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April 14, 2026

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets (Release Nos. 33-11412; 34-105020; File No. S7-2026-09)

Dear Secretary Countryman:

I respectfully submit this comment letter in response to the Commission’s joint interpretive release with the Commodity Futures Trading Commission regarding the application of the Federal securities laws to certain types of crypto assets and certain transactions involving crypto assets (the “**Interpretation**”).¹ I am Managing Partner at Veritas Global Law PLLC (“**Veritas Global**”), where, *inter-alia*, my practice focuses on securities regulation, digital asset market structure, and representation of emerging companies and emerging managers. I write in my personal capacity, and the views expressed herein are my own. They do not represent the views of Veritas Global or any of its clients.

I. INTRODUCTION

The Interpretation is a landmark achievement. The Commission’s five-category taxonomy, its articulation of the investment contract lifecycle, and its treatment of protocol mining, staking, wrapping, and airdrops collectively represent the most significant advance in regulatory clarity for digital asset markets since the 2017 DAO Report.² The Commission’s determination to provide interpretive guidance — rather than continue regulating by enforcement — is commendable, and the extensive public engagement that preceded this release, including the Crypto Task Force’s roundtables and written input process, reflects the best traditions of the Commission.

I write to address two areas where the Interpretation, despite its considerable breadth, leaves material regulatory uncertainty that may impede the Commission’s stated objectives of “enabl[ing]

¹Release Nos. 33-11412; 34-105020, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets (Mar. 17, 2026) (the “Interpretation”).

²Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Release No. 34-81207 (July 25, 2017).

America’s financial markets to move onchain”³ and facilitating “increased entrepreneurship and innovation.”⁴ First, the Interpretation’s treatment of wrapping, mining, staking, and airdrops does not extend to the dominant form of decentralized finance activity: liquidity provision to automated market makers and lending protocols. Second, the Interpretation’s dynamic classification framework — under which a non-security crypto asset may become subject to, and later separate from, an investment contract — creates novel and unresolved fiduciary duty challenges for institutional investors that, if unaddressed, will chill the very institutional adoption the Commission seeks to encourage.

These two issues are related. Institutional capital cannot flow into decentralized finance protocols if (a) the regulatory status of liquidity provision is uncertain, and (b) the fiduciary framework for holding dynamically classified assets is undefined. Resolving both issues would materially advance the Commission’s objectives.

II. THE DEFI LIQUIDITY PROVISION GAP

A. The Scope of the Problem

The Interpretation addresses four categories of crypto asset activity: protocol mining, protocol staking, wrapping, and airdrops. For each, the Commission provides interpretive guidance on whether the activity involves the offer and sale of a security. This guidance is valuable and, in each case, well-reasoned.

However, the Interpretation does not address a fifth category of activity that is, by any economic measure, the most significant: the provision of liquidity to decentralized finance (“DeFi”) protocols, including automated market makers (“AMMs”) and decentralized lending protocols. When a holder of a digital commodity deposits that asset into an AMM liquidity pool — such as those operated by the Uniswap, Curve, or Balancer protocols — the depositor receives a liquidity provider (“LP”) token or receipt token that represents a pro rata claim on the pooled assets. The depositor earns a share of transaction fees generated by the pool’s automated trading activity. When a holder deposits a digital commodity into a decentralized lending protocol — such as those operated by the Aave or Compound protocols — the depositor receives a receipt token and earns interest paid by borrowers.

As of early 2026, DeFi protocols hold in the range of \$95 billion in total value locked.⁵ Liquidity provision is the primary mechanism by which capital is deployed across decentralized finance. It is also the mechanism through which institutional investors are most likely to gain exposure to

³Chairman Paul S. Atkins, American Leadership in the Digital Finance Revolution (July 31, 2025).

⁴Interpretation at Section IX (Commission Economic Considerations).

⁵See DeFiLlama, Total Value Locked (All Chains), available at <https://defillama.com> (as of Apr. 2026).

DeFi-native yield — a prospect that the Commission’s own Interpretation, by classifying major digital commodities as non-securities, has made substantially more attractive.

The Interpretation’s silence on this activity creates a material gap. An institutional investor that reads the Interpretation and concludes that Ethereum is a digital commodity and not a security may then deposit that Ethereum into a Uniswap liquidity pool — and have no guidance from the Commission on whether the LP token received in return is a security, whether the deposit constitutes an investment of money in a common enterprise, or whether the protocol’s automated fee distribution constitutes profits derived from the efforts of others.

