

COMMENT LETTER

Application of the Federal Securities Laws to Certain Types of Crypto Assets

Release Nos. 33-11412; 34-105020 | File No. S7-2026-09

Submitted via: rule-comments@sec.gov

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Subject: Comment on Release Nos. 33-11412; 34-105020 — File No. S7-2026-09

Date: March 22, 2026

I. Introduction

I respectfully submit this comment letter in response to the Commission's invitation for public comment on the Joint Interpretive Release issued March 17, 2026 (Release Nos. 33-11412; 34-105020) (the "Release"). I am a member of the public with an analytical interest in regulatory frameworks applicable to digital asset markets.

I write to commend the Commission and the Commodity Futures Trading Commission for this initiative. The Release represents a meaningful step toward providing the regulatory clarity that market participants, investors, and compliance professionals have sought for many years. The Commission's effort to articulate a workable taxonomy for crypto assets, clarify the lifecycle of an investment contract, and provide interpretive guidance on mining, staking, wrapping, and airdrops is genuinely constructive.

My comments focus on a set of interpretive uncertainties that, in my assessment, may unintentionally facilitate form-over-substance structuring by sophisticated market actors. For each area of concern, I have attempted to explain the nature of the ambiguity, how it may be utilized to avoid the investor protections the Release is designed to preserve, and what specific clarification or supplemental guidance would address the issue. I do not raise these concerns as criticisms of the Commission's intent; rather, I raise them in

the hope that supplemental guidance can close the gaps before they are tested in practice.

My comments are organized as follows. Section II addresses interpretive uncertainty regarding the functionality threshold for digital commodity classification. Section III addresses the issuer-defined fulfillment standard. Section IV addresses the treatment of project abandonment and affiliated successors. Section V addresses the relationship between issuer communication practices and the scope of the Howey analysis. Section VI addresses third-party promotional ecosystems and issuer attribution. Section VII addresses secondary market classification and the need for clearer separation criteria. Section VIII addresses additional structural observations, including ancillary services bundling, restaking, and governance rights. Section IX provides summary recommendations.

II. Interpretive Uncertainty Regarding the Functionality Threshold

A. The Nature of the Ambiguity

The Release defines a "digital commodity" as a crypto asset that is intrinsically linked to and derives its value from the programmatic operation of a crypto system that is "functional." (Section III.A.) Footnote 49 defines a functional crypto system as one in which "the system's native crypto asset can be used on the system in accordance with the programmatic utility of the system."

The Release appears to create interpretive uncertainty regarding when a crypto system is sufficiently functional for its native asset to qualify as a digital commodity. Because the Release does not articulate a minimum threshold for meaningful functionality, market participants may attempt to rely on nominal or superficial utility — such as inconsequential governance voting, trivial gas-fee mechanics with minimal transaction volume, or access gating to a largely inactive application — to argue that an asset falls outside the scope of securities-law treatment.

This interpretive uncertainty is consequential because functionality serves as one of the primary structural distinctions between a digital commodity and a non-security crypto asset that remains subject to an investment contract. Where the boundary can be satisfied by formal or technical capability rather than operative economic use, the investor-protection rationale underlying the Howey analysis may be undermined.

B. Foreseeable Market Consequence

Assets whose networks are genuinely functional — such as those the Commission has expressly identified as digital commodities in footnote 51 — are likely to benefit from increased interpretive clarity under the Release. The Commission's express

identification of specific named assets provides substantial interpretive certainty regarding the Commission's current view that those assets qualify as digital commodities as of the date of the Release, which should reduce regulatory uncertainty for participants in those markets.

By contrast, assets in earlier stages of development whose sponsors seek to argue functionality on the basis of minimal or engineered utility may face residual uncertainty, and purchasers of such assets may be unable to rely on the digital commodity classification with confidence. The absence of a substantiality floor creates asymmetric conditions: well-resourced sponsors can invest in crafting technical arguments for functionality, while ordinary investors may have no reliable basis for assessing whether the classification applies.

C. Recommended Clarification

The Commission should clarify whether functionality, for purposes of the digital commodity definition, requires substantial, operative, and economically meaningful use of the native asset within the associated crypto system, rather than merely formal or technical capability. Relevant factors the Commission might consider articulating include: the volume of genuine, arm's-length transactions utilizing the native asset's programmatic utility; the number of independent, active addresses; the degree to which the system operates without ongoing centralized technical intervention; and whether the utility is circular or self-referential in a manner that does not reflect genuine independent demand.

