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<u>BY ELECTRONIC SUBMISSION</u>

January 9, 2026

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

Dear Members of the Task Force,

We write to provide perspective on the evolving discussions regarding digital asset market structure to the extent these discussions may inform Commission rulemaking or published guidance. Reference is also made to our letters dated March 21, 2025 and May 27, 2025.

In addition to academic and industry discussions, market structure legislation is also evolving in parallel on Capitol Hill, and Commission thinking will inevitably interact with those drafts. The House has already advanced the CLARITY Act of 2025, which uses a classification framework that includes a “digital commodity” category and allocates regulatory responsibilities accordingly. In the Senate, committees have circulated discussion drafts that will ultimately need to be consolidated and reconciled with the House approach; those drafts reflect meaningful progress, but also highlight where definitional choices can create downstream confusion for jurisdiction, disclosures, and secondary-market treatment.

Against that backdrop, we offer comments aimed at helping the Commission avoid frameworks that collapse the distinction between a transaction that may be a securities offering and the underlying asset that trades thereafter. As the Commission evaluates various analytical models to determine its jurisdictional reach, we believe it is critical to adopt a framework grounded in legal rights and obligations.

I. Comments on Legislative Proposals: Moving Beyond "Decentralization"

We strongly endorse the growing consensus in market structure policy debates that rejects "decentralization" as a legal metric. Because "decentralization" is not a binary state, but a subjective and often fluid continuum involving code contribution, node distribution, economic factors, and governance participation and control, relying on it for legal classification introduces intolerable uncertainty, while risking creation of a "false negative" problem where assets that should be subject to security oversight could escape regulation simply by being diffuse in certain ways. There is also a "false positive" problem where market-proven assets are trapped in a securities regime simply because an entity retains an inventory of the asset and/or continues to participate in the technological development of the network along with others.[1]

II. Comments on Regulatory Theories: The Danger of Amorphous Tests

While we support the move away from decentralization as a governing legal standard, concerns remain with regulatory theories that rely solely on an "efforts of others" test (no matter how phrased) as a standalone trigger. This approach effectively reduces the multi-pronged *Howey* analysis to a singular "efforts of others" test, ignoring the requirements for an investment of money, common enterprise, and, crucially, an expectation of profits derived from an enforceable legal promise. The result is not a streamlined test, but a materially diluted one, divorced from the core elements of the *Howey* framework and its roots in traditional Blue Sky laws,[2] under which transactions that lack those essential features may nevertheless be swept wholesale into a securities regime.

Absent a promise,[3] buying an asset in the hope that a distributor's business acumen will drive price appreciation is a voluntary assumption of market and economic risk, not a trigger for securities jurisdiction. Without an enforceable promise and a legal claim on the enterprise, there is no investment contract.[4] A company owes duties to its equity shareholders and may sell assets in furtherance of those obligations. A non-equity purchaser may buy those assets hoping they will appreciate. That alignment of incentives does not create a legal claim. Securities laws regulate enforceable rights, not shared economic interest.

The Commission's jurisdiction should track the lifespan of the obligation; regulating the “promise” while it exists, but liberating the “asset” once that promise is fulfilled or otherwise ends. The dispositive factor is the holder’s legal rights, not their economic hopes. Without that bright line, the definition of a security, and the SEC’s jurisdictional limits, become amorphous and unbounded. This view is consistent with Chairman Atkins’ November 12, 2025, address at the Federal Reserve Bank of Philadelphia.[5]

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[1] *See* Teresa Goody Guillén, Essential Revisions to Strengthen Digital Asset Market Structure Proposals, Prevent Market Failure, and Ensure Securities Law Consistency, (discussing the false negative/postive problem. The author also criticizes the "ancillary asset" concept found in recent legislative proposals, arguing that labeling the asset itself as a security (or "ancillary" thereto) confuses the subject of the transaction with the terms of the offering.)

[2] *See*, Lewis Rinaudo Cohen, Gregory Strong, Freeman Lewin and Sarah Chen, The Ineluctable Modality of Securities Law, (2022).

[3] We use “promise” to mean an enforceable undertaking or obligation, not general statements of optimism or ordinary business efforts.

[4] *See,* Lewis Rinaudo Cohen, Gregory Strong, Freeman Lewin and Sarah Chen, The Ineluctable Modality of Securities Law, (2022); Edward Lee, The Original Public Meaning of Investment Contract, U.C. Davis Law Review, (June 1, 2024).

[5] Paul S. Atkins, Chairman, U.S. Sec. & Exch. Comm'n, Project Crypto: A Roadmap for Economic Reality, Remarks at the Federal Reserve Bank of Philadelphia (Nov. 12, 2025), (asserting that the term "investment contract" describes a legal relationship between parties rather than an "unremovable label attached to an object" and clarifying that such a relationship naturally expires once the issuer's specific promises have been "fulfilled, failed, or terminated").

