

MARCH 19, 2026 | PUBLICATION

## Client Alert: SEC Crypto Update: Clarity on What Is—and Isn't—a Security

On March 17, 2026, the U.S. Securities and Exchange Commission (SEC), joined by the Commodity Futures Trading Commission (CFTC), issued an interpretive release explaining how existing federal securities laws apply to cryptocurrency assets and common on-chain activities.

The bottom line is clear:

- Most cryptocurrency assets are not themselves securities;
- Tokenized traditional instruments remain securities;
- A non-security token can be offered “subject to” an investment contract and later separate from it; and
- When conducted as described, protocol mining, protocol staking, certain wrapping, and some airdrops are not securities transactions.

Effective immediately, the interpretation supersedes the SEC’s 2019 digital asset framework and invites public comment. However, it does not replace the U.S. Supreme Court’s *Howey* test, which remains controlling law and asks whether there is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. The SEC’s latest release clarifies how it will evaluate those elements in cryptocurrency settings, including confirming a common enterprise requirement based on post-*Barkate* case law, but it does not displace the test. Instead, it translates *Howey*’s principles into practical, cryptocurrency-specific guidance. As of March 19, 2026, firms should align product design, disclosures, and operations to the agency’s specifics.

Importantly, the SEC’s interpretation also formalizes a process view long debated in the markets: the legal status of a token hinges on economic reality and communications that reasonably shape purchaser expectations, not branding.

### The Token Categories

#### INDUSTRY SECTOR

Financial Services

#### SERVICE LINE

Litigation & Disputes

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## Digital commodities, collectibles, tools, stablecoins, and digital securities

The SEC classifies cryptocurrency assets by what they do and how they create value, then applies the definition of “security:”

- Digital commodities, digital collectibles, and digital tools are not themselves securities Digital commodities are native tokens of functional networks whose value comes from protocol operation and market supply/demand—not from promised managerial efforts
- Collectibles are designed to be collected or used, like art or in-game items
- Tools perform practical functions such as memberships, tickets, credentials, titles, or identity
- Payment stablecoins issued by “permitted” issuers under the GENIUS Act are excluded from the securities definition by statute as that law phases in; before then, only certain “covered stablecoins” fall outside when offered and redeemed as described
- Digital securities remain securities when “tokenized,” and tokenization by third parties can itself involve a security depending on structure and rights

The SEC anchors the digital commodity category with specific, non-exhaustive examples, including Bitcoin, Ether, Solana, XRP, Cardano, and Litecoin, and notes that a futures listing is not required by naming Algorand and LBRY Credits. This explicit naming and the “futures not required” point are easy to miss but important for listings and risk classification.

## When a Non-Security Token Is “Subject to” an Investment Contract—and When It Separates

The SEC is specific about communications that can create a reasonable expectation of profits from others’ essential managerial efforts. Only representations or promises by or for the issuer that reach purchasers before or at the time of the offer or sale count; unauthorized third-party marketing does not. The channel matters: official websites, social media, whitepapers, regulatory filings, and direct purchaser communications are critical. Representations or promises that are vague or contain no semblance of an actionable business plan, such as those lacking milestones, funding, or other plans for needed resources, likely would not create reasonable expectations of profit. The issuer’s representations or promises to engage in essential managerial efforts from which a purchaser would reasonably expect to derive profits, when combined with an investment of money in a common enterprise, creates an investment contract under the *Howey* test. These timing, source, and channel guardrails function as practical drafting and disclosure guideposts.

## Separation can happen immediately or later—and secondary markets must follow substance

A non-security token offered “subject to” an investment contract does not remain bound forever; rather, it separates when purchasers can no longer reasonably expect the issuer’s essential managerial efforts to remain connected to the token. That can occur immediately on delivery if essential efforts promised are complete, or later if, for example, the issuer publicly and unambiguously abandons the project. Secondary-market treatment—meaning buying and selling of previously issued digital assets between investors on third-party platforms rather than directly from the original project team must track that reality. If purchasers would not reasonably tether the issuer’s managerial efforts to the asset, secondary trades are not securities transactions; if they would, securities laws continue to apply until separation. The interpretation assumes an investment contract exists and does not decide again its creation.

## Next steps

For now, the *Howey* test remains the touchstone, but prior SEC guidance has been superseded in a big way.

In other words, we've received practical clarity without a change in the law. The SEC's press statement and the CFTC's companion announcement position this interpretation as a first step toward harmonized oversight and regulation of cryptocurrency. Shumaker will follow the comment process and related oversight efforts.

If you would like more information on how the SEC's updated interpretation may impact your business or digital asset strategy, please contact Justin Senior or a member of Shumaker's Financial Services Industry Sector.