When and How Do the Securities Laws Apply To Crypto Assets? The SEC Speaks in 2026

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"Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets" is a thing of beauty and a joy forever.[2] This creative Commission-level interpretation, which I will call "the Interpretation," clarifies the SEC's position on numerous issues that have beguiled the crypto asset industry since bitcoin was first mined on January 3, 2009.

One cannot say enough good things about the Interpretation. I will mention four.

First, it is a product of extraordinary and continuing outreach to the public in the best tradition of the SEC, reflecting comments and suggestions offered at roundtables and in written contributions (including mine) to the Crypto Task Force, as well as academic engagement by Commissioners and Staff. Credit for that rightly goes to SEC Chairman Atkins, SEC Commissioner Peirce and CFTC Chairman Selig, although many others are playing important roles.

Second, I will laud the SEC for acknowledging that it can interpret the law, as do members of the Bar, but that it is not "making law" by publishing the Interpretation. Congress and the President can make law by enacting statutes within the ambit of their constitutional powers. The SEC can make law by proposing and adopting APA-compliant rules and regulations within the scope of its statutory bailiwick. The Interpretation, in contrast, is guidance that cannot be undone by Staff, but it could be overridden by legislation, a future Commission or even this same Commission. The Commission would need to explain its changed interpretation and might fail at that, but it could try.

Third, the Interpretation is pedagogical in the way that it catalogues and explains the many different kinds of crypto assets that exist. Going forward, when a crypto permabear conflates BTC with crypto assets, asserting that "crypto assets have no value" or are "highly volatile," one can reply simply by citing the SEC's taxonomy, which sorts crypto assets into five categories based on their characteristics, uses, and functions: digital commodities, digital collectibles,

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[2] SEC Release No. 33-11412, available at https://www.sec.gov/files/rules/interp/2026/33-11412.pdf. Page references in this essay conform with that version, which conforms with the Federal Register version. The Federal Register version is at 91 FR 13714 (March 23, 2026).

digital tools, stablecoins, and digital securities. Some of these assets are market-valued at hundreds of billions of dollars and are no more volatile than the dollar itself.

And of course technology innovation continues, so there will be "more" crypto assets and additional kinds of crypto assets. The Times reported that the interpretation "open[s] the door for more crypto products and give[s] the industry more flexibility as it lobbies Congress to pass legislation."[3]

Fourth, as a doctrinal matter, the Interpretation explains how crypto assets that are "subject to" investment contracts can become non-security commodities or other assets, with decentralization as a core concern (and lack of "control" the determinant of decentralization). This broadly validates, in my view, former Corp Fin Director Bill Hinman's attempt to provide guidance in his famous speech about decentralized and functional networks.[4] To be clear, the Interpretation supersedes Hinman's speech although I consider them congruent.

Having made these four points, I will ruminate in the remainder of this essay about subtleties in the Interpretation that I consider worth noting. If you were hoping for a full presentation of the Interpretation, then you should stop reading now. But if you want to know what caught my eye as a lawyer who now spends most of his time working on crypto industry projects, I have a few points and queries for your consideration.

Here goes:

Investment contracts have five elements, not four or three. That means there are five ways to win on the merits if your token is charged with being an investment contract and therefore a security and you have not complied with the securities laws.

The Interpretation makes this point, although it does not number the elements as I would. "Under *Howey*," it explains, "the term 'investment contract' means any contract, transaction, or scheme whereby a person invests money in a common enterprise and reasonably expects profits to be derived from the efforts of others."[5] Notice the words "contract, transaction, or scheme" in that definition. That's the fifth element, which I call a "Scheme." The other four are (1) an investment of money (2) in a common enterprise (3) with a reasonable expectation of profits (4) to be derived from the efforts of others.

Some analysts collapse the last two elements into one. But more importantly, plaintiffs (including prior SECs) have often ignored what I am calling the fifth element, or they assume that a Scheme is present when it isn't. This Commission understands the law correctly, which dates to the 1946 *Howey* decision itself. Able defense counsel should defend on the basis that, if even one of the five elements is missing, there is no investment contract. In my experience, it is often the case that a Scheme existed in the early days of a token, protocol and ecosystem, but that

[3] David Yaffe-Bellany, "S.E.C., Once Foe to Crypto, Softens Its Regulatory Tone," N.Y. Times, Apr. 1, 2026, at B1.

[4] SEC Division of Corporation Finance Director William Hinman, *"Digital Asset Transactions: When Howey Met Gary (Plastic),"* June 14, 2018, *available at* https://www.sec.gov/newsroom/speeches-statements/speech-hinman-061418.

