitation applies in either case. The termination of an investment contract does not extinguish prior liabilities. Issuers that failed to register an offering under the Securities Act or that made material misstatements during the life of an investment contract, remain exposed to liability under the applicable provisions of the federal securities laws, notwithstanding any subsequent separation of the asset from the investment contract.[5]

III. Significant Open Questions

While the Interpretation provides important insight into the SEC's views on how *Howey* should be applied to transactions involving crypto assets, the representations-and-promises framework introduces a set of questions that the Interpretation currently leaves unresolved. The SEC has solicited public comment on the Interpretation, and several of these questions are well suited for further guidance through rulemaking or interpretive releases.

A. What Constitutes a "Representation" or a "Promise"?

The Interpretation does not define the term "representations or promises" with precision, and the line between a commitment that creates investment contract exposure and ordinary commercial promotion remains unclear. Several difficult cases arise in practice.

- A whitepaper released in connection with a crypto asset sale that describes a development "roadmap" for the related project which includes specific milestones and timelines is almost certainly within scope. Whether a whitepaper that describes intended functionality at a high level of generality, without specific milestones or commitments, crosses the same threshold is far less certain.
- A blog post on a project's official website or a statement made through an official social media channel, such as X, Reddit, or Discord, describing planned or even ongoing protocol upgrades or new features may well be considered by the SEC to be a representation or promise, but the Interpretation does not address whether or how the removal or revision of that post may affect its legal significance.
- The Interpretation takes the position that the significance of statements made outside official channels will depend on the breadth of their dissemination and the token project's established communication practices, but it does not define either standard or indicate how market participants should apply them in practice. Also left open are statements made in semi-private settings for which wide dissemination is reasonably foreseeable, such as statements made on a popular podcast, at a conference, or even at a well-attended dinner or other social event. Finally, it is not suggested that any particular market participant need be aware of the statement. In fact, a great number of transactions in crypto assets are executed programmatically by "bots," agentic AI, or other forms of automation. For these transactions, it may be difficult to establish why a statement made in a blog post several months earlier would transmute bot activity from a simple spot commodity sale to a regulated securities transaction.
- Forward-looking statements that are common in token offerings, including descriptions of ecosystem development plans, validator incentive programs, or treasury spending priorities, may or may not rise to the level of a representation or promise of essential managerial efforts, and the Interpretation provides limited guidance for drawing that distinction.

- There is no discussion of the relevance of the quantum of potential statements constituting representations or promises: Is one significant statement (say, in a single blog post seen by only a small number of viewers) sufficient to "taint" a crypto asset? Might the frequent repetition of a less consequential statement raise its importance relative to such a statement made only once? Further, there is no discussion of how long before a crypto asset sale a representation or promise may have been made without tainting the subsequent asset sale and later secondary transactions in the crypto asset.

The absence of a precise definition is consequential. Without an available exemption, investment contract status triggers registration obligations under the Securities Act, and token projects that cannot determine whether their marketing materials constitute representations or promises face meaningful legal uncertainty as they seek to comply with applicable law. Perhaps even more critically, traders, market makers, and other third-parties unaffiliated with an issuer or its affiliates, agents or promoters may still find themselves engaging in transactions that subject them to liability depending on how one or more such statements are interpreted.

Given that there is currently almost no jurisprudence applicable to representations or promises implicating *Howey* in the context of secondary transactions in non-security assets, counsel may face significant limitations in advising clients as to when such statements should be understood to trigger a requirement for securities law compliance, potentially leading paradoxically to an unintended expansion of the scope of securities law that may be applicable to crypto assets.[6]

It will also remain to be seen if the plaintiffs' bar will seek to use the Interpretation to commence (or add to) actions against crypto market participants on the theory that some market participants may be engaging in non-compliant securities transactions in the secondary markets and therefore be subject to private rights of enforcement.

B. Who Qualifies as the Issuer?

The Interpretation defines "issuer" broadly to include affiliates and agents of the issuer or a promoter.[7] This expansive definition raises difficult questions in the context of decentralized crypto projects, where the boundary between an issuer and an independent participant in the ecosystem may be genuinely unclear.

