



May 27, 2025

BY ELECTRONIC SUBMISSION

SEC Crypto Task Force  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-0213

Dear Members of the SEC Crypto Task Force:

Thank you again for meeting with us on May 20, 2025. Following our conversation—and in light of Commissioner Peirce’s May 19 “New Paradigm” speech—we wanted to share additional thoughts on this question: When does a non-security crypto asset that was once part of an investment contract become separated from that contract?

We believe the analysis by Lewis Cohen, et. al., in *The Ineluctable Modality of Securities Law: Why Fungible Crypto Assets Are Not Securities* (Nov. 10, 2022) remains the most accurate reflection of existing law. As they explain:

*“[T]here is no current basis in the law relating to ‘investment contracts’ to classify most fungible crypto assets as ‘securities’ when transferred in secondary transactions because an investment contract transaction is generally not present and these assets neither create nor represent the necessary cognizable legal relationship between an identifiable legal entity on the one hand and the owner of the crypto asset on the other that is the hallmark of a security.”*

This view was reinforced by Judge Torres’s ruling in *SEC v. Ripple Labs Inc.* In that decision, the court held that certain of Ripple’s historical institutional sales of XRP were investment contracts, but others of Ripple’s transactions involving XRP, including Ripple’s secondary market sales (e.g., blind bid/ask transactions), did not constitute investment contracts. Notably, Judge Torres determined that XRP itself is not a security, even though Ripple had previously sold some units of XRP to sophisticated institutional counterparties as part of investment contracts years prior. See 682 F.Supp.3d 308 (S.D.N.Y. 2023).

We understand the SEC’s concern that the current state of the law may allow bad actors to evade accountability, or that well-intentioned actors may raise money in transactions resembling traditional securities offerings without corresponding oversight. However, if there is a gap in the law, it is Congress’s—not the SEC’s—to fill it. Absent delegated authority, new legal standards must be established by lawmakers. SEC guidance that adheres faithfully to existing law—something that eluded the prior administration—would go a long way toward reducing market confusion. In contrast, reliance on vague and untested concepts like “fully functional” or

“sufficiently decentralized” risks compounding that uncertainty. Importantly, rules must be clear not just for issuers, but for all market participants who could be unwittingly classified as securities exchanges, brokers, dealers, or issuers.

That said, a well-designed safe harbor could provide meaningful protection to good-faith actors navigating genuine legal uncertainty. Such a safe harbor could reduce enforcement risk and provide clear compliance guidelines, especially during the early stages of network development. However, the framework must not imply that transactions involving digital assets—where there is no investment contract—are nevertheless subject to the securities laws. The goal should be to provide clarity where uncertainty exists, not to blur boundaries that are already settled. A sound safe harbor should operate within, not expand, the existing scope of federal securities law.

Until Congress settles on legislation, one potential approach to provide some clarity to market participants regarding when a token severs from an investment contract under existing law would be:

*Where a digital asset has been sold as part of an investment contract, any subsequent offer or sale of that asset shall not be deemed an offer or sale of an investment contract—and the asset shall be presumed to have separated from the investment contract—unless both of the following conditions are met: (i) a material promise made by the issuer to the original purchaser in connection with the investment contract remains outstanding and unfulfilled; and (ii) the subsequent holder has enforceable rights against the issuer arising from that promise.<sup>1</sup>*

Examples of material promises might include commitments to create a functional blockchain, deliver profits, repurchase tokens, commitments to secure exchange listings, or provide dividends or revenue sharing. General public statements or puffery should not qualify.<sup>2</sup> An overly broad standard would render the test unworkable and subject to abuse—either by a regulator reverting to a “regulation by enforcement” model or by private litigants engaging in opportunistic lawsuits.

