

The SEC and CFTC Provide Crypto Clarity: Most Crypto Assets Are Not Securities

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On March 17, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) issued joint guidance, providing comprehensive interpretation and guidance on the application of Federal securities laws to crypto assets and transactions involving crypto assets (the "Joint Guidance").[1] The Joint Guidance represents a significant step toward developing a clearer regulatory framework for the treatment of crypto assets, following extensive engagement with industry participants by the SEC and CFTC.[2] On the same day, SEC Chairman Paul Atkins emphasized in a speech that the "SEC's persistent failure to provide clarity on [the question of when a crypto asset implicates the Federal securities laws] is over" and that the Joint Guidance is "grounded in existing law and informed by extensive public input."[3] The Joint Guidance supersedes prior staff frameworks and positions, including the SEC Division of Corporation Finance's 2019 "Framework for 'Investment Contract' Analysis of Digital Assets." The SEC and the CFTC clarified that they would administer Federal securities laws and the Commodity Exchange Act in accordance with the Joint Guidance.

The Joint Guidance returns to a familiar theme in the digital asset space for regulators: economic substance prevails over form, and whether an instrument constitutes a security depends on its economic characteristics rather than its label or format. This position aligns with the SEC Staff's approach articulated in the January 2026 joint statement on tokenized securities,[4] emphasizing that changing how ownership is recorded does not change what is being sold.

Classification of Crypto Assets

The Joint Guidance groups crypto assets into five categories based on their characteristics, uses and functions: (1) digital commodities; (2) digital collectibles; (3) digital tools; (4) stablecoins; and (5) digital securities.[5] The Joint Guidance generally clarified that digital commodities, digital collectibles and digital tools are not, in themselves, securities. However, they may be offered and sold subject to an investment contract, which is a security. Stablecoins may or may not be securities depending on their characteristics, and digital securities are securities by definition.

Digital Commodities

A digital commodity is a crypto asset intrinsically linked to and deriving its value from the programmatic operation of a functional crypto system, as well as supply and demand dynamics, rather than from the expectation of profits from the essential managerial efforts of others. Examples include Bitcoin, Bitcoin Cash, Ether and XRP. The SEC noted that each of its digital commodity examples "underlies a futures contract that has been made available to trade on a designated contract market operating under the regulatory oversight of the CFTC."[6]

The Joint Guidance explained that a crypto system is considered "functional" if its native crypto asset can be used within the system in accordance with the system's programmatic utility.[7] A digital commodity is necessary to participate in or use certain aspects of an associated functional crypto system, facilitating and incentivizing transaction validation, maintaining system functioning and security, and fostering network effects. Digital commodities may convey governance rights, allowing holders to vote on technical or governance matters, and users may be required to pay transaction or "gas" fees in the crypto system's native digital commodity.

Under the Joint Guidance, a crypto system is "decentralized" if it functions and operates autonomously with no person, entity, or group having operational, economic, or voting control.[8] A functional crypto system does not have a central party that oversees participation or distributes rewards to users (the Joint Guidance clarified that a "central party" is a person, entity, or group of persons or entities having operational, economic, or voting control of a crypto system)[9]. The Joint Guidance explained that because a digital commodity is associated with a functional crypto system, a purchaser would not reasonably expect to profit based on the essential managerial efforts of others and thus does not meet the definition of an investment contract under the Howey test.

Digital Collectibles

A digital collectible is a crypto asset designed to be collected and/or used, potentially representing or conveying rights to artwork, music, videos, trading cards, in-game items, or digital representations of characters or events. Digital collectibles do not have intrinsic economic properties such as generating passive yield or conveying rights to future income, profits, or assets of a business enterprise, and as such, would not be considered investment contracts under the Howey test.

Like physical collectibles, digital collectibles do not provide holders with legal rights or interest in a business enterprise associated with the creator. A digital collectible's value is not based on the expectation of profits from essential managerial efforts but rather on supply and demand, depending on the subject matter, popularity, or scarcity. "Meme coins" are a type of digital collectible typically acquired for artistic, entertainment, social, and cultural purposes, with value driven by supply and demand rather than essential managerial efforts of others.