III. The Issuer-Defined Fulfillment Standard

A. The Nature of the Ambiguity

Section IV.B.1 of the Release provides that a non-security crypto asset ceases to be subject to an associated investment contract once the issuer has fulfilled the representations or promises to engage in essential managerial efforts that gave rise to the investment contract. Footnote 96 clarifies that whether the issuer has fulfilled such representations or promises is assessed against "how the issuer defined or otherwise described" the relevant efforts, rather than against any external or market-standard conception of those efforts.

This formulation, while administratively workable, may create interpretive uncertainty regarding the extent to which issuers can structure the scope of their commitments specifically to accelerate separation from investment contract treatment. An issuer that drafts its whitepaper to describe essential managerial efforts in terms of narrow, easily achievable, and self-verifying technical milestones — such as publication of open-

source code, deployment of a single node, or enablement of any governance vote — may be in a position to declare fulfillment shortly after issuance, even where purchasers' reasonable investment expectations contemplated a substantially more developed and operational system.

B. Investor Protection Consequence

The investor protection concern is that purchasers who made investment decisions based on the totality of an issuer's representations — including aspirational materials, market communications, and community-building activities that go beyond the narrowly defined milestone language — may find themselves without recourse under the Federal securities laws if the issuer successfully argues that separation has occurred based on a formally satisfied but economically minimal milestone. The anti-fraud provisions survive separation, but the practical litigation burden of demonstrating fraudulent intent is materially higher than asserting an ongoing securities relationship.

C. Recommended Clarification

The Commission should clarify that while issuer-defined milestones are the starting point for assessing fulfillment, they are not solely dispositive where the totality of the issuer's representations — including materials disseminated through the issuer's established communication channels — would have led a reasonable purchaser to expect a substantially broader scope of essential managerial efforts. This approach is consistent with the economic reality principle the Commission invokes in Section II of the Release, citing *Forman*, 421 U.S. at 849, and would prevent the issuer-defined standard from operating as an invitation to engineer the fulfillment threshold.

IV. Abandonment, Non-Performance, and Affiliated Successor Entities

A. The Nature of the Ambiguity

Section IV.B.2 of the Release establishes that a non-security crypto asset may cease to be subject to an investment contract where the issuer publicly announces that it will no longer perform the essential managerial efforts it represented or promised — in effect, where the issuer abandons the project. The Release requires that such announcement be "widely disseminated" and "unambiguous." (P. 31, fn. 98.)

The Release may unintentionally allow a project sponsor to terminate the ongoing nexus between an asset and prior managerial promises through public cessation, even where affiliated or coordinated ecosystem actors continue substantially similar development efforts through a successor entity. As the Release acknowledges, the issuer may face continued liability for material misstatements under the antifraud provisions. However, the classification consequence — that the investment contract

ceases to exist — may be achievable through narrative and governance restructuring even where the commercial reality involves continuity of development under a different legal form.

B. Foreseeable Structuring Consequence

A project sponsor facing enforcement risk or development challenges might publicly announce cessation of essential managerial efforts while contemporaneously facilitating a transition to a community foundation, decentralized autonomous organization, or affiliated entity that continues substantially identical development work. The Release's antifraud hook would require the Commission to establish the coordination between the original sponsor and the successor — a fact-intensive inquiry — rather than relying on the simpler classification analysis.

The concern is not that all transitions to community governance are suspect; many represent genuine decentralization milestones that the Release appropriately treats as consistent with digital commodity classification. The concern is that the abandonment pathway, as currently framed, does not distinguish between genuine cessation and structured transition, and provides no guidance on how affiliated or coordinated successor activity affects the classification analysis.

C. Recommended Clarification

The Commission should clarify that the abandonment safe harbor does not sever investment contract status where: (i) the original issuer or its affiliates retain a material economic interest in the successor entity or the associated crypto asset; (ii) the development of the associated crypto system continues under the direction of persons who were previously affiliated with the issuer; or (iii) the transition to a successor entity was arranged or facilitated by the original issuer contemporaneously with or in anticipation of the abandonment announcement. Additionally, the Commission should consider whether a minimum period of genuine development cessation should be required before the abandonment pathway produces its classification consequences.

