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Non-Security Crypto, Investment Contracts, and SEC Compliance

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The U.S. Securities and Exchange Commission has made significant progress over the past 18 months in developing a workable framework for crypto under the federal securities laws.

A key milestone was the Commission's March 2026 interpretation (the "Interpretation") of how the definition of "security" applies to crypto assets and related transactions. The Interpretation divides crypto assets into five categories: (1) digital commodities, (2) digital collectibles, (3) digital tools, (4) stablecoins, and (5) digital securities. The Interpretation states that categories (1)-(4) are not themselves securities, whereas digital securities are (naturally) securities.

The Interpretation also emphasizes, however, that a crypto asset in one of the "non-security" categories may nevertheless be subject to an "investment contract" (including in secondary market transactions)—and thus constitute a "securities transaction." The Interpretation provides detailed guidance to aid in identifying such investment contracts. It also reiterates that any such securities transactions must be registered under the Securities Act of 1933 or conducted pursuant to an exemption from registration.

The Commission has received well-deserved praise for addressing longstanding questions through the Interpretation and other recent announcements. Yet a category of highly practical corollary questions flows from the position that a non-security crypto asset can be subject to an investment contract:

> *In the context of a transaction or arrangement involving a non-security crypto asset that is subject to an investment contract, do the existing securities laws and rules that impose registration and substantive requirements on various categories of entities that facilitate "securities" activities apply—and, if so, how?*

Crypto "Investment Contracts" Present Nuanced Regulatory Questions

Over the decades, the body of SEC rules and guidance governing brokers, dealers, investment advisers, exchanges, clearing agencies, and securities market participants more broadly developed based on the general premise that the relevant activities pertain to an instrument that is itself a security—e.g., a stock or bond. The paradigm shifts for investment contracts: where, as the Commission's Interpretation explains, a non-security crypto asset may be subject to an investment contract—and thus a securities transaction—upon the asset's transfer, depending on the facts and circumstances of the given transaction or arrangement, including relevant contracts, communications, and representations of various parties and the expectations created.

It is clear that the offer and sale of such an investment contract must be registered under the Securities Act or conducted pursuant to an exemption. But it is less clear what activities or functions in connection with a transaction or arrangement involving a non-security crypto asset that is deemed subject to an investment contract would trigger the various entity registration requirements.

Take "broker" status, for example. Under existing SEC guidance, a key consideration when evaluating whether an entity must register as a broker is whether it "handles" the security or otherwise helps facilitate the execution of the securities transaction, commonly coupled with receipt of transaction-based compensation or other factors. But it is unclear how—or if—these concepts would apply to a party that has a role in a transaction or arrangement involving a non-security crypto asset that is deemed subject to an investment contract.

Fundamental questions also exist when considering the application of the "dealer" definition, including whether it is conceptually possible to be a dealer in investment contracts. Under the Interpretation and judicial precedent, investment intent is required to establish an investment contract. But the investment intent necessary to establish an investment contract potentially cuts against a finding that the entity is a dealer. Under the SEC's "dealer-trader" framework, a factor in determining whether an entity is a "dealer" is its motivation for transacting. Typically, dealers do not buy and sell for investment purposes; by contrast, non-dealer "traders" do.

Practical questions also arise concerning substantive requirements applicable to various SEC-registered entities involved in a transaction or arrangement that is an investment contract. For example, SEC Rule 15c3-3 requires a broker-dealer to obtain and "maintain the physical possession or control" of all fully paid securities and excess margin securities carried by the broker-dealer for the account of customers. It is unclear whether the SEC would expect this possession and control requirement to apply in the context of a non-security crypto asset subject to an investment contract. Open questions also exist concerning broker-dealer net capital treatment (e.g., "ready market" status) associated with investment contracts.

A Way Forward

The SEC has previewed a high-impact agenda for crypto, including "Project Crypto" rulemakings and a potential "innovation exemption"—not to mention mandatory rulemakings and studies on deck if crypto market structure legislation becomes law.

Questions around how existing rules apply (or not) to non-security crypto assets subject to investment contracts should not slip through the cracks. A constructive step forward would be to include, as part of a forthcoming crypto rulemaking, proposed guidance on two broad categories of questions relevant to non-security crypto assets subject to investment contracts—(1) status considerations across registration categories, and (2) the application of corresponding substantive requirements.

This need for guidance is not going away, even upon the passage of crypto market structure legislation, which contemplates the continued existence of crypto-related investment contracts. This Commission deserves tremendous credit for tackling difficult and complex crypto issues in a clear, direct, and thoughtful manner. That same approach here will continue to serve investors and the marketplace well. If these questions are left unaddressed, a different Commission may answer them *post hoc* in the context of enforcement actions.

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