While fact-specific analysis is still required, this framework would significantly reduce uncertainty by grounding the inquiry in identifiable legal obligations. Some may argue that issuers could circumvent the standard by promising only token delivery while disclaiming all other commitments. However, in practice, many early token projects—especially ICOs—made material promises to generate market demand. In such cases, the SEC retains full enforcement authority. The SEC would be well within its powers to act where a seller—or someone acting in

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<sup>1</sup> Nothing in this standard precludes the possibility that a downstream seller—independent of the original issuer—could create a new investment contract through their own conduct. This framework addresses only whether the digital asset remains tethered to the original investment contract; it does not immunize new conduct by a downstream seller that independently satisfies the criteria for an investment contract.

<sup>2</sup> Courts have been clear that *investment in efforts* alone is insufficient to satisfy *Howey*. See *Revak v. SEC Realty Corp.*, 18 F.3d 81, 87-88 (2d Cir. 1994).

concert with the seller—knows or recklessly disregards that: (i) material promises made in connection with the investment contract remain unfulfilled; and (ii) the associated tokens are being resold to third parties despite that nonperformance. This approach preserves accountability for bad actors without imposing ongoing or indeterminate obligations on downstream market participants.

To the extent there remains a gap in existing law, the legislature should fix it. In new legislation, one approach to fill the gap is to consider the maturity of the network as the guidepost for when a digital asset severs from an investment contract. Once mature, the digital asset itself should be able to circulate without registration or the need for exemption under the securities laws – because it is no longer part of an investment contract, and transactions in it are not securities transactions, even if conducted by parties originally associated with the asset.

Maturity is a more workable concept than “decentralization,” which has proven elusive and inconsistent in public discourse, litigation and policy discussions. Still, unless carefully cabined, “maturity” could devolve into another ambiguous standard.

A maturity test based on a bright-line, objective test based on economic, control and operational criteria would work. For example, a token could be excluded from securities regulation if it:

- Has an aggregate circulating market value above a defined threshold;<sup>3</sup>
- It is part of a network that is open and permissionless, and has been operational for a defined period; and<sup>4</sup>
- No party, including any group of affiliated parties, has the unilateral ability to change the core functionality of the network or reverse transactions on the network.

This test reflects economic realities rather than arbitrary metrics such as token ownership. Tokens that meet these standards already trade in broad, liquid markets and are supported by public information and market data. Registered investment products—like exchange-traded funds and futures—are being built around these assets. Imposing new disclosure requirements in this context would be both unnecessary and counterproductive.

Worse, requiring disclosures would create the misleading impression that certain parties associated with the token can still control the asset or the network, when that is not true. In other words, requiring disclosures would create the misimpression that the network is more controlled and controllable than it is.

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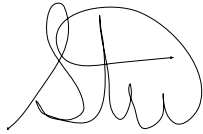
<sup>3</sup> A reasonable threshold might be \$1 billion in circulating market value. Although this proposal is an exclusion not an exemption, the analogy to the SEC’s Regulation M may be instructive. Regulation M proscribes certain activities that offering participants could use to manipulate the price of an offered security. Reg M, however, excludes from its coverage “actively traded securities” with a “public float” of at least \$150M that also have daily trading volumes of at least \$1 million. 17 CFR 242.101(c)(1).

<sup>4</sup> A 10-year operational requirement would set a reasonable standard for this determination.

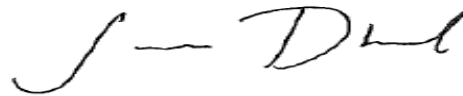
In short, it would be inappropriate to impose new securities law obligations—such as registration or disclosure—on tokens and networks that have operated and traded in broad liquid markets, openly, transparently, and permissionlessly for a significant time. These assets have been integrated into the financial system, are broadly held, and no longer pose the risks that animate the SEC’s concerns.

We appreciate the opportunity to continue this dialogue.

Respectfully submitted,



Stuart Alderoty  
Chief Legal Officer, Ripple



Sameer Dhond  
General Counsel, Ripple



Deborah McCrimmon  
Deputy General Counsel, Ripple