- Many crypto assets are initially deployed and distributed by the subsidiary of an offshore non-profit foundation, presumably making the foundation the "issuer" for purposes of the Interpretation. In addition, frequently a separate onshore "labs" entity acts as the primary or exclusive developer of the related protocol. Whether the "labs" entity would be considered to be an affiliate or agent of the issuer, or a "promoter", will prove to be a highly consequential, if challenging, analysis for the parties launching a token project to make. However, for other market participants, making this determination may be difficult, if not impossible. Yet these market participants will need to form a view on this point so that they are able to evaluate whether representations or promises made by these entities would cause transactions in a non-security crypto asset they are dealing in to be securities transactions, subjecting the participant to securities law compliance obligations.
- Venture capital funds that provided early financing and continue to advocate publicly for a project's development present a similar analytical challenge, particularly where those funds hold governance rights or board seats in the "labs" entity.
- In the case of projects governed by a decentralized autonomous organization, the question of whether representations made by members of the DAO or by grant recipients funded from the DAO's treasury would be deemed to be attributable to the related token's issuer remains unresolved.

For protocols that have undergone significant decentralization since their initial launch, the threshold question of who, if anyone, continues to qualify as the issuer may be dispositive of investment contract status. The Interpretation would benefit from further guidance on this point.

C. "Breaking Up": How Is the Separation of a Crypto Asset from an Investment Contract Established and Communicated?

The Interpretation states that an investment contract terminates upon the issuer's fulfillment of its representations or promises, and that the measure of fulfillment is determined by reference to how the issuer itself (or, perhaps, the relevant affiliate, agent, or promoter) defined or described the commitments, rather than by reference to any generalized market understanding of the relevant concept. This principle presents both opportunities and challenges for market participants.

- Issuers who scoped their original commitments with care and precision may be able to achieve a clean separation from investment contract status by clearly satisfying those commitments and making a public disclosure that they have done so. The Interpretation thus provides an incentive for specificity and transparency in initial communications.
- However, issuers of crypto assets relating to many projects that have already launched made commitments that were inherently open-ended or iterative in nature, such as ongoing protocol improvement, ecosystem expansion, or continued developer engagement. Whether such commitments can ever be "fulfilled" in the sense the Interpretation contemplates is an important unresolved question.
- Although the Interpretation makes clear that, to be relevant to its *Howey* analysis, a representation or promise must occur *prior to* a sale of a crypto asset (such that an asset purchaser can be said to have reasonably relied on the statement), many token projects conduct multiple sales of the related crypto assets over time. In these cases, because most crypto assets are fungible with each other, it would appear that even if an initial large token sale by an issuer was made without any representations or promises, a much smaller subsequent sale of the same asset that, intentionally or perhaps inadvertently, was preceded by a statement that could be considered to be a representation or promise, could result in *all* of the crypto assets then trading in the market being considered to be part of an investment contract (thus resulting in purchases and sales of these assets being securities transactions) since there is no way to distinguish the assets that were sold with the representation or promise from those that weren't.
- The Interpretation does not specify the form, medium, or required breadth of dissemination for a public disclosure of fulfillment. Whether a standard can be articulated that satisfies both the SEC's objectives and the practical realities of decentralized project communications remains to be determined.

D. What Standard Governs Decentralization (and Does It Matter)?

The Interpretation defines a "decentralized" crypto system as one in which no person, entity, or group of persons or entities possesses operational, economic, or voting control over the system. It does not, however, specify thresholds, mechanics, or an analytical process for determining whether a system has achieved decentralization, nor does it clarify what degree of residual influence by founding teams, foundations, or major token holders is permissible. Further, it appears that the main requirement under the Interpretation for non-securities transaction status, in addition to having a value determined by "supply and demand dynamics" (discussed below), is that the system to which a given crypto asset relates is "functional" – a concept apparently unconnected to whether the system is "decentralized". Yet, even here, important questions remain which will require additional guidance. When discussing the topic of "digital commodities", the Interpretation states that: "A functional crypto system *does not have a central party that oversees participation* or distributes rewards to users. As a result, the value of a digital commodity is

intrinsically linked to the programmatic functioning of the associated functional crypto system." (Emphasis added.) Are market participants to understand that the absence of such a central party is a requirement for a system to be considered "functional"? If so, among other systems that utilize crypto assets, many "layer 2" network scaling solutions have a single entity that operates a "sequencer" node which could be viewed as a "central party that oversees participation". Also left open is what type of arrangement, such as a decentralized autonomous organization (or DAO), could constitute a "central party".