However, the Joint Guidance clarified that the offer and sale of a digital collectible that is fractionalized or enables fractional ownership could constitute the offer or sale of a security because it may involve essential managerial efforts from which a purchaser would reasonably expect to derive profits.

Digital Tools

A digital tool is a crypto asset that performs a practical function, such as a membership, ticket, credential, title instrument, or identity badge. Digital tools are commonly issued for use with crypto systems and are often non-transferable, with value derived from their practical functionality. Examples include Ethereum Name Service domain names and CoinDesk's "Microcosms" NFT Consensus Ticket.

Persons acquire digital tools for their functional utility and do not have rights or interests in a business enterprise, just as persons who acquire a museum membership do not expect to realize a profit from the museum operators' essential managerial efforts.

Stablecoins

A stablecoin is a crypto asset designed to maintain a stable value relative to a reference asset like the US dollar. Congress enacted the GENIUS Act in July 2025, creating a comprehensive regulatory framework for "payment stablecoins" and excluding from the definition of "security" any "payment stablecoin issued by a permitted payment stablecoin issuer."

Because the GENIUS Act is not yet effective,[10] the SEC clarified in the Joint Guidance that "Covered Stablecoins" (as described in the Division of Corporation Finance's Stablecoin Statement)[11] does not involve the offer and sale of securities, meaning persons involved in issuing and redeeming Covered Stablecoins do not need to register those transactions with the SEC. Importantly, the Joint Guidance stated that stablecoins other than payment stablecoins issued by a permitted payment stablecoin issuer may meet the definition of a security depending on facts and circumstances.

Digital Securities

A digital security (commonly known as a "tokenized" security) is a financial instrument enumerated in the definition of security that is formatted as, or represented by, a crypto asset, with ownership records maintained on one or more crypto networks. A security is a security regardless of whether it is issued or represented offchain or onchain, and all devices with the economic characteristics of a security are securities regardless of format or label.

Tokenized securities generally fall into two categories: (1) securities tokenized by or on behalf of issuers, and (2) securities tokenized by unaffiliated third parties. Some digital securities convey the same legal rights as offchain securities, while others entitle holders to receive economic distributions

from a central party that manages a business enterprise on behalf of the holders. This analysis aligns with the SEC Staff's January 2026 joint statement on tokenized securities, which confirmed that tokenization does not change the applicability of the Federal securities laws.

Investment Contracts and Non-Security Crypto Assets

How Crypto Assets Can Become Subject to Investment Contracts

The Joint Guidance clarified that how an issuer markets and promotes a contract, transaction, or scheme is relevant to assessing whether it is offering an investment contract. A non-security crypto asset can become subject to an investment contract. This can occur where an issuer offers the non-security crypto asset by inducing an investment of money (in a common enterprise) with representations or promises to undertake essential managerial efforts, and a purchaser reasonably expects profits based on the issuer's representations or promises to engage in such managerial efforts. The Joint Guidance explained that the source, timing and manner of representations are relevant to the reasonableness of the purchaser's expectations. Representations must be conveyed to the purchaser prior to or contemporaneously with the offer or sale to shape purchaser expectations, whereas post-sale representations would not convert a prior sale into an investment contract.

The manner in which the representations or promises are made is also relevant to the purchaser's expectations. The Joint Guidance provides several examples of when a purchaser's expectation of profits would be reasonable, including, but not limited to, representations or promises conveyed to purchasers in written or oral agreements, public communications through which the issuer has established a regular pattern of communicating (such as the issuer's website or official social media accounts), and direct private communications.[12] Generally, the SEC will look to "whether the representations or promises are widely disseminated, the specific means by which the representations or promises are conveyed, and the issuer's established communication practices."

The Joint Guidance added that representations or promises are more likely to create reasonable profit expectations when they are explicit and unambiguous as to essential managerial efforts, contain sufficient detail demonstrating the issuer's ability to implement the proposed project relating to the crypto asset, and explain how the issuer's efforts will produce expected profits. Vague representations lacking milestones, funding or resource plans are unlikely to create reasonable profit expectations.

