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SEC-CFTC Crypto Guidance: Five Categories and the Howey Test

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On March 23, 2026, the Securities Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC") published **guidance in the Federal Register** regarding "Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets." Perhaps frustrated by the lack of progress in a distracted Congress on moving a digital marketplace infrastructure bill forward, the two agencies that had been divvying up oversight of digital assets in previous years, came together to produce joint guidance that will help provide clarity to the marketplace on crypto use cases that fall within each of their jurisdictions.

The crucial stumbling block for the SEC on crypto assets has been how to apply the *Howey* test to them. A problem that has plagued them and the marketplace for at least ten years. This guidance addresses that point head-on, emphasizing that "the interpretation in this release does not supersede or replace the Howey test." Meanwhile, the CFTC has included comments in this guidance regarding when crypto assets that are not be deemed to be securities per the SEC's new interpretation could instead be classified as "commodities."

The guidance identifies "five categories based on [crypto asset] characteristics, uses, and functions: (1) digital commodities; (2) digital collectibles; (3) digital tools; (4) stablecoins; and (5) digital securities." Of these five, digital commodities, digital collectibles and digital tools are all deemed to not be securities, with the caveat that they could be involved in the offer and sale of an investment contract, which offer and sale would be subject to the SEC's jurisdiction. The SEC provides that stablecoins may or may not be securities, based upon the uses of stablecoins, and, of course, a digital security is a security. Also, the SEC goes on to remind that "there may be crypto assets that do not fall within any of these five categories, as well as crypto assets with hybrid characteristics that may fall within more than one category."

The accompanying **fact sheet** provides a summary of each the five categories:

1. Digital Commodities – NOT Securities – 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, rather than from the expectation of profits from the essential managerial efforts of others.
2. Digital Collectibles – NOT Securities – Crypto assets that are 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.
3. Digital Tools – NOT Securities – Crypto assets that perform a practical function, such as a membership, ticket, credential, title instrument, or identity badge.
4. Stablecoins – GENIUS Act Stablecoins NOT Securities – Defined in the GENIUS Act as "payment stablecoin issued by a permitted payment stablecoin issuer."
5. Digital Securities (or "tokenized securities") – Securities – Financial instruments enumerated in the definition of "security" that is formatted as or represented by a crypto asset, where the record of ownership is maintained in whole or in part on or through one or more crypto networks.

The SEC being clear that digital collectibles and digital tools are NOT securities could give rise to another non-fungible token (NFT) craze. NFTs were at the base of much creativity and innovation in the early years of this decade, which energy was significantly chilled by previous SEC actions against NFT issuers. This guidance is so important to providing regulatory certainty to companies interested in picking up on NFTs and using them to support Web3 initiatives and beyond.

In terms of digital securities, the SEC identifies two kinds tokenized securities: "(1) securities tokenized by or on behalf of the issuers of such securities; and (2) securities tokenized by third parties unaffiliated with the issuers of such

securities, which may involve the third party issuing a separate security that derives its value from or is otherwise linked to the subject security." The SEC's recognition of the second kind of tokenized security is likewise very important for the marketplace and will help to stabilize innovation occurring in investment markets based upon crypto assets. In discussing such innovation, the SEC emphasized that just because some tokenized securities may include non-financial benefits (e.g., access to special events or content, or unique discounts or membership benefits) in addition to standard financial benefits, the provision of those non-financial benefits does not cause that token to stop being a tokenized security.

When evaluating a particular crypto asset's characteristics, uses and functions under the *Howey* test, the SEC indicates that it will look closely at whitepapers issued in conjunction with the sale of tokens to determine whether the token is being offered in a manner that encourages "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." Crucially, the SEC recognizes that a token may meet the definition of being a tokenized security only for a limited period of time. Once the purchaser "no longer reasonably expects the issuer's representations or promises to engage in essential managerial efforts to remain connected to the non-security crypto asset" either because the promises have been fulfilled or because there has been a failure of the issuer to satisfy the reps and promises, then the token becomes a non-security token.

The guidance then turns into discussions of protocol staking and protocol mining, activities that are associated with crypto assets, finding that when staking or mining is being undertaken with a non-security token, or that token is "wrapped", such activities are not governed by the SEC. The SEC also concludes that simply airdropping a token is not an offer or sale of a security because it does not involve the investment of money.

As mentioned, this guidance is a good, important step forward to help stoke innovation fires and encourage companies to look to the United States marketplace as a place to engage in a wide variety of crypto asset-related activities. Congressional action that cements the positions the SEC and the CFTC have taken in the guidance will still be important, of course, especially in light of the limited effect agency guidance has in court proceedings, due to the **Supreme Court's decision in *Loper Bright Enterprises***.