For a substantial number of projects currently operating in the market, the question of whether meaningful decentralization has been achieved is genuinely contested. The Interpretation defers this question entirely to the facts of each case but offers market participants limited practical guidance on how to structure, document, or assess decentralization for purposes of a securities law analysis.

Moreover, the Interpretation does not make clear whether the "decentralization" of a protocol to which a "functional" crypto asset relates is necessary for transactions in the crypto asset not to be considered investment contract transactions, stating only that "a digital commodity *may be* native to a crypto system that is decentralized" (emphasis added).

E. What Standard Governs Secondary Market Purchasers?

The Interpretation provides that secondary market purchasers will be considered to hold interests in an investment contract so long as they would "reasonably expect" the issuer's representations or promises to remain connected to the asset. The SEC does not, however, address in detail the standard by which the reasonableness of a secondary market purchaser's expectations is to be assessed. Since it would appear that this is not intended to be a subjective standard (such that for some market participants, a transaction in a given crypto asset is treated as an investment contract while for others, it is not), there would need to be some collective process established for a given crypto asset so that all market participants would be able to determine with certainty when it was "reasonable" to expect that the relevant representations or promises by an issuer were no longer connected to the asset.

In addition, even if one set of representations or promises made in connection with a prior sale of a crypto asset were agreed to have been "fulfilled," it is always possible that new representations or promises could be made before a subsequent sale, resulting in all transactions in the asset reverting to being securities transactions.

The challenge in making this determination is particularly significant for regulated trading platforms, market makers and institutional investors who acquire tokens in secondary markets and need to assess whether those transactions constitute securities transactions requiring registration or an available exemption.

F. Will the Interpretation Lead to a Bifurcated Disclosure Market?

If the best way to avoid secondary transactions in crypto assets from being treated as investment contracts (and therefore securities transactions) is to limit the use of statements that could reasonably be understood to be representations or promises, then will issuers selling crypto assets move toward providing very little substantive information about the related project to the public market? This could result in a bifurcated disclosure market in which retail investors get access to little information about a project to avoid creating securities transactions, while much more fulsome statements and information are provided privately (perhaps under non-disclosure agreements) to large, sophisticated investors, such as venture capital funds. This could be viewed as an unfortunate policy outcome.

IV. Protocol Mining, Staking, Liquid Staking, Wrapping, and Airdrops

The Interpretation provides welcome clarity with respect to several specific crypto asset activities that have been the subject of significant regulatory uncertainty, including protocol mining, staking, liquid staking, wrapping, and certain airdrop disseminations.

- *Protocol Mining*: Both self-mining and participation in mining pools on proof-of-work networks are not considered securities transactions under the Interpretation. Miners contribute computational resources and earn rewards that are distributed programmatically pursuant to the applicable network protocol. According to the SEC, neither form of mining activity involves the essential managerial efforts of others within the meaning of the *Howey* test.
- *Protocol Staking*: Self-staking, self-custodial staking through a third-party node operator, custodial staking arrangements, and liquid staking all fall outside the definition of a securities transaction, provided that custodians do not exercise discretion over whether, when, or how much of a depositor's digital commodities to stake, and do not guarantee the amount of any rewards.

