

## Understanding The SEC's Consequential Crypto Guidance

By **Lewis Cohen and Brian Farber** (April 8, 2026, 4:49 PM EDT)

On March 17, the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission jointly issued an interpretive release that supersedes the 2019 Digital Asset Investment Contract Analysis Framework and reflects the materially changed regulatory posture of the SEC under Chairman Paul S. Atkins.

The release is consequential and offers clarity in several respects. In addition, the CFTC joined the release to state that it and its staff will administer the Commodity Exchange Act in a manner consistent with the release and to observe that certain nonsecurity crypto-assets could meet the act's definition of "commodity."

However, the release also introduces a novel framework intended to apply to both primary and secondary transactions involving nonsecurity crypto-assets. Given the implications of this framework, the SEC has solicited public comment, and may refine, revise or expand its position in order to provide further clarity regarding its treatment of crypto-assets under the federal securities laws.

For the time being, the interpretive questions raised by the release may have significant implications for how new projects using tokens are structured and sold; how secondary market activity in existing tokens is conducted; and how platforms, custodians and market makers assess their exposure. Market participants that do not carefully apply this framework to their existing businesses risk unwittingly engaging in regulated securities activity without adequate compliance procedures.

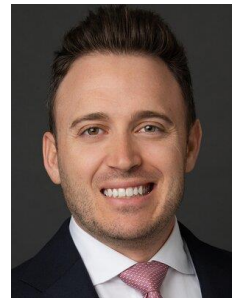
### The Taxonomy and the Clarity It Provides

The release classifies crypto-assets into five categories based on their characteristics, uses and functions. Three categories are determined by the SEC not to be securities as a categorical matter. One category depends on the specific facts and circumstances of the crypto-asset. The fifth category always constitutes a security.

Digital commodities are crypto-assets whose value is intrinsically linked to the programmatic operation of a functional crypto system and supply-and-demand dynamics, rather than the managerial efforts of others. The release identifies 16 specific assets in this category, including tokens relating to Layer 1 blockchain networks, such as bitcoin, ether, solana, cardano, XRP, hedera, aptos and avalanche.



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The release notes that each of the identified assets underlies a futures contract that is available to trade on a CFTC-regulated designated contract market. Notably, a number of these assets were involved in earlier SEC enforcement actions in which it was asserted that the assets constituted "digital asset securities."

The next category, digital collectibles, encompasses nonfungible tokens, certain meme coins, fan tokens and in-game items whose value derives from artistic or cultural significance rather than from a business enterprise.

The release addresses meme coins directly, characterizing them as collectibles rather than securities. Digital tools are functional-use tokens whose value derives from practical utility, such as memberships and identity badges, rather than from profit expectations.

Stablecoins that are fully backed and fiat-redeemable are determined not to be securities, with payment stablecoins issued by permitted issuers under the Genius Act to be excluded from the statutory definition of "security" once that legislation takes effect.

Digital securities, on the other hand, are tokenized versions of traditional securities and remain subject to the federal securities laws.

The release also adds interpretive clarity on several transaction types that have long presented uncertainty. Pure airdrops in which recipients provide no consideration and perform no services benefiting the distributor will not be considered securities transactions. Likewise, mining activity, whether conducted individually or through pools, will not be treated as securities transactions.

Staking activity in many of its various forms, including self-staking, custodial staking and liquid staking, is also not considered to be a securities transaction, provided that custodians do not exercise discretion over staking decisions or guarantee staking rewards. Liquid staking receipt tokens are not treated as securities when the underlying asset is itself a nonsecurity. Wrapping will not be treated as involving a securities transaction when structured as a clean one-for-one exchange with no yield or additional services.

For practitioners who have spent years advising clients in the absence of a coherent federal framework, the release's taxonomy provides critical affirmative guidance. Counsel advising teams working on token-based projects, exchanges, custodians and market makers can now approach a meaningful set of structuring and compliance questions with analytical tools that simply did not exist before March 17.

### **Investment Contracts and the Secondary Market Framework**

The release reaffirms the test established in the U.S. Supreme Court's 1946 decision in *SEC v. W.J. Howey Co.* as the governing analytical framework it uses for determining whether a crypto-asset transaction constitutes an investment contract, under which a transaction qualifies where it involves an investment of money in a common enterprise with an expectation of profits derived from the efforts of others.

Building on that foundation, the release introduces a novel application of the Howey framework to nonsecurity crypto-assets. Where an issuer, its affiliates, agents or promoters have made representations or promises about the future development of a crypto project on which purchasers could reasonably have relied, the release takes the position that not only the original token sale but all

subsequent transactions in that token, including secondary market transactions between parties with no relationship to the original project, will be treated as securities transactions subject to the full suite of federal securities law obligations.

Under the release, this investment contract status, once attached to a crypto-asset, persists until the crypto-asset achieves separation from the investment contract. The release identifies fulfillment or abandonment of the relevant representations and promises as the path to separation, at which point secondary market transactions in the token would no longer be treated as securities transactions.

The result is a framework in which the regulatory status of a secondary market transaction turns not on the characteristics of the token being transacted or the relationship between the transacting parties, but on the historical communications of the project team that initially distributed the token, as well as other related persons, and the degree to which those commitments have been satisfied.

