

Vital Briefing

SEC crypto interpretation: *Howey*, non-security crypto assets, and separation

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The Commission issued its crypto interpretation in March 2026, thus putting a more formal stamp on what for the past year was merely a growing collection of non-binding guidance on a variety of crypto topics. Much of the informal guidance remains, although some topics previously addressed have been subsumed into the crypto interpretation. This Vital Briefing takes a closer look at the first part of the Commission's [crypto interpretation](#) regarding the classification of digital commodities and the Commission's application of *Howey* to non-security crypto assets that are (are not) subject to investment contracts.

I. Classification of crypto assets

The Commission's new crypto asset interpretation, like the 2019 "[Framework](#)" guidance, emphasizes an application of the Supreme Court's *Howey* standard for determining whether something is an investment contract under the federal securities laws.

Under *Howey*, a transaction may be an investment contract and, thus a "security," if it involves: (1) an investment of money; (2) in a common enterprise; and (3) there is a reasonable expectation that profits will be generated by the managerial efforts of others.

The beginnings of an interpretation

Between June 2018 and April 2019, the SEC during the first Trump Administration issued its first comprehensive guidance on crypto assets. That guidance used different language than the latest Commission interpretation (e.g., referring to networks and to third parties—such as promoters—as "active participants" and placing greater emphasis on decentralization much like Bitcoin or Ether functioned essentially on their own in their then-current forms), but much of the substantive analysis would be recognizable today, even if the Commission's interpretation now takes a more categorical approach.

The then-director of the SEC's Division of Corporation Finance emphasized whether third parties sponsor/promote the crypto asset (or retain an interest in the asset) and whether the asset is marketed as an investment or has a price that correlates with the market value of the good or service offered in the network. The Framework emphasized whether third parties engage in "essential managerial efforts" that determine the success

or failure of the enterprise, including supporting a market or the price of the asset, and whether purchasers reasonably rely on those efforts.

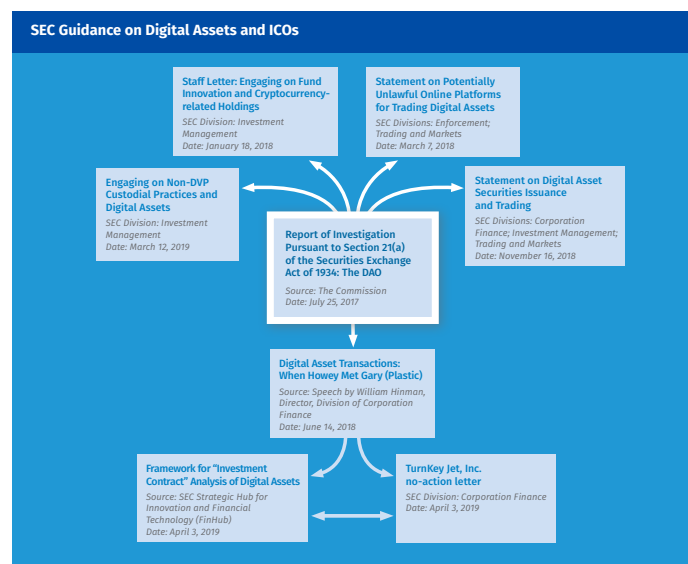
With respect to profit expectations, the former CorpFin director asked whether purchasers seek a return on investment, whether purchasers' motive is clearly to use or consume the asset, and whether independent actors set the asset's price or a promoter supports a secondary market for the asset. Factors noted in the Framework focused on, among other things whether the asset was sold broadly or targeted to persons with a need for the asset's functionality, and whether holders of the asset would have rights to income or profits.

Another factor considered by both the CorpFin director's guidance and the Framework was whether the crypto network was in its early stages of development or was fully developed and operational. Also, in roughly the same time frame, SEC Commissioner Hester M. Peirce issued a [first](#), and then a [second](#), proposal for a crypto asset safe harbor. Hints at the prior guidance can be found in the Commission's interpretation.

