



SEC Issues Crypto Guidance as Congress Considers Market-Structure Legislation

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On March 17, 2026, the Securities and Exchange Commission (SEC) issued [guidance](#) addressing the application of federal securities law to certain types of crypto-assets and crypto-asset activities. The guidance was joined by the Commodity Futures Trading Commission (CFTC), which [indicated](#) that its staff will administer the [Commodity Exchange Act \(CEA\)](#) in a manner consistent with the guidance. This Legal Sidebar provides background related to the guidance, reviews the key components of the guidance, and discusses issues that may be of interest to Congress, which is considering [legislation](#) that aims to clarify the respective jurisdictions of the SEC and CFTC over crypto markets.

Crypto-Assets and Securities Law: The Basics

Crypto-assets are [digital representations of value](#) recorded on cryptographically secured distributed ledgers—i.e., systems that rely on a [peer-to-peer computer network](#), as opposed to a centralized intermediary, to record transactions.

Crypto-assets include a diverse array of instruments. Bitcoin—the [largest](#) crypto-asset by market capitalization—was [created](#) in 2008 by a [pseudonymous](#) programmer or group of programmers. New Bitcoins are created via proof-of-work “mining,” a [process](#) whereby individuals or groups use computers to race to solve cryptographic puzzles, with winners earning the right to validate Bitcoin transactions and receive newly created Bitcoins.

Other crypto-assets are [created and sold](#) by an identifiable entity or group that promises to use proceeds from the sale to develop a new blockchain network or other ecosystem in which the crypto-assets can be used for various purposes. (For an overview of how crypto-assets utilize blockchain technology, see [CRS Report R47425, *Cryptocurrency: Selected Policy Issues \(2023\)*, by Paul Tierno.](#)) These sales of newly created crypto-assets are sometimes called “[initial coin offerings](#)” (ICOs). Many ICOs are accompanied by white papers in which the seller [describes](#) measures it will take to enhance the value of a crypto-asset and touts the potential profits that may accrue to purchasers of the crypto-asset.

[Stablecoins](#)—which aim to maintain a stable value pegged to a reference asset, such as the U.S. dollar—represent a third major category of crypto-asset. Many stablecoin issuers attempt to maintain pegs by

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allowing certain stablecoin holders to [redeem](#) their stablecoins for a fixed amount of the reference asset. To meet these redemption requests, issuers maintain [reserves](#) backing their stablecoins.

The regulatory status of crypto-assets has been a [point of contention](#) for some time. One issue of particular salience is whether various crypto-assets qualify as “securities” under federal law. The federal securities laws [define](#) the term “[security](#)” to include a range of traditional financial instruments such as stocks and bonds, in addition to “investment contracts”—a category that courts have used to evaluate whether “[n]ovel, uncommon, or irregular” arrangements fall within the SEC’s jurisdiction. Under the Supreme Court’s 1946 decision in *SEC v. W.J. Howey Co.*, an arrangement qualifies as an “investment contract” if it involves a “[contract, transaction or scheme](#)” whereby a person invests money in a common enterprise with an expectation of profit derived from the efforts of others. The SEC and federal courts have [generally used](#) the *Howey* test to evaluate whether specific crypto-assets are subject to the securities laws.

Whether a crypto-asset is subject to the securities laws has important implications. Absent an exemption, issuers of securities must [register](#) their offerings with the SEC and disclose information about their financial condition and operations. In many circumstances, issuers that conduct public securities offerings become subject to [periodic reporting requirements](#). In addition, certain securities intermediaries—such as [brokers, exchanges, and clearing agencies](#)—must (absent an exemption) register with the SEC and abide by detailed regulatory requirements.

Crypto-assets that are not securities often qualify as “[commodities](#)” under the CEA. The CFTC—which primarily regulates [derivatives markets](#)—has limited jurisdiction over commodity spot markets. The CEA and associated [CFTC regulations](#) prohibit fraud and manipulation in interstate commodity sales. The CFTC does not, however, possess [broader regulatory authority](#) over commodity spot markets or intermediaries that operate in those markets.