  The Interpretation expressly excludes "restaking" - a process by which digital commodities already staked on their native network are used to provide economic security to additional protocols—from the scope of its covered Protocol Staking Activities. Neither the SEC nor the CFTC has provided guidance on restaking at this time. Given the rapid growth of restaking protocols and the complexity of the multi-layered economic arrangements they create, market participants engaged in restaking should treat their activities as outside the guidance established by the Interpretation and consult with counsel regarding both securities law and CEA implications.
- *Staking Receipt Tokens*: Tokens issued to depositors in connection with liquid staking arrangements are not considered securities where the underlying deposited asset is itself a non-security that is not subject to an investment contract. Receipt tokens issued in respect of digital securities, or in respect of non-security assets that are subject to an investment contract, are themselves securities.

  The Interpretation does not address the CEA status of staking receipt tokens. Market participants and their counsel should consider that a staking receipt token issued in respect of a digital commodity that is not subject to an investment contract may itself qualify as a "commodity" under the CEA. CFTC-registered intermediaries - including futures commission merchants and commodity pool operators—that hold, deal in, or otherwise transact in staking receipt tokens should assess applicable CFTC registration, capital, and customer protection requirements.
- *Wrapping*: Redeemable wrapped tokens issued on a one-for-one basis in exchange for a deposited crypto asset, where the underlying asset is held in custody without rehypothecation and no yield or ancillary services are offered, are not considered securities where the underlying deposited asset is itself a non-security not subject to an investment contract.

  As with staking receipt tokens, the Interpretation is silent on the CEA status of redeemable wrapped tokens. A redeemable wrapped token that is a receipt for a digital commodity not subject to an investment contract may itself constitute a "commodity" under CEA Section 1a(9), with the consequence that CFTC jurisdiction—including anti-fraud authority in spot markets and applicable requirements for derivatives—may apply to transactions involving such tokens. Market participants should also consider whether the wrapping arrangement itself, particularly where conducted by a custodian acting on behalf of multiple depositors, gives rise to any commodity pool or commodity pool operator registration analysis under the CEA.

- *Airdrops*: The Interpretation addresses the *Howey* test's application to certain "airdrop" distributions of non-security crypto assets. The SEC concludes that airdrops in which recipients provide no money, goods, services, or other consideration in exchange for the distributed crypto asset do not satisfy the "investment of money" prong of the *Howey* test and therefore do not constitute offers or sales of securities. By contrast, airdrops in which recipients provide consideration of value, such as by performing services or other activities that advance the distributor's economic interests, may satisfy the investment of money prong and require further analysis under the remaining elements of *Howey*. For example, the Interpretation explicitly covers airdrops of non-security crypto assets, unannounced, to persons who hold a certain crypto asset in their digital wallet or to persons eligible based on their prior use of a particular software application. As such, token projects that use airdrops as a distribution mechanism should carefully assess whether the terms and conditions of their airdrop programs result in recipients providing consideration and should consult with legal counsel to determine whether registration under the Securities Act or an available exemption is required.

V. Practical Recommendations

In light of the Interpretation, market participants should consider the following steps in consultation with legal counsel.

- *Review Existing Public Communications*: Token projects and their counsel should conduct a comprehensive review of whitepapers, websites, social media accounts, and other public communications made prior to each previous token sale to identify statements that may constitute representations or promises of essential managerial efforts within the context of the Interpretation. Where such statements exist, issuers should assess whether the original offering was properly registered under the Securities Act or conducted pursuant to an available exemption, whether the underlying commitments have since been fulfilled, and whether a public disclosure of fulfillment has been made or should be made.
- *Document the Decentralization Analysis*: Projects that seek to establish that a digital commodity has separated from investment contract status should prepare and maintain a documented analysis of the extent to which the protocol has achieved operational, economic, and voting decentralization in light of the definitions set forth in the Interpretation. This analysis should be undertaken before any public statements are made regarding the project's securities law status.
- *Exercise Discipline in Future Communications:* Going forward, token projects should approach any public statements about future development with care. Representations that are specific and time-bound are more likely to create a defined path to fulfillment. Representations that are open-ended or aspirational may be more difficult to satisfy in a manner that supports a clean separation from investment contract status. The Interpretation's framework creates strong incentives for precision and transparency in initial communications.
- *Consider Submitting Comments*: The SEC is accepting public comments on the Interpretation through its public comment portal. This represents a meaningful opportunity to provide input on the questions identified above, particularly with respect to the definition of representations or promises, the scope of the term "token project" in decentralized governance structures and the standard applicable to secondary market purchaser expectations.
- *Evaluate Staking and Liquid Staking Arrangements:* Service providers operating in the staking ecosystem should confirm that their arrangements fall within the interpretive clarity provided by the Interpretation. Of particular importance are the limitations on custodial discretion, the prohibition on guaranteed reward amounts, and the prohibition on rehypothecation of deposited assets.