V. Issuer Communication Practices and the Scope of the Howey Analysis

A. The Nature of the Ambiguity

Section IV.A of the Release provides that representations or promises are more likely to give rise to reasonable profit expectations when they are explicit, detailed, and contain actionable business plans with milestones, timelines, personnel information, and funding details. Conversely, the Release indicates that representations or promises that

"are vague or contain no semblance of an actionable business plan, such as those lacking milestones, funding, or other plans for needed resources, likely would not create reasonable expectations of profit." (P. 27.)

This formulation, read in isolation, may create interpretive uncertainty that inadvertently favors strategic ambiguity in issuer communications. Sophisticated counsel advising issuers may interpret the Release as indicating that the Howey investment contract analysis can be reduced or eliminated through deliberate use of aspirational, vision-oriented, or community-framed language that stops short of formal milestones or funding commitments — while still effectively inducing the same investment behavior from purchasers.

B. Investor Protection Consequence

The investor protection concern is that the distinction between detailed and vague representations was developed in the case law to assess what reasonable purchasers were led to expect, not to provide a drafting guide for minimizing Howey exposure. If issuers can engineer their communications to be sufficiently noncommittal to avoid investment contract treatment while still inducing investor-like behavior through community language, token appreciation narratives, and soft signaling, the Release may have the unintended effect of rewarding communication practices that are less transparent, not more.

C. Recommended Clarification

The Commission should clarify that the specificity of representations is one relevant factor in the totality-of-circumstances analysis, but is not dispositive where the economic substance of a transaction, the manner in which the asset is marketed, and the reasonable expectations of purchasers based on the overall conduct of the issuer collectively indicate the presence of an investment contract. The Commission might also clarify that an issuer who deliberately structures communications to avoid the formal attributes of an investment contract while seeking to achieve the economic benefits of one may not benefit from the interpretive safe harbors established in the Release.

VI. Third-Party Promotional Ecosystems and Issuer Attribution

A. The Nature of the Ambiguity

Section IV.A of the Release states that it would generally not be reasonable for purchasers to expect profits based on representations or promises made by third parties — such as unaffiliated proponents or token holders — unless those representations or promises are "authorized by the issuer and conveyed to purchasers." (P. 26.) Footnote

89 adds that where a third party and the issuer collude to convey representations, those representations are attributable to the issuer.

The Release does not, however, address the broader spectrum of issuer-adjacent promotional activity that characterizes many crypto asset markets. In practice, issuers frequently cultivate promotional ecosystems — including paid or incentivized community contributors, foundation-adjacent media, influencer networks, and ecosystem grant recipients — whose communications may not be formally authorized but are nonetheless amplified, condoned, or strategically encouraged by the issuer.

B. Investor Protection Consequence

The interpretive uncertainty is whether an issuer can benefit from a robust promotional ecosystem that creates investment-like expectations among purchasers while maintaining a formal posture of non-authorization that, under the Release, may insulate those communications from Howey analysis. The concern is that the "authorized" standard, as currently framed, turns on formal attribution rather than economic reality, and may be susceptible to structuring through the deliberate use of intermediary promotional channels.

C. Recommended Clarification

The Commission should clarify that the scope of "authorized" third-party representations extends beyond formal authorization to include circumstances where the issuer: (i) provides material support, funding, or access to third parties who make representations about the issuer's essential managerial efforts; (ii) creates or maintains communication structures through which such representations are routinely disseminated; or (iii) is aware of and does not disavow promotional representations made through channels the issuer has cultivated. This approach would align the attribution standard with the economic reality principle and prevent the formal authorization requirement from creating structural opportunities for issuer deniability.

VII. Secondary Market Classification and Separation Criteria

A. The Nature of the Ambiguity

Section IV of the Release establishes that a non-security crypto asset does not remain subject to an investment contract in perpetuity, and that secondary market transactions are securities transactions only where purchasers "would reasonably expect such representations or promises to remain connected to the non-security crypto asset." (P. 28.) The Release describes the separation analysis as dependent on specific facts and circumstances, and provides certain non-exclusive indicia — fulfillment, abandonment, and passage of time — as bases on which separation may occur.