The *Howey* Test and Crypto-Assets: A Closer Look

The *Howey* test [prioritizes](#) substance over form. As a result, its application to crypto-assets depends heavily on the facts and circumstances surrounding particular instruments and transactions.

The SEC has [never treated](#) Bitcoin as a security because Bitcoin purchasers [do not rely](#) on the entrepreneurial or managerial efforts of others to produce a profit.

Crypto-assets that are intended to ultimately possess utility within a to-be-developed blockchain system [raise](#) more nuanced issues. The proposition that initial distributions of these types of crypto-assets (sometimes called “[network tokens](#)”) can, in certain circumstances, constitute securities offerings appears uncontroversial. Many [courts](#) have [concluded](#) as [much](#), reasoning that issuers led primary-market purchasers to expect profits from the issuers’ efforts to create functional blockchain networks in which tokens could be used. Prominent [crypto advocacy groups](#) and [industry participants](#) also appear to accept that some initial distributions of crypto-assets amount to securities transactions under the *Howey* test.

While there is general agreement that initial distributions of network tokens may represent securities offerings in certain circumstances, other issues involving such assets remain unresolved. One key question is whether a crypto-asset that is subject to the securities laws at one point in time can later transition out of that status. In 2018, the former Director of the SEC’s Division of Corporation Finance, William Hinman, [endorsed](#) this possibility in what has come to be known within crypto circles as the “[Hinman speech](#).”

Former Director Hinman’s theory was that, while many distributions of crypto-assets involve commitments from a centralized entity to engage in activities intended to increase a crypto-asset’s value, those activities may come to an end. For example, if an issuer develops a “[decentralized](#)” network in which a crypto-asset has inherent functionality without ongoing interventions from the issuer, purchasers

of the crypto-asset may no longer depend on the issuer's managerial efforts. As a result, in these circumstances, the crypto-asset may **cease** to represent a security under the *Howey* test, even if it did embody a security before the creation of the associated network. Applying this theory, Hinman **expressed** his view that Ether—the **second-largest** crypto-asset by market capitalization—was not a security at the time of the speech given the decentralization of the Ethereum network, even though Ether was created and sold before that network was fully functional and decentralized. In “putting aside the fundraising that accompanied the creation of Ether,” Hinman **rejected** the proposition that an instrument's status under the securities laws was “static.”

Since the Hinman speech, the significance and meaning of “decentralization” have **occupied** a central place in discussions of crypto regulation. In 2019, SEC staff issued **guidance** regarding the *Howey* test and crypto-assets that built on the basic concepts outlined in the Hinman speech. The guidance **identified** various factors that might be relevant to whether crypto-asset purchasers depend on the efforts of others, including **considerations** that may affect “whether a [crypto-asset] previously sold as a security should be reevaluated at the time of later offers or sales.” Many of the factors identified in the 2019 guidance **involved** whether a network associated with a crypto-asset had reached the point at which it could be deemed “decentralized.”

The 2019 staff guidance left some in the crypto industry **unsatisfied**. A common **complaint** was that the long list of factors identified in the guidance—some of which seemingly required nonpublic information to analyze—did not provide market participants with clear answers regarding the status of many crypto-assets. The guidance also **appeared** to imply that crypto-assets could oscillate between security and non-security status based on difficult-to-monitor changes in the “centralization” of an associated ecosystem, potentially raising compliance challenges for intermediaries like crypto exchanges.

With these concerns lingering, some **commentators** began to advance the view that most crypto-assets *never* qualify as securities under the *Howey* test, regardless of whether they are initially sold in securities transactions or whether an associated network is “centralized” or “decentralized.” Advocates of this theory rely on two fundamental claims. First, they **contend** that, under the *Howey* case law, an instrument cannot qualify as an “investment contract” absent a legal relationship between the instrument's issuer and holders of the instrument. Second, they **maintain** that secondary-market purchasers of crypto-assets typically do not have any legal relationship with a crypto-asset's issuer. This understanding of the *Howey* test—which this Sidebar will call the “absolute separation theory”—thus **implies** that (1) initial distributions of crypto-assets may represent securities offerings given the contractual relationship between parties to those transactions, but (2) secondary-market trading in most crypto-assets falls outside the SEC's jurisdiction.