Commission interpretation 2026



SEC Framework 2019



Source: Lefthand graphic: Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Release No. 33-11412 (Mar. 17, 2026), 91 F.R. 13714 (Mar. 23, 2026). Righthand graphic: Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (July 25, 2017); William Hinman, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018); Staff Letter: Engaging on Fund Innovation and Cryptocurrency-related Holdings (Jan. 18, 2018); Statement on Potentially Unlawful Online Platforms for Trading Digital Assets (Mar. 7, 2018); Statement on Digital Asset Securities Issuance and Trading (Nov. 16, 2018); Engaging on Non-DVP Custodial Practices and Digital Assets (Mar. 12, 2019); Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019); TurnKey Jet, Inc. no-action letter (Apr. 3, 2019).

The interpretation, however, does not address the application the Supreme Court's *Reves* family resemblance standard for determining if a transaction may involve a "note" under the federal securities laws.

The SEC had already withdrawn and superseded the 2019 Framework, although it is perhaps worth noting a key difference between the interpretation and the Framework. Perhaps the most striking difference is that the interpretation is highly categorical in its treatment of various crypto asset-related transactions and activities, whereas the Framework was not necessarily more prescriptive but did require a detailed inquiry into whether a transaction was more or less like an investment contract. As a result, the Framework often couched the analysis in terms that might be familiar to anyone who has undergone an annual eye exam—e.g., is this factor or another more or less like a security. For a while,

private sector groups even attempted to create algorithms that claimed to perform the necessary comparisons and output a conclusion regarding the probability that a coin or other digital asset was likely to be deemed a security.

The Commission's crypto interpretation on its surface appears to make the analysis much simpler. But practitioners would be well advised to continue engaging rigorously with the *Howey* standard for the simple reason that *Howey* remains good law and is the underpinning of much of the new interpretation.

II. Crypto assets subject to an investment contract

The Commission's crypto interpretation ultimately relies heavily on an interpretation of the *Howey* standard. The Supreme Court's *Howey* opinion and its progeny (some of

them loosening the standard slightly) state that for purposes of the federal securities law definition of "security" an instrument is an "investment contract" and, thus, a "security," if: (1) there is an investment of money; (2) in a common enterprise; (3) made with a reasonable expectation of profits to be generated by the entrepreneurial efforts of others. It is the third prong regarding, as the Commission puts it, a "reasonable expectation of profits from the essential managerial efforts of others," that is critical in most instances because it is relatively easy to establish the other elements of *Howey*.

The Commission's crypto interpretation begins its review of *Howey* by focusing on the reasonableness of purchaser's expectations about profits being generated by others. The Commission emphasized the nature of an issuer's statements about a crypto asset as well as the timing and the issuer's manner of making such statements.

Commission’s interpretation of Howey’s profits prong in a nutshell		
Nature of issuer’s representations/promises		
Purchaser does reasonably expect profits from essential managerial efforts of others.		Purchaser does not reasonably expect profits from essential managerial efforts of others.
Issuer’s representations/promises are explicit. How to judge definiteness: - Are representations and promises explicit and unambiguous regarding the essential managerial efforts to be provided? - Do the statements include sufficient details about the issuer’s ability to implement a project? - Do the statements explain how the issuer’s efforts will produce the profits purchasers reasonably expect?	Statements	Statements come from unaffiliated proponents. Statements come from holders of crypto asset. Note: These statements can move to the reasonable column if they are authorized by the issuer.
Statements are made before or contemporaneously with issuer’s offer/sale of crypto asset to purchaser.	Timing	Timing of issuer’s statements and offer/sale to purchaser are not sufficiently aligned.
- Written/oral agreements. - Public communications via issuer’s website. - Issuer’s official social media. - Direct private communications with issuer. - Issuer’s publicly available regulatory filings. - Documents clearly attributable to the issuer (e.g., white papers).	Manner	Other communications would be insufficient, but may move to the reasonable column depending on several factors: - Whether the statements are widely disseminated. - Whether the issuer’s representations/promises are specific. - The nature of the issuer’s established communications practices.
Source: Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Release No. 33-11412 (Mar. 17, 2026), 91 F.R. 13714 (Mar. 23, 2026).		