[5] Interpretation at 12.

the Scheme did not endure and therefore there is no investment contract today. This brings me to my next point.

Secondary trading of crypto assets (other than digital securities) is excluded from the securities laws unless the project team made enduring representations or promises worthy of continuing reliance, which is a continuing Scheme.

The Commission's Interpretation of *Howey* is that "a non-security crypto asset that has been subject to an investment contract does not remain subject to the associated investment contract in secondary market transactions where purchasers would not reasonably expect … representations or promises to remain connected to the non-security crypto asset…. The associated investment contract will continue to be transferred to subsequent purchasers of the non-security crypto asset in secondary market transactions until the non-security crypto asset separates from the issuer's representations or promises…."[6]

Planning makes perfect. A well-advised project team will not make representations or promises about its managerial or entrepreneurial efforts that can reasonably be relied upon interminably, nor will it empower others to do so on its behalf. It will likely make representations and promises to initial purchasers of tokens in transaction documents. Those primary market transactions might well be securities offerings, structured appropriately to fit within a registration exemption. But a well-advised team will not reiterate those representations and promises to and for the benefit of the secondary market.

Business plans including timetable and milestones are especially sensitive in this regard. Investors like timetables and milestones, but publishing them suggests a Scheme that can attach a crypto asset to an investment contract. Admittedly, there is tension between making promises that investors want and avoiding a Scheme. Forward-looking updates self-published recently and inadvisedly in social media could determine the outcome of a close case.

Some crypto assets are securities, but there are many non-security crypto assets. There are many kinds of securities, just as there are many kinds of crypto assets. Lawyers for crypto companies need to consider the full statutory lists of securities in the course of their work.

At least since the *DAO Report* in 2017, we have known that a crypto asset could be an "investment contract," which is a security.[7] Or, as the Interpretation explains (in accord with the case law), a crypto asset can become "subject to" an investment contract, which is a security. At least since *BlockFi* in 2022, we have known that a crypto asset could be a *Reves* "note" that is a security.[8] The Interpretation explains at length what is, and is not, an investment contract, and how a crypto asset that is initially the subject of an investment contract which is a security can,

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[6] *Id.* at 27-28.

[7] *See* SEC Release No. 81207, *"Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO,"* July 25, 2017, *available at* https://www.sec.gov/files/litigation/investreport/34-81207.pdf.

[8] *Matter of BlockFi Lending LLC*, SEC Release No. 33-11029 (Feb. 14, 2022), *interpreting and applying Reves v. Ernst & Young*, 494 U.S. 56 (1990).

over time, lose that status, at which point the asset "separates" from the investment contract and is no longer subject to the securities laws. Lawyers for project teams seeking to design non-security crypto assets should follow the detailed guidance in the Interpretation on those points.[9]

Most securities law crypto asset analyses begin and end with consideration of the terms "investment contract" and "note," but I and my colleagues go much deeper than that. We have analyzed more than 150 crypto assets for clients. The Interpretation points out many ways that a crypto asset can be a security. In addition to a *Howey* investment contract or a *Reves* note, a crypto asset can be "stock," a "bond," a "certificate of interest or participation in a profit-sharing agreement," "any interest or instrument commonly known as a security," a "receipt for, guarantee of, or warrant or right to subscribe to or purchase" a security or a "certificate of deposit for a security," or, if it contains embedded smart contract features, it could perhaps fall within one of the "derivatives" elements of the statutory definition covering a "put, call, straddle, option, or privilege on any security," a "security future" or a "security-based swap."

The Interpretation assesses particular crypto assets for classification as all of these. I would add to the list "evidence of indebtedness" and "transferable share," and I am confident that the Commission and its Staff would agree as those terms have been applied in other interpretations. All possibilities must be considered when potentially applicable in order to be confident in an asset classification conclusion.

The Interpretation teaches us, indirectly, how to offer crypto assets in the US lawfully.

It's easily done if your token will have no intrinsic value, like a standard meme coin, or will be non-fungible, like a traditional NFT. You probably won't attract much venture capital for a project like that because capitalists strongly prefer to allocate venture funds to projects with growth potential. But follow the Interpretation and your project launch should be lawful.

