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Editorial Office
101 Park Ave., 24th Floor, New York, NY 10178 (800) 543-6862
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Staking Out the Perimeter: Securities and Exchange Commission Outlines Limits of Jurisdiction Over Digital Assets

***By Matthew B. Hanson, Andrew Michaelson, Kimberly A. Prior,
Russell Sacks, Daniel Kahan and Bowen Hielt****

In this article, the authors highlight the key interpretations included in a new interpretive guidance from the Securities and Exchange Commission addressing the definition of a “security” as applied to crypto assets and transactions involving crypto assets, potential next steps, and some risks and opportunities stemming from these new developments.

For nearly a decade, crypto market participants have sought additional clarity about when and how federal securities laws apply to the creative new tokens, protocol mechanisms, and incentive structures arising in digital markets. For the moment, congressional efforts to pass comprehensive crypto market legislation have stalled. In the meantime, the Securities and Exchange Commission (SEC) announced in March of 2026 its own formal interpretation of when it believes securities laws apply—and do not apply—to digital assets.¹

On March 17, 2026, the SEC issued new interpretative guidance (the Guidance) from the Commission itself (not just senior staff), addressing the definition of a “security” as applied to crypto assets and transactions involving crypto assets. In the public messaging announcing the Guidance—in statements by Chairman Paul Atkins,² his fellow commissioners,³ and the head of SEC’s Division of Corporation Finance⁴—the SEC positioned its new Guid-

* The authors, attorneys with King & Spalding LLP, may be contacted at mhanson@kslaw.com, amichaelson@kslaw.com, kprior@kslaw.com, rsacks@kslaw.com, dkahan@kslaw.com and bhielt@kslaw.com, respectively.

¹ Securities and Exchange Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Final Rule, Mar. 17, 2026 (available at: <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>).

² Paul Atkins, Regulation Crypto Assets: A Token Safe Harbor, Mar. 17, 2026 (available at: <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-regulation-crypto-assets-031726>).

³ Paul Atkins, Hester Peirce, & Mark Uyeda, Crypto Markets – and the American People – Deserve Clarity, CoinDesk, Mar. 19, 2026 (available at: <https://www.coindesk.com/opinion/2026/03/19/crypto-markets-and-the-american-people-deserve-clarity>).

⁴ James Moloney, The Last Chapter in the Book of Howey, Mar. 17, 2026 (available at: <https://www.sec.gov/newsroom/speeches-statements/moloney-statement-book-of-howey-031726>).

ance as a more tailored framework for digital assets, while affirming that the so-called “*Howey* test” remains binding legal precedent. The Guidance, which takes effect immediately as an interpretive rule but nonetheless invites public comment, establishes a new taxonomy of multiple categories of digital assets and then identifies only one category, “digital securities” that the SEC views as securities. The Guidance also describes the SEC’s views on when the concept of an “investment contract” applies to bring securities laws into play. And it addresses when an investment contract ceases, at which point securities laws would no longer apply to the asset. The Guidance also walks through the SEC’s interpretation of the limits of securities laws around several long-debated concepts in crypto markets, including protocol mining, protocol staking, wrapping, and air dropping.

This article highlights the key interpretations included in the Guidance, potential next steps, and some risks and opportunities stemming from these new developments.

AIMING TO SET GUARDRAILS

Progress on crypto regulation has proven fitful. During the past couple of years, policymakers have advanced several ambitious bills and regulatory ideas. But the current leading approach to defining broader crypto market regulation, the Digital Asset Market Clarity Act (CLARITY Act), seems to have stalled in the Senate, and passage of the much anticipated “market structure” legislation is currently uncertain.⁵

The SEC’s Guidance appears to represent the fruits of thinking done at the agency over the past year to outline how securities laws come into play for crypto enterprises doing business in the United States. Without new legislative authority to write new rules, it appears the SEC is announcing its views as formally as it can.

In short, the Guidance establishes the five categories of crypto assets described in Table 1.

⁵ Ahmed Barakat, CLARITY Act Faces Four-Week Senate Deadline Before August Recess, July 6, 2026 (available at: <https://cryptonews.com/news/clarity-act-senate-recess-deadline-ethics-standoff/>).