That crypto trades in active secondary markets does not provide an independent jurisdictional determinant for the SEC. Trading velocity is a function of market structure and maturity, not legal classification. There are many mature markets - gold and silver included - that exhibit high-volume secondary market trading and rapid price discovery for assets, and yet spot trading in those assets are not securities transactions.

Similarly, a device manufacturer may, in good faith, sell hardware and at the same time announce a future software update that will unlock new capabilities in that hardware, driving up the secondary market price of those devices. Speculators buying the hardware today in anticipation of that update have no legal recourse under securities law, nor should they, if the manufacturer later cancels the software release. The speed at which these devices trade on secondary markets (e.g., eBay, specialized electronics brokers, or other exchanges) does not change the legal analysis.[6]

We recognize that determining when a specific promise has been fulfilled, terminated, or expired can present a fact question. But courts resolve fact questions of this kind routinely: whether a contract has been performed, whether a warranty has lapsed, or whether a duty continues. That ordinary inquiry cannot justify a default rule that treats obligations as perpetual and, by extension, treats the underlying asset as permanently subject to securities regulation. A rule that avoids the fact inquiry by converting time-bound promises into an indefinite securities designation collapses the distinction between the investment contract and the asset itself and disregards the basic reality that obligations end.

III. "Passive Economic Interest" and Speculation

Frameworks suggesting that a "passive economic interest" alone could trigger securities laws mistakenly conflate speculation with investment rights.[7]

A holder of a digital asset usually has a "passive" interest in the sense that they hope the value of their asset increases without their direct involvement. However, mere passivity does not convert a non-security into a security. What distinguishes a security is not that the holder has a passive interest, but that the interest represents a legal claim on the enterprise (e.g., rights to dividends, revenue shares, liquidation proceeds, ownership interest, etc.).

Any framework that classifies an asset as a security merely because the holder hopes for a "passive" price increase ignores the reality that speculation is a feature of all markets, security and non-security markets alike.[8]

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[6] *See e.g., Noa v. Key Futures,* 638 F.2d 77, 80 (9th Cir. 1980) (The "federal securities laws do not reach every scheme").
[7] *See supra* note 1 (Suggesting that "Economic Abstraction Factors," including "passive economic interests" could create securities law jurisdiction.)
[8] *See* Corporate Finance Institute, Speculation, (describing speculation broadly across markets).

IV. Determining the "Capital Raising" Boundary

“Capital raising” is sometimes invoked as shorthand to justify application of securities laws to crypto transactions,[9] but the term must have a precise legal boundary. Privity, meaning a direct relationship at the time of the transaction between a seller and buyer involving a primary distribution, provides a clear, legally grounded bright line.

We understand the policy motivation to ensure appropriate disclosures in traditional capital-raising contexts. However, the better approach is to regulate the obligations and promises that arise from privity - those that create enforceable rights - rather than to deem the asset as permanently retaining securities status simply because it may have once been part of a traditional capital raising event.

In a primary distribution, such as an initial coin offering, privity creates a direct nexus of accountability. The buyer's capital flows directly to the issuer in exchange for promises, usually regarding network development, establishing a traditional counterparty relationship that securities laws are designed to protect.

However, in blind bid/ask transactions in mature crypto marketplaces - like exchanges - the issuer’s participation is merely as another market actor. Privity is usually absent; the buyer and seller are unknown to one another, and the seller's identity is irrelevant to the decision to purchase the asset. The buyer has no direct contract, or even contact, with the issuer. The issuer is simply a seller of inventory into an active marketplace of many buyers and sellers, economically analogous to an oil company selling barrels. Purchasers in this secondary market rely on liquidity, demand, market sentiment, price arbitrage, and/or existing utility, not on new promises. The issuer's original commitments to initial investors do not survive new sales to these downstream buyers.[10]

While privity is required for unregistered security claims,[11] downstream purchasers of traditional securities also may maintain some enforceable rights against the issuer. That is because certain rights are embedded in the equity instrument and those rights persist regardless of who holds the instrument.[12] By contrast, in crypto markets the token usually does not, by itself, embed an ongoing claim on the issuer.

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[9] *See supra* note 1 (“A central premise of this proposal is that capital raising marks the critical trigger for securities market regulation”).

[10] This is not to suggest that sales by an issuer on a peer-to-peer pseudonymous platform should fall outside the securities laws. Privity and solicitation may still be said to exist where an issuer conducts a traditional capital raise, like an initial coin offering, on a peer-to-peer pseudonymous platform where there is no robust marketplace and the issuer is effectively the only source of liquidity, or where an issuer otherwise seeds, funds or controls liquidity pools. Importantly, however, once a liquidity pool becomes independently liquid, meaning pricing and trading terms are determined at arms length between market participants, privity can be said to be broken.