B. The Doctrinal Question: Can Autonomous Code Constitute the “Efforts of Others”?

The Howey test requires, among other things, that a purchaser reasonably expect to derive profits from “the essential managerial efforts of others.”⁶ The Interpretation correctly explains that “administrative and ministerial activities are not managerial efforts that satisfy Howey’s ‘efforts of others’ requirement.”⁷ The Commission applies this principle to conclude that protocol mining, protocol staking, and wrapping do not involve the offer and sale of a security because the activities of the relevant participants are “administrative or ministerial in nature and do not constitute essential managerial efforts.”⁸

The same analysis extends, with even greater force, to liquidity provision in truly decentralized protocols. The core doctrinal question — which no court has squarely addressed and which the Interpretation does not reach — is whether the autonomous, deterministic⁹ execution of code by a smart contract can constitute the “efforts of others” within the meaning of Howey.

I submit that it cannot, and that the Commission should so interpret. The “efforts of others” requirement, as developed in the case law, contemplates human agency — the exercise of judgment, discretion, and managerial decision-making by identifiable persons or entities whose labor and expertise generate returns for passive investors.¹⁰ A fully deployed, immutable smart

⁶SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946); SEC v. Glenn W. Turner Enterprises, Inc., 474 F.2d 476, 482 (9th Cir. 1973).

⁷Interpretation at 12, citing First Fin. Fed. Sav. & Loan v. E.F. Hutton Mortgage, 834 F.2d 685 (8th Cir. 1987); Union Planters Nat’l Bank v. Commercial Credit Business Loans, Inc., 651 F.2d 1174 (6th Cir. 1981).

⁸See Interpretation at Sections V and VI (discussing protocol mining, protocol staking, and wrapping).

⁹Probabilistic or stochastic execution by artificial intelligence agents of code by smart contract is an additional legal question that I am also considering under separate scholarship.

¹⁰See Glenn W. Turner, 474 F.2d at 482 (“the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise”); see also Donovan v. GMO-Z.com Tr. Co., Inc., 779 F. Supp. 3d 372, 388 (S.D.N.Y. 2025) (“Ministerial, technical, and clerical tasks often are ‘necessary’ for an investment scheme to operate and thereby generate a profit, but courts have long found such efforts to be insufficient under Howey’s third prong.”).

contract that executes a constant product market-making formula¹¹ does not exercise judgment or discretion. It performs a deterministic mathematical function. The “efforts” that generate returns for LP token holders are not the efforts of any person or entity; they are the mechanical operation of code in response to market demand.

This argument is a natural doctrinal extension of the analytical framework that then-Director Hinman articulated in his 2018 address, in which he observed that where a network becomes “sufficiently decentralized” such that purchasers no longer reasonably expect a person or group to carry out essential managerial efforts, the asset may not satisfy the Howey test.¹² Director Hinman was addressing the decentralization of networks; the same principle applies with even greater force to the decentralization of protocols. If a sufficiently decentralized network removes the “efforts of others” element for the network’s native asset, then *a fortiori*, an immutable smart contract — which operates with no human intervention at all — cannot supply the “efforts of others” element for the tokens it issues to liquidity providers.

This analysis also finds support in the Southern District of New York’s recent treatment of programmatic secondary market transactions in *SEC v. Ripple Labs*.¹³ Judge Torres’s distinction between institutional sales (where the expectation of profits from the issuer’s efforts was well-established) and programmatic sales on digital asset exchanges (where blind bid/ask transactions did not create a reasonable expectation of profits from Ripple’s efforts) rests on the same foundational principle that animates the analysis here: the “efforts of others” element depends on whether the purchaser’s returns are attributable to the identifiable managerial conduct of a specific person or entity. In the context of an immutable AMM, there is no such person or entity — the purchaser’s returns are attributable to algorithmic execution and market dynamics.

This is analytically distinguishable from a managed investment fund, where a human portfolio manager exercises discretion over the deployment of pooled capital. It is also distinguishable from a centralized exchange, where human operators make decisions about listing, matching, and settlement. In a truly decentralized AMM, there is no person making these decisions. The protocol’s rules are fixed at deployment (or, in the case of governance-minimized protocols, are

¹¹See, e.g., Hayden Adams et al., *Uniswap v2 Core* (Mar. 2020) (describing the constant product formula $x \times y = k$); Hayden Adams et al., *Uniswap v3 Core* (Mar. 2021) (introducing concentrated liquidity, where liquidity providers select custom price ranges, transforming LP positions into non-fungible, actively managed allocations); Hayden Adams et al., *Uniswap v4 Core* (Aug. 2024) (introducing a hooks system enabling third-party code execution at ten callback points in the pool lifecycle, demonstrating that protocol architecture can range from fully deterministic execution to customizable logic layers).