If a non-security crypto asset is subject to an investment contract, that does not transform the crypto asset itself into a security, and such a non-security crypto asset may not remain subject to the investment contract if purchasers would not reasonably expect the relevant representations or promises to remain connected to the non-security crypto asset. However, the SEC clarified that if

purchasers did expect such representations or promises to remain connected to the non-security crypto asset, such crypto asset would continue to be subject to the associated investment contract in secondary market transactions. Such secondary market transactions would need to either be registered under the Securities Act or be conducted pursuant to an exemption.

Separation from Investment Contracts

A non-security crypto asset subject to an investment contract does not necessarily remain subject to it in perpetuity. Separation from the investment contract may occur when: (1) the issuer fulfills its representations or promises to engage in essential managerial efforts, even if it continues providing non-essential efforts; or (2) purchasers would not reasonably expect the issuer to be able to fulfill or continue the represented essential managerial efforts, such as where a sufficiently long time has passed without the issuer conducting promised efforts or where the issuer announces abandonment of development.[13]

Importantly, the fact that a non-security crypto asset may be separated from an investment contract does not affect the application of the Federal securities laws with respect to the original investment contract. Issuers remain potentially liable for failure to register offerings and for material misstatements or omissions even if the crypto asset subsequently separates from the investment contract.

Protocol Mining and Protocol Staking

Protocol Mining

The Joint Guidance stated that "Protocol Mining Activities", which involves mining digital commodities on proof-of-work (PoW) networks and the roles of mining pools and pool operators, do not involve the offer and sale of securities.[14] In PoW networks, miners contribute computational resources to validate transactions and add new blocks, earning rewards programmatically distributed by the network.

A miner's individual mining is not undertaken with a reasonable expectation of profits from essential managerial efforts of others; rather, the miner contributes its own resources to secure the network and receive rewards. Similarly, when miners combine resources in mining pools, individual miners still perform actual mining, while pool operators' coordination activities are administrative or ministerial in nature.

Protocol Staking

With respect to "Protocol Staking Activities", which involves staking digital commodities on proof-of-stake (PoS) networks and related service provider activities, the Joint Guidance clarified that such activities do not involve the offer and sale of securities.[15] In PoS networks, node operators must stake

the network's digital commodity to be selected programmatically to validate new blocks, earning newly generated digital commodities and any applicable transaction fees.

The Joint Guidance addressed multiple categories of staking: (1) self (or solo) staking, (2) self-custodial staking directly with a third party, (3) custodial arrangements, and (4) liquid staking. In each case, such staking remains an administrative or ministerial activity, with expected financial incentives derived solely from such activity rather than from the essential managerial efforts of others.

Liquid staking generally involves depositors receiving "Staking Receipt Tokens", evidencing their ownership of deposited digital commodities and allowing such depositors to accrue rewards to such digital commodities. The offer and sale of a Staking Receipt Token, which is a receipt for a non-security crypto asset not subject to an investment contract, does not involve the offer and sale of a security. However, a Staking Receipt Token that is a receipt for a digital security or a non-security crypto asset subject to an investment contract is a security.

The Joint Guidance also clarified that ancillary services provided by service providers to the staking protocol, including slashing coverage, early unbonding, alternate rewards payment schedules, and aggregation of digital commodities, are merely administrative or ministerial and do not constitute essential managerial efforts.

Wrapping of Crypto Assets

The "wrapping" of crypto assets refers to depositing a crypto asset with a custodian or cross-chain bridge in return for an equivalent amount of "Redeemable Wrapped Tokens" (which may be a crypto asset native to a different crypto network or a crypto asset based on a different token) standard on a one-for-one basis.[16] The offer or sale of a Redeemable Wrapped Token that is a receipt for a non-security crypto asset not subject to an investment contract does not involve the offer and sale of a security.

The Joint Guidance explained that holders of such Redeemable Wrapped Tokens are not making an investment in an enterprise, as their funds are neither pooled together for deployment by promoters nor tied to promoter efforts. The value of such tokens derives from the value of the deposited crypto asset, not from the essential managerial efforts of others. The wrapping process itself is an administrative or ministerial function facilitating interoperability between different crypto networks and token standards.