The practical implications are significant. The overwhelming majority of tokens currently trading in secondary markets were distributed by project teams that published detailed white papers, development road maps and public commitments about future protocol improvements. Under the release's framework, secondary transactions occurring today in a token relating to a project that has not yet achieved separation may be considered securities transactions, irrespective of whether the transacting parties had any awareness of, or relationship with, the token project.

### **Open Questions Requiring Further Guidance**

The release's investment contract framework, while consequential in scope, leaves a number of interpretive questions unresolved. Market participants and their counsel will need to address these questions as they assess the implications of the release for existing activities and structure future transactions.

#### ***What constitutes a "representation or promise" for purposes of the framework?***

The release identifies "representations or promises" about future project development as the operative trigger for investment contract status in transactions involving nonsecurity crypto-assets, but it does not define that term with precision.

A detailed development road map included in a token-based project's white paper almost certainly satisfies the standard. Whether statements made in a blog post published by a developer team or by a foundation associated with a token project, oral remarks made at an industry conference, or communications on social media platforms in the period preceding a token sale would satisfy the standard is not definitively addressed.

Consider a project that launched a token in, say, 2021 with a published white paper committing to a suite of protocol upgrades or integrations. Then, because "software is never finished," persons associated with the project may have made multiple additional statements about future planned project developments across various public forums and social media — some of which could well constitute new representations or promises that may attach to the token.

Under the release's framework, it is unclear which of these many communications — if any — may have triggered, or renewed, investment contract status, and whether or how long that status may persist. The answer is consequential not only for the project team but for every platform, custodian and trader

transacting in that token in secondary markets, since the continued attachment of representations or promises would result in all secondary transactions in the token — even tokens previously sold by the project team — needing to comply with the federal securities laws.

The absence — in fairness, the impossibility — of a bright-line test for the attachment and separation of representations or promises from a crypto-asset means that determining whether a particular set of communications triggers ongoing investment contract status requires a constantly updated facts-and-circumstances analysis. This analysis, in turn, requires a review and understanding of an ongoing and evolving record of statements relating to the asset that neither the project team nor secondary market participants may be systematically preserving or even able to identify.

Ironically, while the release provides a very helpful framework for determining which crypto-assets are securities, it leaves open many questions as to when transactions in crypto-assets must comply with the federal securities laws, a distinction that many may find challenging to apply.

### ***Who qualifies as the issuer in decentralized project structures?***

The release defines the relevant party for making "representations or promises" broadly to include not only the entity deemed to be the token issuer, but also that entity's affiliates, agents and promoters.

For a crypto project organized through a combination of an offshore foundation, a domestic development company and venture capital investors holding governance rights, the question of whose statements are attributable for purposes of the investment contract analysis is inevitably complex.

A lead investor who publicly endorsed the project's development road map at a token launch event, or a venture investment firm whose partner tweeted bullish projections about the project in the weeks preceding a token sale, may qualify as a promoter whose statements contribute to investment contract status. Secondary market participants transacting in such tokens years later are unlikely to have access to the organizational and contractual information necessary to make that determination on a transaction-by-transaction basis.

In the absence of further guidance, secondary market participants are left to assess investment contract status on the basis of organizational and communications information they are unlikely to have and that may not be publicly available.

### ***What is required to achieve separation from an investment contract?***

The release identifies fulfillment or abandonment of the relevant representations and promises as the mechanism by which a crypto-asset achieves separation from an investment contract.

It does not, however, specify what standard of fulfillment is required, what form a public disclosure of fulfillment must take or what level of dissemination is necessary for such a disclosure to be effective. Many token projects have made open-ended commitments, including commitments to ongoing protocol development, ecosystem expansion and governance improvements, that may not lend themselves to clean satisfaction of a fulfillment standard.

The practical effect is that projects seeking to exit investment contract status under the release's framework may not be able to do so with confidence. A project team that believes it has fulfilled its commitments has no reliable mechanism to establish that determination against the SEC's own

assessment, and no clear standard against which to measure it.

***What are the disclosure incentives under the release, and is there a risk of unintended consequences?***

The release's framework creates a structural dynamic that warrants further guidance and development. Because the investment contract trigger is satisfied by representations or promises about future development, a project team that seeks to minimize its investment contract exposure has an incentive to limit its public communications about future plans.

If that incentive is widely acted upon, the result could be a market in which retail investors receive less public information about token projects than they would have in the absence of the release, with more detailed project communications reserved for sophisticated parties through private channels. That outcome would be in tension with the disclosure objectives that animate the federal securities laws.

The release does not address this dynamic. Unless the SEC provides safe harbors or bright-line standards for communications that do not trigger investment contract status, the framework as written could create an incentive structure that runs counter to the transparency the federal securities laws are designed to promote.

**Conclusion**

The release represents the SEC's most comprehensive statement to date on the application of the federal securities laws to both crypto-assets and crypto-asset activity, and is consequential for a wide range of market participants.

The five-category taxonomy provides a helpful analytical framework for structuring and addresses compliance questions that practitioners have been navigating without formal commission-level guidance for years. Meanwhile, the interpretive clarity on mining, staking, airdrops and wrapping resolves long-standing uncertainties that have complicated advice to clients across the ecosystem.

The joint engagement from the CFTC further enhances the value of the release.

However, the investment contract framework also raises a set of questions that will require further important guidance, and potentially more formal rulemaking, to resolve. The SEC has invited public comment on the release, and market participants with views on the interpretive questions identified above should consider participating in the comment process.

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