¹²William Hinman, Dir., Div. of Corp. Fin., SEC, *Digital Asset Transactions: When Howey Met Gary (Plastic)* (June 14, 2018) (observing that where “the efforts of a third party are no longer a key factor for determining the enterprise’s success,” the asset “may not represent an investment contract”).

¹³See *SEC v. Ripple Labs, Inc.*, No. 1:20-cv-10832, 2023 WL 4507900, at *14-15 (S.D.N.Y. July 13, 2023) (Torres, J.) (holding that programmatic sales of XRP on digital asset exchanges did not constitute the offer and sale of investment contracts because the blind bid/ask transactions did not establish that purchasers expected profits from Ripple’s efforts). While the case was ultimately settled, the analysis on the programmatic point here is instructive from an analytical perspective.

modifiable only through broad-based governance processes that the Interpretation itself recognizes as compatible with non-security status¹⁴).

C. The Decentralization Spectrum and a Proposed Framework

I do not suggest that all DeFi liquidity provision falls outside the scope of the securities laws. The DeFi ecosystem encompasses a wide spectrum of protocol designs, and the Commission should recognize that the Howey analysis must be applied along that spectrum. I propose the following framework:

Category 1: Immutable or Governance-Minimized Protocols. Where a DeFi protocol’s smart contracts are deployed on a public blockchain, are immutable or modifiable only through broad-based governance processes with no central party exercising operational, economic, or voting control,¹⁵ and the protocol’s fee structure is determined algorithmically rather than by managerial discretion, the provision of liquidity to such a protocol and the receipt of LP tokens in return should not constitute the offer and sale of a security. The LP token in this context is functionally analogous to a warehouse receipt — it evidences the depositor’s ownership of the underlying pooled assets and entitles the depositor to withdraw those assets plus accrued fees. The Commission’s own analysis of Redeemable Wrapped Tokens as “receipts” for deposited crypto assets¹⁶ supports this characterization. Like a Redeemable Wrapped Token, an LP token from an immutable protocol “does not change any of the rights, obligations, or benefits of the deposited crypto asset”¹⁷ in a manner that introduces the economic characteristics of a security.

Category 2: Upgradeable Protocols with Centralized Control. Where a DeFi protocol’s smart contracts are upgradeable by a small group of identified persons (e.g., a multi-signature wallet controlled by the founding team), and that group exercises discretion over material parameters such as fee structures, supported assets, and capital allocation, the provision of liquidity may involve the “efforts of others” sufficient to satisfy Howey. In this scenario, the LP token holder’s returns are attributable not solely to algorithmic execution but to the managerial decisions of identifiable persons — a closer analogue to the traditional investment contract.

Category 3: Intermediate Designs. Many protocols fall between these poles — featuring time-locked upgradeability, progressive decentralization roadmaps, or governance processes that are broad-based but influenced by concentrated token holdings. For these protocols, the Commission should articulate factors relevant to determining whether the “efforts of others” element is satisfied, including: the degree to which protocol parameters are modifiable by identified persons;

¹⁴Interpretation at Section III.A (noting that digital commodities “may convey to holders certain governance rights”).

¹⁵The Interpretation defines a “central party” as “a person, entity, or group of persons or entities having operational, economic, or voting control of a crypto system.” Interpretation at n.54.

¹⁶See Interpretation at Section VI (discussing Redeemable Wrapped Tokens as “receipts”).

¹⁷Id.

the concentration of governance power; the practical ability of governance participants to direct economic value to themselves; and whether the protocol’s core market-making or lending function operates autonomously or requires ongoing human intervention.