The Release does not provide a mechanism by which issuers, market intermediaries, or investors can obtain certainty about whether separation has occurred in any particular case. The result is a continuous secondary market classification problem with no bright-line resolution. This asymmetry operates to the disadvantage of ordinary investors: sophisticated market actors with access to legal resources can construct separation arguments on a transaction-by-transaction basis, while retail participants and smaller intermediaries lack the means to make equivalent assessments.

B. Foreseeable Market Consequence

Assets whose associated investment contracts have clearly separated — for example, those issued by issuers who have publicly and unambiguously declared milestone completion and ceased active development responsibilities — are likely to experience improved secondary market liquidity and reduced compliance friction. Assets in transitional states, where the separation analysis is genuinely contested, are likely to face residual uncertainty that may affect their accessibility on regulated venues and their treatment by compliance-oriented intermediaries.

C. Recommended Clarification

The Commission should consider establishing a voluntary disclosure mechanism through which issuers can make a formal, publicly available declaration of milestone completion or project abandonment, analogous to current reporting obligations for material events by registered issuers. Such a declaration, if accurate and complete, could serve as a non-exclusive safe harbor for secondary market participants who act in good faith reliance on it. Additionally, the Commission should consider articulating non-exclusive objective factors — such as the passage of a specified period without issuer development activity, a threshold level of decentralization as independently verified, or public completion of defined milestones — that market participants could use as benchmarks in assessing separation status.

VIII. Additional Structural Observations

A. Ancillary Services: Bundling and Economic Characterization (Section V.B.3)

The Release identifies three specific staking-related services — Slashing Coverage, Early Unbonding, and Alternate Rewards Payment Schedules — as "administrative or ministerial" in nature, and states that a service provider offering any or all of these services does not thereby engage in essential managerial efforts. (Pp. 50-52.)

A structural observation worth the Commission's attention is that while each of these services may be genuinely ministerial in isolation, their combination may produce a product with materially different economic characteristics. Slashing Coverage transfers

downside risk; Early Unbonding provides liquidity optionality; Alternate Rewards Payment Schedules permit cash flow structuring. A provider offering all three to a depositor population creates an arrangement that begins to resemble a risk-managed, yield-structured financial product rather than a simple administrative pass-through. The Commission should consider clarifying that the ministerial characterization of individual ancillary services does not automatically extend to bundled structures whose aggregate economic character materially exceeds the sum of their parts.

B. Restaking: An Explicitly Unaddressed Activity (Footnote 107)

The Release explicitly states that it does not address restaking, defined as a process that allows digital commodities staked on their associated network to be used on additional crypto systems. (Fn. 107.) Restaking represents a significant and growing sector of the staking ecosystem, involving layered yield structures derived from securing multiple networks with the same underlying staked asset.

The explicit omission creates a meaningful gap. Market participants engaged in restaking protocols — involving both restaking providers and depositors — have no interpretive guidance on whether the additional yield layer generated by securing secondary networks constitutes essential managerial efforts under Howey. The Commission should prioritize supplemental guidance on restaking as a near-term step in its ongoing interpretive program.

C. Governance Rights and the Equity-Analogue Question (Section III.A)

The Release recognizes that digital commodities may convey governance rights — such as voting on software upgrades or treasury expenditures — while retaining digital commodity status. (P. 15.) The Release does not, however, address the spectrum of economic significance that governance rights can represent in practice.

In many existing crypto systems, governance rights include authority to activate or modify protocol fee switches that direct revenue to token holders, authorize token buybacks, allocate treasury capital to specific beneficiaries, and set validator economics that directly affect staking yields. These rights may approach, in economic substance, the kind of profit participation and enterprise control that characterize equity interests in traditional corporate structures. The Commission should clarify that governance rights compatible with digital commodity status are those that do not, in economic substance, entitle holders to a share of business revenues, profits, or assets distributed by a central party on behalf of a business enterprise.

D. Stablecoin Framework: Interpretive Period and Marginal Cases (Section III.D)

The Release carefully distinguishes between two sources of stablecoin protection: the statutory exclusion applicable to payment stablecoins issued by permitted payment stablecoin issuers under the GENIUS Act (which is not yet effective as of the Release date), and the Commission's interpretive treatment of "Covered Stablecoins" under the prior staff statement framework, which the Commission now formally endorses. (Pp. 21-23.)