Case law applying the *Howey* test to crypto-assets does not reflect a uniform approach to the issues raised by the absolute separation theory. The U.S. District Court for the Southern District of New York's decision in *SEC v. Ripple Labs* can be read to support a fairly strong distinction between initial distributions of crypto-assets and secondary-market trading, which may provide some support to the absolute separation theory. Other language in that decision, however, **appears** to endorse a fact-specific approach to analyzing whether secondary-market transactions in crypto-assets involve “investment contracts,” as opposed to a categorical rule that all such transactions fall outside the scope of the securities laws. The upshot of the *Ripple* decision for the absolute separation theory thus remains unclear. Other judges in the Southern District of New York (where several of the relevant cases have been litigated) have **rejected** the absolute separation theory, with one **explicitly departing** from the *Ripple* decision's reasoning.

The issues discussed above generally do not apply to **reserve-backed stablecoins**, which are issued by entities that attempt to maintain a stablecoin's peg to a reference asset by standing ready to meet redemption requests. At one point, **commentators** debated whether **stablecoins** that do not pay their holders interest qualify as securities under the *Howey* test. In July 2025, Congress provided a partial

answer to that question when it enacted [the Guiding and Establishing National Innovation for U.S. Stablecoins \(GENIUS\) Act](#). The GENIUS Act [established](#) a detailed regulatory framework for issuers of “payment stablecoins”—i.e., stablecoins that are designed to be used as a means of payment or settlement and are redeemable for a fixed amount of monetary value. The GENIUS Act [provides](#) that payment stablecoins issued by “permitted payment stablecoin issuers” are not securities. It also [prohibits](#) permitted payment stablecoin issuers from paying interest “solely in connection with the holding, use, or retention of” payment stablecoins.

The Second Trump Administration: A Shift in the SEC’s Posture and the Road to Market-Structure Legislation

Under the second Trump Administration, the SEC has taken steps that are [broadly viewed](#) as [reflecting](#) a less interventionist stance toward crypto markets than the approach that prevailed under the Biden Administration. In 2025, the SEC [dropped](#) several [lawsuits](#) against [crypto firms](#) that were filed during the tenure of former Chair Gary Gensler. The agency also launched a [Crypto Task Force](#) that seeks to provide clarity to crypto markets and “recommend practical policy measures that aim to foster innovation and protect investors.” The tenor of public comments regarding crypto from SEC leadership has also changed. Whereas former Chair Gensler [contended](#) that the “vast majority” of crypto-assets likely fell within the agency’s jurisdiction, current Chair Paul Atkins has [focused](#) his public comments on ways that crypto-assets can transition out of SEC jurisdiction, the need for a clear taxonomy specifying the regulatory status of different types of crypto-assets, and the possibility of crypto-specific exemptions from the securities laws.

Alongside these developments, Congress is [considering](#) crypto market-structure legislation that aims to clarify the respective jurisdictions of the SEC and CFTC over different categories of crypto-assets and transactions.

The SEC’s March 2026 Guidance

The [SEC’s March 2026 guidance](#)—which supersedes the 2019 staff guidance discussed above—includes

- a [five-category taxonomy](#) outlining the agency’s views on how the securities laws apply to different types of crypto-assets;
- a [discussion](#) of the circumstances in which a crypto-asset that is not itself a security can become “subject to” an investment contract and later “separate from” that contract, which is relevant to whether secondary-market transactions involving the crypto-asset come within the ambit of the securities laws; and
- [analysis](#) of how the securities laws apply to certain crypto-asset activities.

Crypto-Asset Taxonomy

The guidance [identifies](#) five categories of crypto-assets: digital commodities, digital collectibles, digital tools, stablecoins, and digital securities. It [explains](#) that digital commodities, digital collectibles, and digital tools are not themselves securities, but 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. [Digital securities](#) are just that—securities. The guidance [clarifies](#) that, given the dynamic nature of crypto markets, there may be crypto-assets that do not fall within any of these five categories and crypto-assets that fall within more than one category.