If instead your plan is to create a token that will be intrinsically linked to and will derive its value from the programmatic operation of a crypto system that is "functional," as well as supply and demand dynamics, then you are creating a "digital commodity" that will not be the subject of an investment contract and will not be a security unless there is a Scheme that creates a reasonable expectation of profits from the efforts of others or the token has the economic characteristics of a traditional security. The economic characteristics of a traditional security are passive yield or rights to future income, profits or assets of an entity.[10]

The Interpretation does not dwell on the likelihood that early-stage projects will not be digital commodities that are not securities because they will not fit that definition, but that is the case.

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[9] *See* Interpretation at 24-33. Basically, vague, time-bound statements, made only to particular token purchasers, are best.

[10] The holders of traditional securities also tend to have "governance rights" in the issuer. These rights, such as the right of stockholders to elect directors of the issuer, are not universal but are common. The holders of non-security crypto assets are not stockholders, so they do not have the governance rights of stockholders. The Interpretation focuses on economic rights without dwelling on governance rights, except to note that governance tokens (which allow crypto asset holders to vote on technical or governance matters) can be digital commodities.

And in that usual case, the answer under current law is to offer and sell the token relying advertently on existing Securities Act registration exemptions, primarily Section 4(a)(2), SEC Regulation D and Regulation S.[11] If and when the Scheme terminates, or when the crypto system is "functional," then the token will be a digital commodity and the securities laws will no longer apply.

Decentralization is decisively favorable for a project in terms of asset classification unless the token has the economic characteristics of traditional securities.

After the *DAO Report*, well-advised project teams stopped including the economic characteristics of traditional securities in tokens. The planning focus shifted – and rightly so – to decentralization. In a sufficiently decentralized project, there is no reasonable reliance upon the (managerial or entrepreneurial) "efforts of others" because there are no such others. Therefore, there is no investment contract.

In its Interpretation, the Commission reasons that the purchaser of a digital commodity "would not reasonably expect to profit based on the essential managerial efforts of others" because a digital commodity "is associated with a functional crypto system," which "does not have a central party that oversees participation or distributes rewards to users." A "central party" is "a person, entity, or group of persons or entities having operational, economic, or voting control of a crypto system."[12] The "central party" concept used in the Interpretation resembles the "Active Participant" (or "AP") concept of the old FinHub Framework (which has been superseded by the Interpretation). I believe that the "central party" needs to be the founding and managerial group (or related entity) of the project in order to defeat decentralization, but the Interpretation does not say so. Future SEC guidance might address that point.

We don't have a clear statement in the Interpretation that utility tokens, also known as consumption tokens, are not securities, and we still need that.

"Importantly, the federal securities laws generally do not apply to items that are purchased for use or consumption, whether they are physical or digital."[13] Relatedly, assets that are bought and used primarily for their utility, rather than a reasonable expectation of profits, are not investment contracts and are probably not any other kind of security. The Interpretation comes close to making that point when it mentions the "utility" of commodities, of digital collectibles, and of digital tools.

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[11] *See* Patrick Daugherty, "Raising Capital," in Legal Matters in Web 3: A Desk Reference (2024), edited by Anup Malani and M. Todd Henderson, *available at* https://tinyurl.com/yt5ntw67. Additional means of offering tokens for sale will soon be proposed by the SEC.

[12] Interpretation at note 54 and accompanying text. A "functional crypto system" is one whose "native crypto asset can be used on the system in accordance with the programmatic utility of a system." *Id.* note 49. In other words, a "functional" crypto system (or protocol) is operational. Its native crypto asset can actually be used on it.

[13] *Id.* at page 11, *citing United Housing Foundation, Inc. Forman*, 421 U.S. 837, at 852-53 (1975).

Digital tools are fungible. They may be issued by a central party and they may be transferrable, according to the Interpretation: "Digital tools are commonly issued for use in connection with crypto systems and are designed to perform practical functions within such systems."[14] So "digital tool" would seem to be the best label for a utility token, which is all about practical use, bearing in mind that labels do not determine the results of a fact-intensive analysis. A team developing a utility token will want it to be classified as a digital tool, if possible, in conformity with the SEC's taxonomy.

In the lead-up to the Interpretation, Corp Fin gave favorable no-action letters to three applicants whose proposed tokens might be classified as utility tokens.[15] *DoubleZero*, *Fuse Crypto*, and *MegPrime Holding* were welcome developments. But they are not unambiguous interpretations that utility tokens are not securities in that they also discuss, to a greater or lesser degree, decentralization.