[11] *See Pinter v. Dahl*, 486 U.S. 622, 644 n. 21 (1988) (discussing privity in the context of unregistered statutory-seller claims under Section 12(a)(1)).

[12] For example, section 11(a) of the Securities Act provides that *“any person acquiring such security”* may bring a claim based on a defective registration statement. *See* 15 U.S.C. § 77k(a) (emphasis added).

Viewing every issuer sale as a perpetual capital raise produces perverse outcomes. For example:

- <u>The "Zombie Promise":</u> The issuer becomes permanently tethered to representations made years earlier to a different class of purchasers, creating a legal fiction of reliance. Secondary-market participants, who never saw the original materials, never engaged the issuer, and never provided capital in exchange for a promise, are treated as if they relied on promises. Original purchasers may still have whatever rights they acquired at the time of sale, and if enforced, others may incidentally benefit, but that is true of many common-law remedies. Incidental benefit does not create standing or a new securities relationship.
- <u>Operational Paralysis:</u> The issuer is effectively frozen out of ordinary commercial activity. Basic business functions, paying vendors, issuing grants, compensating contributors, or managing treasury, are recast as continuous capital formation simply because the issuer holds and monetizes inventory.

Lastly, generalized concerns about information asymmetry also does not supply a substitute securities law jurisdictional hook. Information asymmetries exist in every transaction and, standing alone, does not create a legal duty to disclose anything.[13]

V. Addressing Evasion and Defining Control

Any approach to crypto market regulation should account for the potential for evasion through masked control. The coded rules of a network or token function are analogous to embedded promises, defining the rights of all participants. When an issuer, developer, or affiliated group retains the unilateral ability - “control”- to alter those rules, such as by changing code, reversing ledger history, modifying validation parameters, or reprogramming the token itself, it can be said that they may be maintaining an ongoing obligation with every user of that network or holder of that asset. Thus, in those cases, the Commission could consider exercising, and, where needed, tailoring,[14] its jurisdiction. This is consistent with a rights-based framework and with the Commission’s traditional approach to securities law.[15]

However, control must be objectively defined. Not all influence constitutes control. Shared interest in the asset’s value is not control. Participation in open network governance is not control. Merely holding or monetizing an asset as inventory is not control.

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[13] *See e.g., Chiarella v. United States*, 445 U.S. 222, 235 (1980) (“A duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information.”); *Dirks v. SEC*, 463 U.S. 646, 658 (1983) (“[A] duty to disclose arises from the relationship between parties [] and not merely from one's ability to acquire information because of his position in the market.”)
[14] As discussed in Section VI below, a disclosure framework for those that retain control may be tailored to focus on the levers of control.
[15] The SEC defines control as the “means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise power to direct or cause the direction of the management and policies.” 17 C.F.R. § 230.405.

Finally, concerns about the use of pseudonymous or privacy-enhancing tools to evade regulatory oversight and concerns about price or market manipulation can be addressed under existing anti-fraud and market-manipulation laws.[16] These laws already prohibit deceptive, manipulative, or fraudulent conduct regardless of the form or classification of the underlying asset.

VI. Endorsement of Fit-For Purpose Disclosures

For primary offerings that may be subject to securities regulation, or other cases where disclosures are legally warranted (like the unilateral exercise of control), we commend the rising call for fit-for purpose disclosure regimes, rather than imposing the incongruent burden of full corporate registration designed for traditional equity.[17]

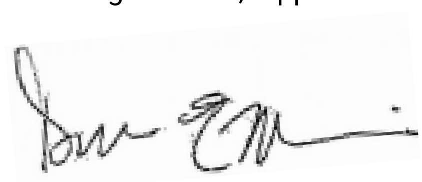
Conclusion

We appreciate the Commission's thoughtful work on these complex issues, and look forward to further engagement. Please contact Stuart Alderoty, Sameer Dhond or Deborah McCrimmon if you wish to further discuss the points raised in this letter or have any questions.

Respectfully submitted,

Stuart Alderoty
Chief Legal Officer, Ripple

Sameer Dhond
General Counsel, Ripple



Deborah McCrimmon
Deputy General Counsel, Ripple

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[16] The "CFTC may exercise its enforcement power over fraud related to virtual currencies sold in interstate commerce." , CFTC announces enforcement action for engaging in a manipulative and deceptive digital asset "pump-and-dump" scheme. See also, 18 U.S.C. §1343 (The federal wire fraud statute makes it a crime to effect (with use of the wires) "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."); Restatement (2d) of Torts, Sec. 525 ("One who fraudulently makes a misrepresentation of fact… for the purpose of inducing another to act or to refrain from action… is subject to liability for pecuniary loss caused.").

[17] Paul S. Atkins, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at the America First Policy Institute: American Leadership in the Digital Finance Revolution (July 31, 2025)