- *Assess CFTC Regulatory Obligations for Intermediary Activities*: Market participants that intermediate digital commodities - whether by operating trading platforms, managing pooled investment vehicles, providing trading advice, or acting as counterparties in leveraged or margined transactions - should evaluate their obligations as CFTC-regulated intermediaries. The Interpretation's confirmation that named digital commodities are commodities under the CEA means that futures commission merchants, commodity pool operators, commodity trading advisors, introducing brokers, and swap dealers dealing in these assets are subject to applicable CFTC registration, capital, reporting, and customer asset protection requirements. The CFTC's anti-fraud and anti-manipulation authority also applies to spot market intermediary activity in digital commodities regardless of whether a registration obligation is triggered.

VI. Areas for Ongoing Guidance

As helpful as the guidance to the market provided by the Interpretation may be, inevitably, new questions are also raised. For example, factual determinations will be needed to assess whether representations and promises have been made and, if explicitly provided by third parties, whether such parties can be deemed authorized to make such representations and promises so as to bind the issuer. For example, the chief technology officer of a development company associated with a crypto asset-based system makes an offhand statement on a popular podcast heard by many market participants that an important new feature to be added to the system will "ship before the end of the next quarter". Would such a statement be considered a "promise or representation" that would need to be fulfilled before the tokens could again trade in non-securities transactions? Would it make a difference to the conclusion of the crypto asset's market price went up significantly following dissemination of this remark? And what if the CTO was released from the development company several weeks later? Furthermore, such statements are arguably self-benchmarks against which future liability will be measured. While the Interpretation makes clear that existing securities laws still apply in certain of these contexts, in practice it may prove difficult to enforce the many requirements of the securities on transactions involving these assets – consider for example the need to make an assessment of the scienter requirement of the anti-fraud provisions found in several of the federal securities laws.

The Interpretation also leaves open a vexatious question many market participants thought had been left behind: if transactions in certain non-security crypto assets are securities transactions, are these transactions that involve an "equity" security or a non-equity security? Hopefully, future SEC guidance will shed light on this question, which can have a significant impact on regulatory outcomes.

As discussed above, market participants will look forward to further guidance on the core concept of "functionality". Especially given the adage in technology circles that "software is never finished", the very concept of "functionality" in the context of a software-based crypto-asset system will likely come under greater scrutiny: a system that is "functional" at one point in time may require significant adaptations through the "entrepreneurial and managerial efforts" of an entity or group of persons to remain functional as the overall marketplace evolves. The rapid changes driven by the availability of code produced by large language models is a constant reminder of this fact.

The Interpretation's focus on "supply and demand dynamics" will also benefit from further development. In many crypto asset-based systems, a single entity (such as a "foundation") may control a significant portion of the fixed and untraded supply of the asset and is able to make important decisions about when that supply in the market is increased. In addition, certain ecosystem participants may engage in periodic or programmatic buy-backs of a related crypto asset, thereby reducing the available supply. It will be important for market participants to understand which (if any) of these practices could impact a determination that a crypto asset falls into the non-security "digital commodity" category in the Interpretation's framework.

Future judicial interpretation must also be considered. The Interpretation recognizes that the *Howey* test is binding legal precedent and merely conveys agency views regarding how certain aspects of the test apply to crypto assets and transactions involving crypto assets. The Supreme Court's recent overruling of the long-followed *Chevron* doctrine in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024) is also relevant. Under this ruling, courts are no longer bound to adopt a deferential posture in assessing whether a federal agency has acted within its statutory authority during the rulemaking process and instead are now more at liberty to exercise their own independent judgment, especially in instances of ambiguity.