The evolution of AMM protocol design itself validates this spectrum-based approach. The progression from Uniswap v2’s fully deterministic constant product formula, to v3’s concentrated liquidity (which transforms LP positions from passive, fungible tokens into actively managed, non-fungible allocations), to v4’s hooks system (which enables third-party code to execute custom logic at ten callback points in the pool lifecycle), demonstrates that protocol architecture increasingly spans the full range from autonomous execution to customizable, potentially centralized logic — precisely the continuum the proposed framework is designed to address.¹⁸

This spectrum-based approach is consistent with the Commission’s own reasoning in the Interpretation. The Commission recognizes that decentralization is a continuum — not a binary state — and that the absence of a “central party” is a key factor in determining whether a digital commodity’s value is derived from the efforts of others.¹⁹ The same logic applies to protocols: a protocol without a central party does not generate returns through the “efforts of others,” while a protocol with a central party exercising managerial discretion may. Indeed, the Commission’s own DeFi Roundtable examined this precise distinction — between operational control over a protocol, which may trigger registration obligations, and the publication of autonomous, self-executing software, which should not.²⁰

D. An Alternative Analytical Framework for Lending Protocol Receipt Tokens

I note a further doctrinal consideration that may be relevant to the Commission’s analysis of receipt tokens from decentralized lending protocols specifically. When a holder deposits a digital commodity into a lending protocol such as Aave and receives a receipt token bearing interest paid by borrowers, the transaction bears structural resemblance to a debt instrument: the depositor provides principal, receives interest, and retains a right to withdraw the principal. This structure may warrant analysis under the *Reves v. Ernst & Young* “family resemblance” test for notes,²¹ rather than (or in addition to) the *Howey* investment contract test. Under *Reves*, the relevant inquiry is whether the instrument bears a strong family resemblance to categories of notes that are not securities — including notes evidencing consumer financing, notes secured by a lien on a small

¹⁸See supra note 11.

¹⁹See Interpretation at Section III.A (“A functional crypto system does not have a central party that oversees participation or distributes rewards to users.”).

²⁰See SEC Crypto Task Force, Roundtable on Decentralized Finance (June 9, 2025) (examining the distinction between operational control over a DeFi protocol and the publication of autonomous, self-executing code).

²¹*Reves v. Ernst & Young*, 494 U.S. 56, 64-66 (1990) (applying the “family resemblance” test to determine whether a “note” is a security, considering: (1) the motivations of buyer and seller, (2) the plan of distribution, (3) the reasonable expectations of the investing public, and (4) the existence of an alternative regulatory regime that reduces the risk of the instrument).

business, and notes evidencing bank deposits. A lending protocol receipt token, which evidences the depositor’s right to withdraw deposited assets plus accrued interest from an autonomous lending pool, may bear a stronger resemblance to a certificate of deposit or bank deposit receipt than to a security. I raise this not as an alternative to the Howey analysis presented above, but as an additional doctrinal pathway the Commission may wish to consider.

E. Anticipating Objections

I recognize that the argument advanced above invites at least three significant objections, and I address them candidly.

First, the “embedded efforts” objection. One might argue that even an immutable smart contract was designed and deployed by human developers whose intellectual labor is “embedded” in the code, and that these initial design efforts constitute the “essential managerial efforts” that generate LP returns. This objection, while superficially appealing, conflates the design of a tool with the operation of an enterprise. The developer of a vending machine exercises considerable engineering skill in designing the machine, but the operation of the deployed machine — accepting payment, dispensing product — does not involve the developer’s ongoing “efforts” in any sense relevant to Howey. The same is true of an immutable smart contract: the developer’s design efforts are complete at deployment. The returns generated by the protocol thereafter are attributable to market dynamics (the volume and direction of trading activity) and the mechanical operation of deployed code — not to the ongoing managerial efforts of any person.²² The Interpretation itself draws this distinction when it treats protocol mining and staking activities as ministerial rather than managerial, even though the protocols that enable those activities were designed by human developers.

Second, the governance vote objection. One might argue that in governance-minimized protocols, governance token holders — who are distinct from LP token holders but whose votes may affect protocol parameters — constitute “others” whose “efforts” generate LP returns. This objection proves too much. If the act of voting in a broad-based governance process were sufficient to satisfy Howey’s “efforts of others” element, then shareholder voting in a publicly traded corporation would make every equity security doubly a security — once because the corporation’s management exercises essential managerial efforts, and again because the shareholders govern through voting. The law has not generally treated broad-based governance participation as the kind of “essential managerial effort” contemplated by Howey. The Interpretation itself acknowledges this when it notes that governance rights — including voting on software upgrades and treasury expenditures — are compatible with non-security status for digital commodities.²³ The same

²²Cf. *Donovan*, 779 F. Supp. 3d at 388 (distinguishing between efforts that are “necessary” for an enterprise to operate and efforts that are “essential managerial efforts” under Howey).

