

GIBSON DUNN



Securities Regulation & Corporate Governance and  
Fintech & Digital Assets Update

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## SEC Crypto Task Force Hosts Its Inaugural Roundtable on Security Status

*The dawn of a new era in crypto regulation was evident during the SEC Crypto Task Force's inaugural roundtable on March 21, 2025. Crypto enthusiasts and skeptics met to discuss and debate the definition of a "security," the regulation of digital assets, and the type of "fit-for-purpose" regulatory and disclosure framework that could be developed for such assets.*

### Crypto & The SEC: A New Era

This inaugural roundtable was part of the SEC's "[Spring Sprint to Crypto Clarity](#)" series that aims to explore key areas of interest in the regulation of digital assets. Featuring industry supporters and critics alike, the roundtable discussions generally centered on three key issues:

- Understanding how the definition of a "security" under the federal securities laws should be applied to digital assets;
- Development of a new regulatory framework under the federal securities laws applicable to digital assets; and
- Judicial precedents and emerging legislative initiatives that will inform the SEC's authority and approach, which market participants should bear in mind given the uncertainty that will likely persist in the regulatory environment.

## I. The Investment Contract Analysis under the *Howey* Test

To date, the SEC's efforts to regulate digital assets have largely pivoted on the application of the "*Howey*" test in determining whether the digital asset is an "investment contract" and, therefore, a security subject to the federal securities laws.<sup>[1]</sup> The "investment contract" analysis set forth by the U.S. Supreme Court in *SEC v. W.J. Howey* requires four elements to be met for an "investment contract" to exist: (i) there is an investment of money (ii) in a common enterprise (iii) with a reasonable expectation of profits (iv) to be derived from the efforts of others.<sup>[2]</sup> In its 2019 *Framework for "Investment Contract" Analysis of Digital Assets* (the "Framework"),<sup>[3]</sup> the SEC Staff emphasized that determining whether a particular digital asset at the time of its offer or sale satisfies the *Howey* test depends on the specific facts and circumstances, and the inquiry is focused on the "economic realities" of the transaction. In prior years, the SEC has brought numerous crypto-related enforcement actions and civil suits and employed an expansive application of the *Howey* test to digital assets.

## II. The SEC and its Staff Signal a Policy Shift in Application of the *Howey* Test

The formation of the Crypto Task Force, launch of the inaugural roundtable, and recent SEC staff guidance on meme coins and on proof-of-work mining activities appear to signal a policy shift away from prior years in how the SEC will apply and interpret *Howey* and the regulation of digital assets.

On February 27, 2025, the Staff of the SEC's Division of Corporation Finance (the "Staff") issued [guidance](#) on meme coins,<sup>[4]</sup> indicating that transactions in these digital assets generally do not involve the offer and sale of securities under federal securities laws.<sup>[5]</sup> The Staff reasoned that purchasers of meme coins make no investment in a common enterprise because their funds "are not pooled together to be deployed by promoters or other third parties for developing the coin or a related enterprise."<sup>[6]</sup> Rather, the value of meme coins comes from "speculative trading and the collective sentiment of the market, like a collectible."<sup>[7]</sup>

As discussed in [Gibson Dunn's March 21, 2025 Client Alert](#), on March 20, 2025, the Staff released a [statement](#)<sup>[8]</sup> providing its views on certain activities on proof-of-work (PoW) networks known as "mining." The Staff stated that the mining activities described in the statement (*i.e.*, "Protocol Mining") generally do not constitute the offer and sale of securities under the federal securities laws, because the act of Protocol Mining, whether by solo miners or mining pools,<sup>[9]</sup> does not involve an expectation of profit derived from the entrepreneurial or managerial efforts of others. Rather, the miner's expectation to receive rewards is "derived from the administrative or ministerial act of Protocol Mining performed by the miner."<sup>[10]</sup> As such, rewards are "payments to the miner in exchange for services it provides to the network rather than profits derived from the entrepreneurial or managerial efforts of others."<sup>[11]</sup>

Notably, Democrat Commissioner Caroline A. Crenshaw issued statements criticizing both the meme coin and PoW Staff guidance, contending that in both circumstances, the guidance failed to address the need for a facts and circumstances analysis focused on the economic realities of the specific arrangement under the *Howey* test.

Taken together, the Staff's position on meme coins and PoW mining activities suggest that market participants may expect a reappraisal of the *Howey* test from the new SEC and its Staff going forward, one more focused on a common-sense analysis.