Digital Commodities. The guidance indicates that a “[digital commodity](#)” is a crypto-asset that is “intrinsically linked to and derives value from the programmatic operation of a crypto system that is functional, as well as supply and demand dynamics, rather than from the expectation of profits from the essential managerial efforts of others.” Digital commodities do not have “intrinsic [economic properties](#) or rights,” such as generating a passive yield or conveying rights to the profits or assets of a business enterprise. The guidance [identifies](#) certain crypto-assets that fall within this category, including Bitcoin, Ether, XRP, and Solana. Because digital commodities do not derive their value from the managerial efforts of others, the guidance [explains](#), they are not themselves investment contracts.

Digital Collectibles. Under the guidance, a “[digital collectible](#)” is a crypto-asset that is “designed to be collected and/or used and 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, among other things.” This category includes “[meme coins](#)”—crypto-assets acquired for “artistic, entertainment, social, and cultural purposes,” which generally lack functionality. The guidance [indicates](#) that the value of digital collectibles does not depend on the managerial efforts of others, meaning digital collectibles are not themselves investment contracts.

Digital Tools. The guidance explains that a “[digital tool](#)” is a crypto-asset that “performs a practical function, such as a membership, ticket, credential, title instrument, or identity badge.” Because the value of digital tools depends on their functional utility rather than the managerial efforts of their developers, the guidance [says](#), they are not themselves investment contracts.

Stablecoins. The guidance defines “[stablecoin](#)” to mean a crypto-asset that is “designed to maintain a stable value relative to a reference asset like the U.S. dollar.” It [indicates](#) that payment stablecoins issued by permitted payment stablecoin issuers will not qualify as securities by operation of statute after the [effective date of the GENIUS Act](#). Other stablecoins [may represent securities](#) depending on the facts and circumstances. The guidance [explains](#) that, prior to the effective date of the GENIUS Act, the SEC will adhere to the views expressed in [April 2025 staff guidance](#), which concluded that non-yielding stablecoins with certain characteristics are not securities.

Digital Securities. Under the guidance, “[digital securities](#)” are tokenized versions of instruments enumerated in the statutory definitions of “security,” such as stocks and bonds—i.e., digital versions of such instruments that are recorded on a blockchain or other form of distributed ledger technology. Digital securities are securities, the guidance [explains](#), because they have the economic characteristics of securities; in the SEC’s view, recording securities on a blockchain does not change their status as securities.

The Relationship Between a Crypto-Asset and an Investment Contract

While the guidance provides that certain categories of crypto-assets are not themselves securities, it clarifies that non-security crypto-assets can become “[subject to](#)” an investment contract, during which time secondary-market sales of those assets constitute [securities transactions](#). A non-security crypto-asset can become “subject to” an investment contract, the guidance [explains](#), “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.” The guidance then [discusses](#) factors that determine whether a purchaser’s expectation of profits is “reasonable.” Those factors include the [source](#), [timing](#), and [specificity](#) of representations and promises regarding managerial efforts, along with the [channels](#) through which such representations and promises are communicated.

Under the guidance, a non-security crypto-asset that is sold “subject to” an investment contract does not necessarily retain that status [in perpetuity](#). Rather, the guidance [indicates](#) that such an asset “separates from” an investment contract when purchasers “could no longer reasonably expect the issuer’s

representations or promises to engage in essential managerial efforts to remain connected to” the asset. In these circumstances, the crypto-asset is **no longer subject** to the federal securities laws. A crypto-asset may “separate from” an investment contract, the guidance **explains**, when an issuer has “fulfilled its representations or promises to engage in essential managerial efforts,” even if the issuer continues to engage in non-essential efforts related to the asset. The guidance also **says** that a crypto-asset may “separate from” an investment contract when an issuer publicly announces it is unable to complete promised managerial efforts or when it becomes clear that an issuer will not complete such efforts. In those circumstances, the guidance **adds**, issuers may be liable for material misstatements or omissions in connection with their failure to complete the underlying project.