Enumerated definition of “security”

The following chart is an amalgam of the federal securities laws. For crypto interests, “investment contract” is the key definition.

Note
Stock
Treasury stock
Security future
Security-based swap
Bond
Debenture
Evidence of indebtedness
Certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate
preorganization certificate or subscription
Transferable share

Investment contract

Voting-trust certificate
Certificate of deposit for a security
Fractional undivided interest in oil, gas, or other mineral rights
Any put, call, straddle, option, or privilege on any security certificate of deposit or group or index of securities (including any interest therein or based on the value thereof)
Any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency
Any interest or instrument commonly known as a “security”
Any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing
But shall not include currency or any note, draft, bill of exchange, or banker’s acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited

Source: Securities Act of 1933 (15 USC §77b(a)(1)), Securities Exchange Act of 1934 (15 USC §78c(a)(10)), Investment Company Act of 1940 (15 USC §80a-2(a)(36)), and Investment Advisers Act of 1940 (15 USC §80b-2(a)(18)). The Exchange Act contains slightly different language than the other acts regarding “certificate[s] of interest or participation,” does not include “evidence of indebtedness” within the enumerated definition of “security,” and explicitly excludes “banker’s acceptances” and related instruments from the definition of “security.” The ICA and the IAA do not include “security-based swap[s]” within the enumerated definition of “security.”

Separation of crypto asset and investment contract		
Commission examples	Issuer satisfies representations/promises • Essential managerial efforts at an end. • Non-essential managerial efforts may continue	Issuer fails to satisfy representations/promises • Long time has elapsed since offer/sale and purchasers clearly understand that essential managerial efforts are not happening. • Issuer abandons development of a crypto system and states it will no longer provide essential managerial efforts as represented or promised (Note: The Commission said this must be done via a widely-disseminated communication).
Effect	Investment contract no longer exists absent creation of a new investment contract,	Project effectively at an end but issuer could still be liable under the antifraud provisions of the federal securities laws.
Rationale	Purchasers no longer have a reasonable expectation of profits from the essential managerial efforts of others.	Purchasers no longer reasonably expect the issuer to be able to satisfy or continue to engage in essential managerial services that were represented or promised.
Source: Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Release No. 33-11412 (Mar. 17, 2026), 91 F.R. 13714 (Mar. 23, 2026).		

The Commission’s crypto interpretation also contemplates that a non-security crypto asset can separate from an issuer’s representations and promises regarding the provision of essential managerial efforts. As a result, where a purchaser of a non-security crypto asset that is subject to an investment contract could no longer reasonably expect the issuer’s representations or promises to engage in essential managerial efforts to remain connected to the non-security crypto asset, the non-security crypto asset separates from those representations or promises and would not be subject to the federal securities laws.

The Commission emphasized what it identified as the key principle regarding investment contracts and non-security crypto assets:

The interpretation in this section IV is intended to underscore the

Commission’s view that how an issuer markets and promotes a contract, transaction, or scheme impacts whether the issuer is offering or selling an investment contract. To the extent issuers make representations or promises about essential managerial efforts they plan to undertake, we encourage issuers to clearly and in sufficient detail outline those efforts, provide a timeline and milestones for completing those efforts, explain the resources needed to complete those efforts, and publicly disclose the completion of those efforts.

III. Looking ahead

The categorical approach taken by the Commission’s crypto interpretation is evidence of the overall policy shift from all previous administrations that addressed

blockchain issues. However, the continued reliance on the *Howey* standard, even if the interpretations in certain instances are less familiar, suggests that *Howey* remains good law and that it remains a standard that both the Commission and participants in the blockchain industry must still address. That said, the results of the Commission’s latest application of *Howey* would, in practice, tend to ease restrictions on the blockchain industry, especially regarding non-security tokens. The Commission’s new approach would appear to have several goals in view, including not just easing restrictions on some corners of the blockchain industry, but also perhaps anticipating legislation that may shift some oversight duties to the Commodity Futures Trading Commission.

In the upcoming Part II of this series, the spotlight will turn to the Commission’s interpretation regarding mining and staking activities.