### III. Key Discussion Points from the Roundtable

Roundtable panelists explored both the challenges and opportunities associated with defining the security status of digital assets, and several important themes emerged:

- 1. Challenges of Applying the *Howey* Test:** Several panelists noted the difficulty of applying the *Howey* test in a consistent and predictable manner and questioned whether it continues to be responsive to the different mix of risks inherent in the novel technological arrangements that underpin crypto tokens and other digital assets. For example, panelists observed that *Howey* was decided at a time when information was disseminated in a print format, which gave rise to certain informational asymmetries that the securities laws were designed to address, whereas the same inquiry may not be an effective way of surfacing the relevant risks and other questions about ownership and control that characterize digital assets. Many panelists also argued that in order to be effective, a principles-based regulatory regime needs to recognize that digital assets' features can vary considerably across different asset classes and change over the life of a particular digital asset. Several panelists suggested that the SEC consider a model based on the concept of control; in their view, where a digital asset's underlying protocol is sufficiently decentralized, such that it is no longer controlled by individual human actors (such as a founder, promoter, or manager), the trust and risk profiles associated with the system no longer give rise to the information concerns the federal securities laws were designed to address. They advocated that in such cases, the federal securities laws should not apply. Others sounded a more cautionary note, including the view that a test based on control would result in similar line-drawing challenges that arise under *Howey* and would still depend on a facts and circumstances analysis.
- 2. The SEC's Jurisdictional Authority:** Panelists considered the appropriateness of the SEC's jurisdictional authority to regulate the digital assets industry relative to other regulatory agencies, such as the Commodity Futures Trading Commission (the "CFTC"), which has jurisdictional authority over digital assets that are commodities and which has been viewed by some as a more appropriate regulator for the industry. In light of many digital assets being marketed to retail investors and other economic realities, one panelist reasoned that, from a policy perspective, the SEC's investor protection mandate makes it an ideal regulator in certain respects. In contrast, other panelists argued that the SEC should explicitly exempt digital assets from being subject to the federal securities laws.
- 3. A Path to Compliance:** Several industry participants noted that many digital asset companies and promoters are eager for clarity in the application of the regulatory framework and a path to compliance. One panelist encouraged the SEC to consider an interim regulatory framework with a built-in sunset that would allow industry participants to opt-in, temporarily, to being regulated while providing the SEC with time and practical experience to refine its approach and work toward notice and comment rulemaking. Another panelist underscored that the Securities Act and the Exchange Act provide broad exemptive authority to the SEC, which the SEC should exercise to narrow the definition of a security to exclude digital assets.
- 4. The Continuing Importance of Judicial Decisions.** Several panelists were quick to note that previous SEC enforcement actions as well as state enforcement and private litigation have already produced a significant body of case law applying the *Howey* test

and other securities law concepts to digital assets; these precedents will continue to expose industry participants to uncertainty and litigation risk, particularly post-*Loper Bright*.[\[12\]](#)

#### IV. Important Considerations Going Forward

Notwithstanding these SEC developments and the broader policy shifts they may foretell, market participants should bear in mind that existing judicial decisions will continue to serve as precedent for transactions in digital assets and anticipated legislation will ultimately shape the regulatory environment for the industry.

Although the SEC has recently dropped or paused many of its high-profile lawsuits and investigations against major players in the crypto industry, private litigants may continue to rely on judicial decisions in prior SEC enforcement cases, which could continue to expose industry participants to uncertainty and litigation risk.[\[13\]](#)

In addition, many industry commentators expect that under a crypto-friendly administration, the Republican-controlled U.S. Congress will prioritize passing comprehensive legislation aimed at clarifying the regulatory environment around digital assets. Any final legislation will have a significant impact on the industry going forward. Although these developments are in the early stages, key legislative efforts include the following:

- **The GENIUS Act:** On March 13, 2025, the Senate Banking Committee approved the Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025 (the “GENIUS Act”). The GENIUS Act would establish a comprehensive regulatory framework for the issuance and regulation of “payment stablecoins” in the United States.[\[14\]](#) Importantly, the GENIUS Act would explicitly exclude payment stablecoins from the federal regulatory regimes for securities, commodities, and investment companies, placing qualified payment stablecoin issuers outside the SEC’s regulatory authority, and payment stablecoins would be excluded from the definition of “security” under the federal securities laws.[\[15\]](#) The GENIUS Act is the first digital asset-related legislation approved by a congressional committee in the 119th Congress, and it will now move to the full Senate for consideration, where it is expected to receive bipartisan support.
- **FIT 21:** Under the previous Congress, on May 22, 2024, the U.S. House of Representatives passed the Financial Innovation and Technology for the 21st Century Act (FIT 21). Key features of FIT 21 include provisions that would remove “investment contracts” that are recorded on a blockchain from the statutory definition of “security” if certain conditions are met. FIT 21 represents an effort by lawmakers to police the boundaries of the *Howey* test’s application to digital assets and to delineate more clearly the regulatory responsibilities of the SEC and the CFTC. Although FIT 21 was not signed into law, lawmakers have explained that FIT 21 is a starting point for new legislation to be introduced in this Congress.