²³See Interpretation at Section III.A (noting that digital commodities “may convey to holders certain governance rights” including “voting on certain technical or governance matters, such as software upgrades and treasury expenditures”).

principle should apply to the governance of DeFi protocols: broad-based governance is a feature of decentralization, not evidence of an investment contract.

Third, the scope-of-jurisdiction objection. One might argue that the Commission should resist interpretive guidance that narrows the potential scope of the securities laws over a rapidly evolving asset class. I take this concern seriously — but submit that it is better addressed through the spectrum framework proposed above than through regulatory silence. The framework I propose does not immunize all DeFi liquidity provision from the securities laws; to the contrary, Category 2 (upgradeable protocols with centralized control) and Category 3 (intermediate designs) preserve the Commission’s enforcement jurisdiction where managerial discretion exists. What the framework does is provide clarity for Category 1 protocols — the immutable, governance-minimized designs where the doctrinal case for Howey coverage is weakest. Regulatory silence, by contrast, chills participation across the entire spectrum, including in protocols where the securities laws have the least doctrinal purchase.

F. The Practical Imperative

The absence of guidance on DeFi liquidity provision is not merely a doctrinal gap — it is a practical impediment to institutional adoption. Regulated entities, including registered investment advisers and broker-dealers, cannot participate in DeFi liquidity provision without a reasonable basis for concluding that the activity does not involve the offer and sale of unregistered securities. The Commission’s Interpretation has removed the threshold barrier to institutional engagement with digital commodities by classifying major assets as non-securities. But the next logical step for an institutional holder of digital commodities — deploying those assets productively through DeFi protocols — remains encumbered by regulatory uncertainty that only the Commission can resolve.

I respectfully urge the Commission to supplement the Interpretation with guidance addressing DeFi liquidity provision, using the spectrum-based framework proposed above or an alternative analytical approach that accounts for the continuum of protocol decentralization.

III. THE INSTITUTIONAL FIDUCIARY DUTY PROBLEM

A. Dynamic Classification as a Novel Regulatory Phenomenon

The Interpretation introduces a framework under which the regulatory classification of a crypto asset is not fixed but dynamic. A non-security crypto asset may become subject to an investment contract when an issuer makes representations or promises to undertake essential managerial efforts.²⁴ The same asset may later separate from that investment contract when the issuer fulfills or abandons those representations or promises.²⁵ This dynamic is not binary — it operates

²⁴See Interpretation at Section IV.A.

²⁵See Interpretation at Section IV.B.

continuously, with the classification of any given asset depending at any point in time on the state of the issuer's representations and the reasonable expectations of purchasers.

This framework is doctrinally sound as an interpretation of *Howey*. But it creates a regulatory phenomenon that is unprecedented in the history of the Federal securities laws: an asset whose classification as a security or non-security may change at any time, based on conduct by the issuer that is beyond the control or even the knowledge of the asset's holder.

In traditional securities markets, classification is fixed at the instrument level. A share of common stock is always a security. A Treasury bond is always a security. A bushel of wheat is never a security. The regulatory obligations of an investor — and the fiduciary obligations of an adviser managing assets on behalf of a client — are determined by the fixed classification of the instruments in the portfolio.

The Interpretation disrupts this assumption. Under the Interpretation, an institutional investor may acquire a digital commodity in good faith reliance on its non-security classification, only to find that the asset has become subject to an investment contract because the issuer — a separate entity over which the investor has no control — has made new representations or promises to the market. Conversely, an investor may acquire a crypto asset that is subject to an investment contract, intending to hold it until separation occurs, and find that the issuer's conduct has extended the investment contract indefinitely.

B. The Governance-Classification Nexus

The fiduciary duty problem is compounded by the interaction between governance rights and the dynamic classification framework — an intersection the Interpretation does not address. Many digital commodity protocols feature governance mechanisms through which token holders can vote to activate protocol fee switches, authorize token buybacks from the treasury, or direct the allocation of protocol revenue. The Interpretation treats governance rights as compatible with non-security status.²⁶ But a governance vote that activates a fee switch — directing protocol trading fees to governance token holders — may transform the governance token's economic profile from a utility instrument into a profit-sharing instrument. Under the Interpretation's own framework, this could constitute the formation of a new investment contract: the governance majority's decision to distribute economic value creates a reasonable expectation of profits derived from the efforts of the governance participants who directed the distribution.