It would be an excellent next step, in line with Supreme Court precedent,[16] for the Commission or Corp Fin to issue favorable guidance to or for the benefit of a project team whose crypto system and proposed token are centralized but fully functional. Such a token might well qualify as a digital tool because function is the core criterion of a digital tool, which can be issued by a central party. A digital tool that is bought primarily for use and not with a reasonable expectation of profit is not subject to an investment contract in my view, even if the issuer is a central party. But the Interpretation is ambiguous about the need for decentralization in the Commission's investment contract analysis, noting only that a digital commodity "*may* be native to a crypto system that is decentralized."[17]

That ambiguity is the reason why further guidance is needed: It is sometimes the case that project management is centralized even though the crypto system is fully functional and tokens are being used, *ergo* consumed, as intended.

Thanks to the SEC, we now have a non-exclusive list of crypto assets that are NOT securities (unless they are, or become, subject to investment contracts because of a Scheme).

Many of us have been asking the SEC to tell us all which crypto assets are, and which are not, securities, in its opinion. Finally, the SEC has done that. First, I'll give you the list. Then I'll

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[14] Interpretation at 20. *Id.* ("their value is derived from their practical functionality").

[15] *See* Letter of Michael Seaman, SEC Division of Corporation Finance, to Cooley LLP, dated Sept. 29, 2025, at https://www.sec.gov/files/corpfin/no-action/doublezero-final-conformed-092625.pdf ("*DoubleZero*"); Letter of Jonathan A. Ingram, SEC Division of Corporation Finance, to Latham & Watkins LLP, dated Nov. 19, 2025, at https://tinyurl.com/4rw5jdft ("*Fuse Crypto*"); Letter of Jonathan A. Ingram, SEC Division of Corporation Finance, to Gibson, Dunn & Crutcher LLP and Gray, Reed & McGraw LLP, dated Jan. 12, 2026, at https://tinyurl.com/yw674wsu ("*MegPrime Holding").*

[16] *See United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, where there was a central party (Riverbay) but an investment contract did not exist because the co-ops were purchased for personal consumption.

[17] Interpretation at n. 50 (emphasis added).

comment on it. Examples of digital commodities include Algorand (ALGO); Aptos (APT); Avalanche (AVAX); Bitcoin (BTC); Bitcoin Cash (BCH); Cardano (ADA); Chainlink (LINK); Dogecoin (DOGE); Ether (ETH); Hedera (HBAR); Litecoin (LTC); Polkadot (DOT); LBRY Credits (LBC); Shiba Inu (SHIB); Solana (SOL); Stellar (XLM); Tezos (XTZ); and Ripple (XRP).[18] Most of these assets underlie futures contracts traded on designated contract markets, although that is not why they are digital commodities.

Examples of digital collectibles are CryptoPunks, Chromie Squiggles, Fan Tokens, Dogwifhat (WIF), and VCOIN.[19] Digital tools include Ethereum Name Service domain names and CoinDesk's "Microcosms" NFT Consensus Ticket.[20]

None of these assets is, *in itself*, a security.[21] They all lack the economic characteristics of a security as described in the Interpretation and summarized above. They are purchased primarily for their uses (and their market prices are a function of supply and demand) rather than being purchased primarily with an expectation of profit (at prices reflecting the performance of a business).

Again, these crypto assets are not securities. And yet "*any asset* that is not a security … can be offered and sold subject to an investment contract, which is a security."[22] Some lawyers are interpreting the Interpretation as holding that every crypto asset named in the Interpretation is a non-security crypto asset. That is incorrect. They are not traditional securities and, if there is no Scheme that extends to the secondary market, then they also are not subject to investment contracts. But any of these assets could be, or could become, the subject of an investment contract, depending upon the existence of such a Scheme.

Also, any stablecoin other than a payment stablecoin issued by a permitted stablecoin issuer under the GENIUS Act could be the subject of an investment contract (or could for other reasons be a security). There will be no investment contract, though, in the case of any of these assets unless there is a Scheme that relates to the particular asset at the time of the assessment.[23]

For this reason, I believe that every crypto asset listed above can be traded lawfully on a secondary platform in the US market without federal securities law compliance, subject only to a

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[18] *Id.* at 14.

[19] *Id.* at 17.

[20] *Id.* at 20.

[21] The "fact sheet accompanying" accompanying the Interpretation states that digital commodities, digital collectibles, digital tools and GENIUS Act stablecoins are, in each case, "NOT Securities" (emphasis in original).

[22] Interpretation at 13 (emphasis added).

[23] Nevertheless, "Covered Stablecoins," as defined in the Staff Statement on Stablecoins (Apr. 4, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/statement-stablecoins-040425, are not securities.

finding in each case that a Scheme does not exist regarding the asset. This brings me to my final comment on the Interpretation.