Table 1

Category	Description	Securities Law Treatment
Digital Commodities	Crypto assets that are intrinsically linked to and derive their value from the programmatic operation of a crypto system that is “functional,” as well as supply and demand dynamics ⁶	Not inherently a security, but could be subject to an investment contract
Digital Collectibles	Crypto assets designed to be collected and/or used that may represent or convey rights to artwork, music, videos, trading cards, in-game items, or digital representations or references to internet memes, characters, current events, or trends ⁷	Not inherently a security, but could be subject to an investment contract
Digital Tools	Crypto assets that perform a practical function, such as a membership, ticket, credential, title instrument, or identity badge ⁸	Not inherently a security, but could be subject to an investment contract

⁶ Securities and Exchange Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Final Rule, Mar. 17, 2026 (available at: <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>) pg. 14; the Guidance specifically identifies the following as digital commodities: Aptos (APT), Avalanche (AVAX), Bitcoin (BTC), Bitcoin Cash (BCH), Cardano (ADA), Chainlink (LINK), Dogecoin (DOGE), Ether (ETH), Hedera (HBAR), Litecoin (LTC), Polkadot (DOT), Shiba Inu (SHIB), Solana (SOL), Stellar (XLM), Tezos (XTZ), XRP (XRP), Algorand (ALGO), and LBRY Credits (LBC).

⁷ Id. at 16; the Guidance classifies meme coins as a type of digital collectible, noting they are typically acquired for entertainment, social, and cultural purposes and their value is driven by supply and demand rather than essential managerial efforts. A meme coin could evolve into a digital commodity if it becomes functional within a crypto system.

⁸ Id. at 20; notably, fractionalized digital collectibles—those enabling individuals to acquire fractional ownership interests—could constitute securities.

Stablecoins	Crypto assets designed to maintain a stable value relative to a reference asset ⁹	Payment stablecoins issued under the GENIUS Act will be excluded from the securities definition by statute and earlier Staff guidance, but other stablecoins may be securities depending on facts and circumstances
Digital Securities	A financial instrument enumerated in the definition “security” that is formatted or represented by a crypto asset, where record of ownership is maintained in whole or in part on or through a crypto network ¹⁰	Considered a security

The taxonomy of crypto assets described in the Guidance largely aligns with the framework set forth in the CLARITY Act. An area of intense debate with respect to the CLARITY Act has been around the payment of yields or rewards on stablecoin holdings. A compromise was reached by the Senate Banking Committee that would permit the payment of activity-based rewards tied to platform activity or transactions and that prohibits passive yields that resemble interest.

NOT QUITE DONE WITH *HOWEY*

In a statement issued the same day as the new interpretative guidance, SEC Director of Corporation Finance James Moloney remarked that the Guidance amounted to a “final chapter” for the eighty-year-old case guiding the SEC’s determinations of when crypto activities qualify as securities.¹¹ In *SEC v. W.J. Howey Co.*, a case involving out-of-state investments in Florida orange groves, the Supreme Court developed the essential test for when a business activity qualifies as an “investment contract,” and thus a “security” subject to registration under Section 5 of the Securities Act of 1933.¹² Though the subject

⁹ Securities and Exchange Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Final Rule, Mar. 17, 2026 (available at: <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>) pg. 21.

¹⁰ Id. at pg. 23.

¹¹ James Moloney, The Last Chapter in the Book of Howey, Mar. 17, 2026 (available at: <https://www.sec.gov/newsroom/speeches-statements/moloney-statement-book-of-howey-031726>).

¹² *SEC v. W.J. Howey Co.*, 328 U.S. 293.

matter has changed dramatically from orange groves to the blockchain, the “*Howey* test” has been the focal point of the SEC’s approach to crypto markets in recent years.¹³ Notably, the Guidance expressly supersedes the SEC staff’s 2019 “Framework for ‘Investment Contract’ Analysis of Digital Assets,” which had been the primary analytical tool for crypto securities analysis for nearly seven years.¹⁴ Market participants should update their analyses accordingly.

Despite the messaging about trying to close the book on *Howey*, the SEC is still careful to note in the Guidance that individual circumstances may mean that a given non-security crypto asset might be part of an “investment contract” and therefore subject to securities laws.¹⁵ The SEC cautions that a “non-security crypto asset becomes subject to an investment contract when an issuer offers it by inducing an investment of money in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits.”¹⁶ Critically, the Guidance tightens the investment contract analysis by requiring that the issuer have affirmatively made “representations or promises” to undertake essential managerial efforts. The Guidance states that “[a]bsent such representations or promises being conveyed to purchasers, it would not be reasonable for a purchaser to expect profits from the contract, transaction, or scheme.” This is narrower than the traditional *Howey* formulation, which broadly asked whether purchasers relied on the “efforts of others,” and it effectively raises the threshold for classifying a crypto asset as a security. The Guidance also clarifies that post-sale representations, third-party statements (unless authorized by the issuer), and vague or unactionable statements are unlikely to create an investment contract. The Guidance further confirms that the “common enterprise” element of the *Howey* test must be satisfied—resolving longstanding ambiguity about whether the SEC viewed commonality as a required element.