This creates a compounding uncertainty for institutional fiduciaries. Not only may the classification of a digital commodity change due to issuer conduct (the dynamic classification problem described above), it may also change due to a governance vote by other token holders — a form of “classification risk” that is truly unprecedented. An institutional investor holding a

²⁶See Interpretation at Section III.A.

governance-minimized digital commodity classified as a non-security could find itself holding a security if a majority of governance token holders vote to activate a fee switch, even if the institutional investor voted against the proposal. This is the kind of risk that no existing fiduciary framework is designed to address.

C. The Fiduciary’s Dilemma

This dynamic classification framework creates acute challenges for fiduciaries — including registered investment advisers, ERISA fiduciaries, trustees, and the directors and officers of registered investment companies — who have legal obligations to manage assets in accordance with applicable law and the terms of their governing documents.

1. Investment Policy Compliance. Most institutional investment policies specify the types of assets that may be held — typically by reference to regulatory classification (e.g., “equity securities,” “fixed income securities,” “commodities”). A registered investment adviser whose investment policy permits holding “digital commodities” may find, through no fault of its own, that a portfolio holding has become subject to an investment contract and is now a security — potentially an unregistered security. The adviser may be in technical violation of its investment policy, its registration obligations, and its fiduciary duty to clients, based solely on the issuer’s unilateral conduct.

2. Custody Obligations. The custody rules applicable to registered investment advisers (Rule 206(4)-2 under the Advisers Act) and broker-dealers (Rule 15c3-3 under the Exchange Act) differ depending on whether the asset held is a security. If a digital commodity in an adviser’s custody becomes subject to an investment contract, the adviser’s custody obligations may change — potentially requiring the adviser to transfer the asset to a qualified custodian on an expedited basis. The adviser may not even be aware that the classification has changed.

3. Reporting Obligations. An institutional investor holding a digital commodity has no obligation to file reports with the Commission. If that digital commodity becomes subject to an investment contract, the investor may have reporting obligations under Section 13 of the Exchange Act (including Schedules 13D and 13G) that it did not previously have. The trigger for these obligations — the formation of an investment contract — may occur without the investor’s knowledge.

4. ERISA Considerations. ERISA fiduciaries have a duty of prudence that requires them to consider the regulatory status of plan assets. A plan that holds digital commodities classified as non-securities under the Interpretation faces a unique risk: the assets may become securities — and potentially “plan assets” subject to ERISA’s prohibited transaction rules — through issuer conduct that the fiduciary cannot predict or prevent.

D. Proposed Solution: A Good-Faith Reliance Safe Harbor

The fiduciary challenges described above are a direct consequence of the Interpretation’s dynamic classification framework. They cannot be resolved by the fiduciary alone — they require regulatory action by the Commission.

I propose that the Commission establish a Good-Faith Reliance Safe Harbor for institutional investors, structured as follows:

1. Classification Reliance. An institutional investor that acquires a crypto asset in good-faith reliance on its classification as a non-security under the Interpretation — whether because the asset is expressly identified as a digital commodity in the Interpretation, or because the investor has obtained a reasoned legal opinion that the asset satisfies the Interpretation’s criteria for non-security status — should not be deemed to have purchased or held an unregistered security if the asset subsequently becomes subject to an investment contract due to the issuer’s post-acquisition conduct.

2. Reasonable Disposition Period. If a non-security crypto asset in an institutional investor’s portfolio becomes subject to an investment contract, the investor should have a reasonable period (I suggest no less than 180 days from the date the investor knew or reasonably should have known of the classification change) to dispose of the asset, register the holding, or take other remedial action, without being deemed in violation of the Federal securities laws during that period.

3. Monitoring Standard. The Commission should clarify the standard of care applicable to institutional investors and their advisers with respect to monitoring the ongoing classification status of crypto asset holdings. I submit that a periodic review standard — rather than a continuous monitoring obligation — is appropriate, given that classification changes depend on issuer conduct that is external to the investor. A quarterly review of material developments relating to the issuers of crypto assets in the portfolio would be a reasonable and administrable standard.

4. Issuer Notification Obligation. To facilitate institutional compliance, the Commission should consider requiring issuers who make representations or promises that may give rise to an investment contract to provide contemporaneous public notice — analogous to a Form 8-K filing for material events — so that institutional holders and the market have timely information about events that may affect the classification of the crypto asset.