The roundtable surfaced many of the challenges associated with defining digital assets’ status as “securities,” while clearly demonstrating the need for a pathway to compliance that helps protect both entrepreneurs and investors to the extent the securities laws apply to digital assets. It appears that the SEC will continue to re-assess and clarify its interpretation of the *Howey* test’s

application to digital assets. The SEC also will likely continue its work towards providing a clearer regulatory framework.

Accordingly, while industry participants should expect additional changes in the SEC's policy and enforcement approach towards digital assets, they should be mindful of legal risks that potentially apply to their current business and strategic plans. Moreover, a reduction in SEC crypto-focused enforcement should not be interpreted as the elimination of litigation risk associated with digital assets, especially given the possible emergence of a significantly more active private civil litigation bar.

Finally, in contrast to the last several years, it appears from the roundtable and the recent Staff guidance that the Staff may be ready for productive engagement and consultation with individual market participants.

[1] The term "security" is defined in Section 2(a)(1) of the Securities Act of 1933, as amended (Securities Act), Section 3(a)(10) of the Securities Exchange Act of 1934, as amended (Exchange Act), Section 2(a)(36) of the Investment Company Act of 1940, and Section 202(a)(18) of the Investment Advisers Act of 1940, and includes the term, "investment contract."

[2] See *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) ("*Howey*").

[3] Framework for "Investment Contract" Analysis of Digital Assets (Apr. 3, 2019), <https://www.sec.gov/about/divisions-offices/division-corporation-finance/framework-investment-contract-analysis-digital-assets>. See also William Hinman, Digital Asset Transactions: When Howey Met Gary (Plastic), Remarks at the Yahoo Finance All Markets Summit: Crypto (Jun. 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418>.

[4] The Staff defined a meme coin as "a type of crypto asset inspired by internet memes, characters, current events, or trends for which the promoter seeks to attract an enthusiastic online community."

[5] Staff Statement on Meme Coins, Division of Corporation Finance (Feb. 27, 2025), <https://www.sec.gov/newsroom/speeches-statements/staff-statement-meme-coins>.

[6] *Id.*

[7] *Id.*

[8] Statement on Certain Proof-of-Work Mining Activities, Division of Corporation Finance (Mar. 20, 2025), [https://www.sec.gov/newsroom/speeches-statements/statement-certain-proof-work-mining-activities-032025?utm\\_medium=email&utm\\_source=govdelivery#\\_ftnref1](https://www.sec.gov/newsroom/speeches-statements/statement-certain-proof-work-mining-activities-032025?utm_medium=email&utm_source=govdelivery#_ftnref1).

[9] Mining pools are arrangements where computational resources are pooled to increase participating miners' chances of successfully validating transactions and earning rewards. Mining pools may be administered by a pool operator who typically is responsible for coordinating the miners' computational resources, maintaining the pool's mining hardware and software,

overseeing the pool's security measures to protect against theft and cyberattacks, and ensuring that the miners are paid rewards.

[10] Statement on Certain Proof-of-Work Mining Activities, *supra* note 8.

[11] *Id.*

[12] See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), in which the U.S. Supreme Court overruled *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and provided that judges must independently interpret statutes without deference to an agency's reading of the law.

[13] See, e.g., *SEC v. Terraform Labs Pte. Ltd.*, 2023 WL 8944860 (S.D.N.Y. Dec. 28, 2023); *SEC v. Terraform Labs Pte Ltd.*, 2023 WL 4858299 (S.D.N.Y. July 31, 2023).

[14] The GENIUS Act defines a payment stablecoin as a digital asset that is or is designed to be used as a means of payment or settlement if: (i) the issuer is obligated to convert, redeem, or repurchase for a fixed amount of monetary value; (ii) it will maintain a stable value relative to the value of a fixed amount of monetary value; and (iii) it is not a national currency, bank deposit, interest-bearing instrument, or a security under federal securities laws (other than by virtue of being a bond, note, evidence of indebtedness, or investment contract). GENIUS Act, § 2(15)(A).

[15] Under the GENIUS Act, payment stablecoins would also be excluded from the definition of "commodity" in the Commodity Exchange Act of 1936, and the definition of an "investment company" under the Investment Company Act of 1940.

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