¹³ The *Howey* test sets clear benchmarks for identifying an “investment contract”—whether the contract, transaction, or scheme involves: (1) an investment of money (2) in a common enterprise (3) with an expectation of profits derived from the efforts of others. *SEC v. W.J. Howey Co.*, 328 U.S. 293.

¹⁴ Securities and Exchange Commission, Framework for “Investment Contract” Analysis of Digital Assets (Withdrawn), Superseded by Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, last updated Mar. 20, 2026, (available at: <https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets>).

¹⁵ Securities and Exchange Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Final Rule, Mar. 17, 2026 (available at: <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>) pg. 24-25.

¹⁶ *Id.*

Practically speaking, the SEC notes it will assess the manner in which representations or promises are made to a purchaser, the explicitness of the descriptions of managerial efforts to be undertaken by the issuer, and the timing of the statements made by the issuer. Companies and entrepreneurs should continue consulting counsel to ensure that their marketing activities and communications with prospective purchasers do not inadvertently create what the SEC would view as an investment contract.

Perhaps the most consequential aspect of the Guidance is its framework for when a non-security crypto asset that may have originally been part of an investment contract can “separate” from the investment contract and cease to be subject to the federal securities laws.¹⁷ The Guidance identifies two primary separation triggers: (a) the issuer fulfills and completes its represented or promised essential managerial efforts, and (b) the issuer fails to fulfill, or publicly abandons, those efforts. In either case, the investment contract terminates and the underlying crypto asset is no longer subject to the securities laws, including registration requirements. The SEC emphasizes that issuers should make public disclosures when fulfillment has occurred. This framework has major practical implications: projects that initially sold tokens under investment contracts should evaluate whether separation has already occurred or can occur, and those planning token offerings should (if desired) consider structuring their disclosures with eventual separation in mind.

Importantly, however, separation is prospective only and does not retroactively cure historical securities law violations. Even after a non-security crypto asset separates from an investment contract, the issuer remains potentially liable for material misstatements or omissions made during the investment contract’s existence and for any failure to register the original offering.

The Guidance also addresses secondary market transactions. Where a non-security crypto asset remains subject to an investment contract, secondary market transactions in that asset are securities transactions requiring registration or an exemption. Once separation occurs, however, secondary market trading is no longer subject to the securities laws. This distinction has significant implications for crypto exchanges and trading platforms, which may be among the biggest beneficiaries of this aspect of the Guidance.

¹⁷ This topic has been the subject of extensive discussion and occasional Staff guidance. See, e.g., William Hinman, Digital Asset Transactions: When Howey Met Gary (Plastic), Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), <https://www.sec.gov/newsroom/speeches-statements/speech-hinman-061418> (noting that “the analysis of whether something is a security is not static”).

With this revised approach to the investment contract analysis, the SEC's Guidance details the manner in which the SEC now applies *Howey* to scenarios involving protocol mining, protocol staking, wrapping, and air dropping. While this is not the first time the SEC has engaged with these scenarios, the Guidance's attention on these scenarios reflects the SEC's updated views and interest in developing a comprehensive framework. The Guidance notes that most scenarios involving these activities are not securities transactions under the *Howey* test, and thus not subject to registration or exemption rules.¹⁸

There are exceptions to this general statement, however, and it is vital that companies and entrepreneurs assess whether their staking, wrapping, or air drop activity involves an investment contract. For example, individuals involved in the process of generating, issuing, and redeeming a Staking Receipt Token that is a receipt for a non-security crypto asset likely do not need to register the transaction with the SEC.¹⁹

Conversely, individuals involved in the process of generating, issuing, and redeeming a Staking Receipt Token that is a receipt for a digital security or non-security crypto asset subject to an investment contract likely do need to register the transaction with the SEC.²⁰ The focus is thus on the nature of the crypto asset underpinning the activity – the actions of staking, wrapping, or air dropping do not transform a non-security into a security, and vice versa.

The Guidance also establishes important boundary conditions: if a custodian decides whether, when, or how much to stake on behalf of a user, or if a liquid staking provider guarantees reward amounts, those activities fall outside the scope of the Guidance and may implicate securities laws. Market participants should carefully evaluate whether their specific staking arrangements satisfy the parameters set forth in the Guidance.

PROJECTING POTENTIAL NEXT STEPS

In a March 17, 2026, address to the Digital Chamber Blockchain Summit on the day the Guidance was published, Chairman Atkins noted that the Commodity Futures Trading Commission (CFTC) is joining with the SEC in

¹⁸ Securities and Exchange Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Final Rule, Mar. 17, 2026 (available at: <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>) pg. 38, 47, 55, and 60.