Airdrops

An "airdrop" is a means for crypto asset issuers to disseminate their crypto assets in exchange for no or nominal consideration, typically to generate interest, reward early users, promote applications, or

build communities.[17] Where an issuer conducts an airdrop of non-security crypto assets to recipients who do not provide money, goods, services, or other consideration in exchange, the non-security crypto asset does not become subject to an investment contract because the first element of the Howey test (requiring an investment of money) is not met.

The Joint Guidance applies only to airdrops where recipients provide no consideration to the issuer in exchange for the airdropped non-security crypto assets. Where consideration was provided to the issuer prior to announcement of the airdrop, and recipients are not required to provide further consideration to obtain the airdropped tokens, the consideration is not viewed as being provided in exchange for the airdrop.

Implications for Market Participants

The Joint Guidance set clear boundaries for crypto asset classification strategies and provided a framework of terminology and structures. For issuers and platforms, a central design question for crypto asset products is how the structure will be characterized for regulatory purposes. The SEC encouraged issuers making representations or promises about essential managerial efforts to clearly outline those efforts, provide timelines and milestones, explain the resources needed, and publicly disclose their completion.

Some issuers may determine they must change business practices in connection with the Joint Guidance, and other potential issuers may choose not to undertake future issuances or to alter the form of their crypto asset issuances.

The interpretation does not impact any other applicable laws, including Federal tax laws under the Internal Revenue Code or the Bank Secrecy Act and Anti-Money Laundering Act, which are outside its scope.

Conclusion

The Joint Guidance represents a critical and landmark moment for the crypto asset industry, providing long-sought regulatory clarity on the application of Federal securities laws to various crypto assets and transactions involving crypto assets. By classifying crypto assets into distinct categories, clarifying conditions under which non-security crypto assets may become subject to or separate from investment contracts, and providing interpretations on certain crypto activities, the Joint Guidance provided additional clarity for market participants.

The SEC has provided for public comment on the Joint Guidance, and it may revise it based on feedback received to provide further clarity regarding its treatment of crypto assets under the Federal

securities laws. Market participants should carefully review the detailed guidance and assess its implications for their crypto asset activities, product design, and compliance obligations.

Katten will continue to monitor any updates to the Joint Guidance and provide updates to market participants as needed.

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1 SEC and CFTC Joint Guidance, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, (March 17, 2026), available at: https://www.sec.gov/files/rules/interp/2026/33-11412.pdf.

2 See Katten's analysis of the SEC and CFTC's "Project Crypto" Initiative, available at: https://quickreads.ext.katten.com/post/102mggk/sec-and-cftc-announce-joint-project-crypto-initiative-at-historic-harmonization.

3 Regulation Crypto Assets: A Token Safe Harbor, Chairman Paul S. Atkins (March 17, 2026), available at: https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-regulation-crypto-assets-031726.

4 Katten's analysis of the January 2026 joint statement is available at: https://katten.com/sec-issues-guidance-on-tokenized-securities

5 Joint Guidance at 13.

6 Id. at fn. 51.

7 Id. at fn. 49.

8 Id. at fn. 50.

9 Id. at fn. 54.

10 The GENIUS Act will become effective on the earlier of 18 months after its date of enactment (July 18, 2025) or the date that is 120 days after the date on which the primary Federal payment stablecoin regulators issue any final regulations implementing the GENIUS Act.

11 Securities and Exchange Comm'n Div. of Corp. Fin., Statement on Stablecoins (April 4, 2025), available at: https://www.sec.gov/newsroom/speeches-statements/statement-stablecoins-040425 (explaining that "Covered Stablecoins are crypto assets designed and marketed for use as a means of making payments, transmitting money, or storing value… are marketed solely for use in commerce, as a means of making payments, transmitting money, and/or storing value, and not as investments… [and] use the proceeds from sales of Covered Stablecoins to acquire assets that are then held in a pooled account.").

12 Joint Guidance at 26.

13 See id. at 28-32.

14 See id. at 35-40.

15 See id. at 40-54.

16 See id. at 54-58.

17 See id. at 58.

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