SEC and CFTC interpretations can be expected to align on issues not addressed by the Interpretation. Rationalizing the extraterritorial application of federal securities, commodities and derivatives regulation, conforming it across statutes and agencies as much as possible, would be an enormous achievement.

The level of cooperation between the SEC and the CFTC, particularly between their two Chairmen, is extraordinarily high and laudatory. Much of the credit for this goes to CFTC Chairman Michael Selig, who moved to Washington to work for the SEC, serving first as Chief Counsel for the SEC Crypto Task Force and as a senior advisor to SEC Chairman Paul Atkins immediately before he was nominated and confirmed for his current role at the CFTC. In late January of this year, Chairmen Atkins and Selig jointly announced that "Project Crypto," previously an Atkins initiative, would proceed as a joint effort by the SEC and the CFTC. In March, the Chairmen signed a historic Memorandum of Understanding, pledging "to coordinate, as appropriate, in areas of common regulatory interest where collaboration can enhance regulatory effectiveness and market integrity."[24]

The Interpretation itself was issued by the SEC to construe the federal securities laws, not the Commodity Exchange Act, but Selig has had a hand in all of that, and his work will continue. The SEC notes in the Interpretation that "the CFTC provides … guidance that the CFTC and its staff will administer the Commodity Exchange Act consistent with the interpretation."[25]

Because of this high level of inter-agency cooperation, there should be no reason for concern that the agencies might take inconsistent positions in rulemaking proceedings or courts in the near term. There also is an opportunity for the SEC and the CFTC to give joint guidance. One area where this would be especially useful relates to the extraterritorial application of US law. The SEC adopted Regulation S in 1989 for use in structuring off-shore offerings to land outside the scope of Securities Act registration requirements. Regulation S should be interpreted by the SEC to clarify its application to crypto asset offerings, which Chairman Atkins' predecessor refused to do. It was "regulation by enforcement" then – but not now.[26]

Modernizing Regulation S to directly address digital securities would help clarify the law. While that would be good, more is needed because the SEC has no generally applicable standards for application of other federal securities laws to putatively "off-shore" activities. It would be monumentally useful, in my view, for the agencies jointly to give guidance about what conduct can be conducted within the US, and by whom, by a crypto asset platform, while lawfully

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[24] Memorandum of Understanding Between the SEC and the CFTC Regarding Harmonization in Areas of Common Regulatory Interest, Mar. 11, 2026, at 4, *available at* https://www.sec.gov/files/mou-sec-cftc-2026.pdf. "Coordination is intended to provide greater regulatory clarity, reduce uncertainty, and help ensure that U.S. markets remain globally competitive and attractive to innovators and investors." *Id.*

[25] Interpretation at 9.

[26] "The [SEC and CFTC] jointly recognize the foundational importance of fair notice to market participants and not regulating through enforcement." Memorandum of Understanding, *supra* note 23, at 4.

avoiding registration and regulation under the Commodity Exchange Act and the full spectrum of federal securities laws. In-depth guidance of that sort would surely help the crypto industry flourish in America.

Conclusion

The Interpretation is a major milestone on the path toward clarifying the laws applicable to the crypto industry and its customers in the United States. Telling us which crypto assets are, and are not, securities, and why, should have happened years ago. But at least it has happened now. Telling us when these assets can be traded lawfully in secondary markets also is an advance. Teams that want to avoid creating securities when they mint crypto assets will avoid the kinds of representations and promises identified as problematic in the Interpretation in order to avoid a Scheme or to terminate it early. Teams and crypto asset traders in US markets will want to document decentralization and functionality factual predicates and conclusion.

Going forward, I would like to see a clear finding by the SEC or its staff that utility tokens are not securities even if they are centralized, as I believe to be the case (absent a Scheme). Also on my "wish list": joint agency guidance about how to operate an on-shore crypto exchange for spot cash market transactions without registering as a securities exchange or a designated contract market. The so-called CLARITY Act, if enacted, will largely resolve these issues by establishing a separate registration category for digital commodity exchanges, but enactment is uncertain.

Market structure issues will remain front and center in the two agencies whether or not we see legislation enacted this year. Either they will write rules under the CLARITY Act or they will issue guidance under the existing statutes. I am grateful, as we all are in the Bar, for the transparency assured to the public by Chairmen Atkins and Selig, Commissioner Peirce, and agency staff, and for the numerous opportunities offered by them to participate in the process of improving the law.