¹⁹ Securities and Exchange Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Final Rule, Mar. 17, 2026 (available at: <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>) pg. 52.

²⁰ *Id.*

implementing the new Guidance,²¹ and will administer the Commodity Exchange Act consistently with it. CFTC Chairman Michael S. Selig echoed Chairman Atkins's sentiments, noting a shared commitment to "fostering a regulatory environment that allows the crypto industry to flourish in the United States with clear and rational rules of the road."²² The joint approach is designed to provide a more coherent regulatory framework across the two primary federal market regulators.

Chairman Atkins also expressed support for several additional concepts not included in the Guidance itself, in what he referred to as his vision for "Regulation Crypto Assets." Drawing from the CLARITY Act,²³ that set of additional ideas included a startup exemption for crypto developers, a fundraising exemption for crypto entrepreneurs, and an investment contract safe harbor for crypto issuers who complete or permanently cease all essential managerial efforts.²⁴ While those concepts will not be implemented along with the interpretive shifts embodied in the Guidance, it is possible they emerge in subsequent SEC rulemaking—especially if additional crypto market structure regulation is passed that provides additional legislative authority for such exemptions and safe harbors.

KEY RISKS & OPPORTUNITIES

This continues to be an exciting time for the crypto industry. While legislation and/or more regulation is undoubtedly needed, the SEC's new Guidance provides companies and entrepreneurs with clearer principles regarding how the SEC plans to approach certain crypto assets and transactions from the perspective of policing U.S. federal securities laws.

As regulators, legislators, and market participants continue pursuing clarity, it is important to keep the following points in mind.

- *The new Guidance is nuanced.* The SEC is careful to caveat and cabin its analyses to the specific scenarios envisioned in its Guidance. Even

²¹ Paul Atkins, Regulation Crypto Assets: A Token Safe Harbor, Mar. 17, 2026 (available at: <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-regulation-crypto-assets-031726>).

²² Press Release, CFTC Joins SEC to Clarify the Application of Federal Securities Laws to Crypto Assets, Mar. 17, 2026 (available at: <https://www.cftc.gov/PressRoom/PressReleases/9198-26>).

²³ H.R. 3633.

²⁴ Paul Atkins, Regulation Crypto Assets: A Token Safe Harbor, Mar. 17, 2026 (available at: <https://www.sec.gov/newsroom/speeches-statements/atkins-remarks-regulation-crypto-assets-031726>).

when dealing with one of the four classes of crypto assets the Guidance identified as non-securities (digital commodities, digital collectibles, digital tools, and payment stablecoins under the GENIUS Act), it is necessary to assess whether any scenario-specific facts exist that could lead the SEC to nevertheless determine that a contemplated activity is subject to securities laws.

- *Issuers will still be scrutinized.* The SEC cautions issuers that non-security crypto assets can still become part of an investment contract—subject to securities laws—through issuers’ acts or representations. Entrepreneurs and companies will need to carefully calibrate their outreach to potential consumers to understand whether their actions may lead the SEC to understand their transactions to be subject to securities laws.
- *Innovation is being encouraged.* Both the Guidance and Chairman Atkins’s remarks make clear that the U.S. Government is attempting to support crypto development. Though still just ideas, Chairman Atkins’s proposals regarding startup and fundraising exemptions provide examples of the support posture the SEC envisions for the future.
- *Historical exposure is not erased.* Even where a non-security crypto asset has separated from an investment contract under the Guidance’s framework, issuers remain potentially liable for material misstatements or omissions made during the investment contract’s existence and for any failure to register the original offering. The Guidance does not provide a retroactive safe harbor for past conduct.
- *The risk landscape is increasingly more defined.* With this Guidance, the SEC states its view for the time being regarding what will, and will not, be considered a security. While future regulation is inherently unpredictable—especially with the possibility that a new administration could take a different interpretation—those involved in the crypto space can move forward with increased confidence right now that the SEC is focused on outlining a regulatory environment more specifically tailored to the crypto asset context.

But perhaps the most important point to keep in mind is that actual legislation and formal rulemaking are still to come. The CLARITY Act was advanced by the Senate Banking Committee in May of 2026, but must still be passed by the full Senate, reconciled with the House version for passage by the House, and then signed by the President before becoming law. If the CLARITY Act becomes law, then the SEC will need to craft implementing rules for which the Guidance may be a blueprint. In the meantime, this new Guidance is a

strong indication of the current SEC Commission's views, but future leadership could easily announce different views. To quote Chairman Atkins's speech announcing the new Guidance: "only Congress can ensure that regulation in this area is future-proofed through comprehensive market structure legislation."