Crypto-Asset Activities

The guidance **discusses** the SEC’s views regarding the application of the federal securities laws to **protocol mining**, **protocol staking**, the “**wrapping**” of crypto-assets, and **airdrop disseminations**.

As discussed, **protocol mining** is a process that involves the use of computers to solve complex mathematical problems, which allows miners to validate crypto transactions and earn rewards. Individuals may **engage** in mining by themselves or by combining their computational resources with others in mining “pools.”

Protocol staking involves depositing crypto-assets to a protocol for a chance to validate crypto transactions and earn rewards. Staking can take a **variety of forms**, including solo staking and staking that involves a third-party custodian.

“**Wrapping**” a crypto-asset involves depositing the asset with a custodian or computer program, which generates another crypto-asset that operates on a different network and can be redeemed for the deposited crypto-asset.

Airdrops are a means by which the issuer of a crypto-asset can distribute the asset for no or nominal consideration. Issuers may **conduct** airdrops to generate interest in a new crypto-asset, to reward early users of a crypto-asset, or for other reasons.

The guidance clarifies that **protocol mining arrangements**, **protocol staking arrangements**, the **offering** of crypto “wrapping” services for non-security crypto-assets, and **airdrops** do not constitute securities transactions, provided they meet specified conditions.

Issues for Congress

One takeaway from the SEC’s guidance is that the agency does not accept the absolute separation theory as a statement of existing law. In **concluding** that non-security crypto-assets remain “subject to” an investment contract if purchasers continue to reasonably expect essential managerial efforts from an issuer, the guidance appears inconsistent with the core claim about secondary-market trading advanced by absolute separation theorists. Some commentators have expressed surprise at this development, **characterizing** the guidance as a “meaningful departure from what had been perceived as the current SEC position.”

A second **notable feature** of the guidance is its move away from the 2019 staff guidance’s **emphasis** on “decentralization” as a central concept in analyzing whether secondary-market trading in a crypto-asset is subject to the securities laws. Instead, the guidance **focuses** that inquiry on an issuer’s representations and promises. Where an issuer’s representations and promises do not include any commitments related to “decentralization,” the SEC’s new framework may offer an easier route for crypto-assets to avoid secondary-market regulation.

The SEC has published the guidance as Congress [considers](#) legislation that aims to clarify the agency’s jurisdiction over crypto-assets. In July 2025, the House of Representatives passed [H.R. 3633, the Digital Asset Market Clarity Act](#), which would comprehensively overhaul the regulation of crypto markets. In January 2026, after soliciting comments on an earlier draft, the Senate Banking Committee released its own [draft market-structure bill](#). According to [reports](#), the Senate Banking Committee may hold a markup for that bill (or revised market-structure legislation) in April 2026.

While H.R. 3633 and the Senate Banking Committee draft have several differences and employ distinct terminology, they [both](#) would [allow](#) issuers of certain crypto-assets to engage in primary-market sales (subject to certain conditions and size limits) without registering underlying investment contracts as securities. Issuers that utilize this exemption would face [tailored disclosure requirements](#) for their [initial offerings](#) and [ongoing reporting requirements](#), which would be administered by the SEC. The ongoing reporting requirements would [continue](#) until a defined period after an issuer makes certain [certifications](#) to the SEC. Under H.R. 3633, the certifications would involve the “[maturity](#)” of a blockchain system associated with a crypto-asset. After making such a certification, issuers engaged in “material ongoing efforts” related to a mature blockchain system would face [narrower](#) disclosure requirements related to their role within such a system. Under the Senate Banking Committee draft, the certifications would involve an issuer’s [ongoing efforts](#) related to a crypto-asset.

Both [bills](#) would [provide](#) that secondary-market transactions in covered crypto-assets are not securities transactions, effectively codifying the absolute separation theory with respect to those assets. While the bills would narrow the SEC’s jurisdiction over secondary crypto markets, [H.R. 3633](#) and [draft legislation](#) released by the Senate Agriculture Committee would give the CFTC new regulatory authorities over those markets and certain intermediaries that operate in them.

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