This dual-source framework is accurate and well-structured, but creates residual uncertainty for stablecoins that do not clearly fit either category — including algorithmic stablecoins, yield-bearing stablecoins, offshore dollar-pegged instruments, and mixed-model products. The prohibition on interest or yield payments by permitted stablecoin issuers under Section 4(a)(11) of the GENIUS Act means that yield-bearing stablecoins will fall outside the statutory exclusion. The Commission should clarify that such stablecoins remain subject to individual Howey analysis, and should consider articulating the factors most relevant to that analysis.

IX. Summary of Recommended Actions

For the Commission's convenience, I summarize below the specific clarifications or supplemental guidance requested in this letter:

- **Section II — Functionality:** Clarify that digital commodity classification requires substantial, operative, and economically meaningful use of the native asset, not merely formal or technical capability. Provide objective factors relevant to the substantiality assessment.
- **Section III — Issuer-Defined Fulfillment:** Clarify that issuer-defined milestones are not solely dispositive where the totality of the issuer's representations would have led a reasonable purchaser to expect a broader scope of essential managerial efforts.
- **Section IV — Abandonment and Affiliated Successors:** Clarify that the abandonment pathway does not sever investment contract status where affiliated or coordinated successor entities continue substantially similar development, and consider a minimum cessation period requirement.
- **Section V — Strategic Vagueness:** Clarify that the specificity of issuer representations is one factor in the totality-of-circumstances analysis and does not operate as a dispositive safe harbor against Howey analysis where economic substance indicates an investment contract.
- **Section VI — Third-Party Attribution:** Clarify that the "authorized" standard for third-party representations extends to circumstances where the issuer provides material support for, cultivates, or fails to disavow promotional ecosystems that create investment-like expectations.
- **Section VII — Secondary Market Separation:** Establish a voluntary formal disclosure mechanism for separation declarations, and articulate non-exclusive objective benchmarks for assessing separation status.
- **Section VIII.A — Ancillary Services Bundling:** Clarify that the ministerial characterization of individual ancillary services does not automatically extend to

bundled structures whose aggregate economic character materially differs from the sum of their components.

- Section VIII.B — Restaking: Prioritize supplemental guidance addressing whether restaking activities constitute essential managerial efforts under Howey.
- Section VIII.C — Governance Rights: Clarify that governance rights compatible with digital commodity status do not include rights that, in economic substance, entitle holders to a share of enterprise revenues, profits, or assets distributed by a central party.
- Section VIII.D — Stablecoins: Clarify the treatment of yield-bearing, algorithmic, and mixed-model stablecoins that fall outside both the GENIUS Act exclusion and the Covered Stablecoin interpretive framework.

X. Conclusion

Release Nos. 33-11412 and 34-105020 provide substantial interpretive clarity regarding the Commission's current views on the application of the Federal securities laws to crypto assets and transactions involving crypto assets. The Commission's express classification of named digital commodities, its articulation of the investment contract lifecycle, and its treatment of protocol mining, staking, wrapping, and airdrops collectively represent a meaningful and constructive contribution to the regulatory framework.

The observations in this letter are not intended to diminish that contribution. They are intended to identify a set of interpretive uncertainties that, if unaddressed, may be utilized by sophisticated actors to achieve form-over-substance regulatory outcomes — to the detriment of the ordinary investors the Federal securities laws are designed to protect. Each of the ambiguities identified in this letter involves a provision that is defensible as written but susceptible to creative structuring at the margins.

I respectfully urge the Commission to consider the clarifications and supplemental guidance outlined above, and to treat this release as the first step in an ongoing interpretive program rather than a final statement. The crypto asset markets are evolving rapidly, and the regulatory framework will need to evolve with them.

I appreciate the Commission's consideration of these comments and remain available to provide further analysis or clarification if that would be helpful to the Commission's work.

Respectfully submitted,

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March 22, 2026

Note: This letter is submitted as a public comment pursuant to the Commission's invitation at File No. S7-2026-09. All citations are to the joint interpretive release as published March 17, 2026. Nothing in this letter constitutes legal advice.