Further, as an interpretive rule under the Administrative Procedure Act, the Interpretation represents a statement of general applicability and future effect and, as such, is properly construed as a guidance document. Consequently, the Interpretation's guidance, while taking immediate effect, is subject to future rulemaking, including notice and comment rulemaking that will carry the force and effect of law, leaving this guidance at the mercy of future political headwinds.

Conclusion

The Interpretation represents the most comprehensive formal guidance on the securities law status of crypto assets that the SEC has issued. Its five-category taxonomy, which also includes a forward-looking approach, provides the industry with a long-sought framework for assessing whether a given digital asset constitutes a security, and its interpretive clarity regarding protocol mining, staking, wrapping, and certain airdrop activities removes meaningful uncertainty for infrastructure participants across the ecosystem. At the same time, the investment contract framework, with its central reliance on representations and promises made by token projects as the operative trigger for securities law obligations, introduces important questions that will require further development through rulemaking, interpretive guidance, or litigation. The SEC has invited comment, and market participants are well advised to engage with that process. As this area of law continues to evolve, we stand ready to assist clients in navigating the legal and regulatory landscape.

It should be noted that this Interpretation is issued under the SEC's and CFTC's existing statutory authorities and does not reflect or anticipate the scope of any pending or prospective legislation. Congress is currently considering market structure legislation that would adopt a radically different application of securities law to activity involving crypto assets. This proposed legislation would also materially expand the CFTC's jurisdiction over digital commodity spot markets and establish a comprehensive registration framework for digital commodity exchanges, brokers, and dealers. If and when such legislation is enacted, market participants should expect that further guidance will be required to reconcile the Interpretation's framework with the expanded statutory authority, and we will advise clients accordingly.

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If you have any questions about the issues addressed in this alert, or if you would like a copy of any of the materials referenced in it, please do not hesitate to contact Lewis Rinaudo Cohen (Partner) at 212-701-3758 or lrcohen@cahill.com, Sam Enzer (Partner) at 212-701-3125 or senzer@cahill.com, Greg Strong (Partner) at 302-884-0001 or gstrong@cahill.com, Gary Kalbaugh (Partner) at 212-701-3505 or gkalbaugh@cahill.com, Brian Farber (Counsel) at 212-701-3152 or bfarber@cahill.com or Edward Leaf (Associate) at 202-862-8990 or eleaf@cahill.com.

[1] Securities and Exchange Commission and Commodity Futures Trading Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Release Nos. 33-11412 and 34-105020 (the "Interpretation"), available at https://www.sec.gov/files/rules/interp/2026/33-11412.pdf.

[2] In footnote 49 of the Interpretation, a crypto system is defined as "functional" if the system's native crypto asset can be used on the system in accordance with the programmatic utility of the system. However, this standard makes no direct (or even indirect) reference to the concept of "decentralization" and it would seem that, so long as the system to which a crypto asset relates is "functional", whether or not the system is "decentralized" is not a relevant factor in determining whether transactions in the crypto asset constitute securities transactions.

[3] Pub. L. No. 119-27, 139 Stat. 419 (2025) (the "GENIUS Act"). The GENIUS Act excludes from the statutory definition of "security" any "payment stablecoin issued by a permitted payment stablecoin issuer." The Act will become effective on the earlier of eighteen months after its enactment (which was July 18, 2025) or one hundred and twenty days after the issuance of final implementing regulations by the applicable federal regulators.

[4] *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946).

[5] The Interpretation makes clear that the termination of an investment contract does not cure prior violations of the Securities Act's registration provisions, nor does it immunize issuers from antifraud liability arising out of material misstatements or omissions made during the period in which the investment contract was in existence.

[6] For an exhaustive discussion and analysis of the current application of *Howey* to secondary market activity involving crypto assets, *see* Lewis Cohen et al., *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities*, (Nov. 10, 2022), available at https://static.cahill.com/docs/Ineluctable-Modality.pdf.

[7] Interpretation, Section IV.A.