This proposal complements, on the institutional investor side, Commissioner Peirce’s proposed Safe Harbor 2.0 — which would provide token developers a three-year exemption from registration requirements to facilitate network development and decentralization.²⁷ Commissioner

²⁷See Commissioner Hester M. Peirce, Token Safe Harbor Proposal 2.0, Proposed Securities Act Rule 195 (2020); Commissioner Hester M. Peirce, Running on Empty: A Proposal to Fill the Gap Between Regulation and Decentralization, Remarks at Chicago, Ill. (Feb. 6, 2020) (identifying a “regulatory Catch 22” whereby networks

Peirce’s proposal addresses the regulatory Catch-22 facing developers who cannot distribute tokens without securities registration but cannot achieve decentralization without token distribution; the safe harbor proposed herein addresses the mirror-image problem facing institutional investors who cannot hold dynamically classified assets without a framework for managing classification risk. The two proposals are structurally complementary.

E. Anticipating Objections to the Safe Harbor

I address two principal objections to the proposed safe harbor.

First, the moral hazard concern. One might argue that a 180-day safe harbor creates an incentive for strategic behavior — that issuers could coordinate classification changes with affiliated institutional holders, allowing those holders to trade on advance knowledge of the change during the disposition period. This concern is real but manageable. The safe harbor’s “knew or reasonably should have known” trigger means that an institutional investor with advance notice of the classification change — including through an affiliation with the issuer — would not benefit from the 180-day disposition period; the period would begin running from the date of actual knowledge, not from the date of public notice. Moreover, trading on advance knowledge of a classification change that affects the security’s regulatory status would likely constitute a fraud in connection with the purchase or sale of a security under Section 10(b) and Rule 10b-5 — the very statutory provisions the Commission enforces most vigorously. The safe harbor protects innocent holders, not informed insiders.

Second, the jurisdictional concern. One might argue that the Commission should not create a safe harbor that limits the reach of the Federal securities laws in a new and evolving market. I submit that the safe harbor does not limit the Commission’s jurisdiction — it limits only the consequences for innocent holders of assets whose classification changes through no fault of their own. The issuer who makes representations or promises that give rise to an investment contract remains fully subject to the securities laws’ registration and antifraud provisions. The safe harbor addresses the downstream consequence of the issuer’s conduct on third-party holders, not the issuer’s own obligations. In this respect, it is analogous to the good-faith purchaser protections that pervade the securities laws, including Section 4(a)(1) of the Securities Act (exempting transactions by persons other than issuers, underwriters, and dealers) and the bona fide purchaser protections under UCC Article 8.

F. The Market Development Imperative

The Commission has stated that the Interpretation is intended to “reduce the perceived risk of engaging in the crypto asset markets and encourage more crypto asset activity in the United

cannot distribute tokens for decentralization because securities laws block distribution, and cannot achieve network maturity without token distribution).

States.”²⁸ Institutional capital is the single most important driver of market maturation, liquidity, and investor protection. Pension funds, endowments, and registered investment companies bring not only capital but also governance standards, compliance infrastructure, and market discipline that benefit all participants.

The absence of a fiduciary framework for dynamically classified assets is the most significant impediment to institutional participation in crypto asset markets today. An investment adviser who cannot determine, with reasonable certainty, whether a portfolio holding is a security or a non-security cannot discharge its fiduciary obligations to clients. The result is that prudent institutional investors — the investors whose participation the Commission most needs — remain on the sidelines.

Establishing the safe harbor proposed above would not weaken investor protection. To the contrary, it would strengthen it by enabling the participation of the most sophisticated and compliance-oriented market participants, whose presence raises standards for all participants. The alternative — continued uncertainty that keeps institutional capital out of the market — leaves retail investors as the primary participants in crypto asset markets, with less protection and less market discipline than would exist in a market with robust institutional participation.

IV. CONCLUSION

The Interpretation is a constructive and important first step. The two issues identified in this letter — the DeFi liquidity provision gap and the institutional fiduciary duty problem — are not criticisms of the Commission’s framework but rather requests for the Commission to extend its framework to the areas where guidance is most urgently needed.

I commend the Commission for its transparent and inclusive process, and I respectfully urge the Commission to supplement the Interpretation with guidance addressing these issues. I welcome the opportunity to engage further with the Commission and the Crypto Task Force.

²⁸Interpretation at Section IX (Commission Economic Considerations).