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## SEC Releases Cryptocurrency and Digital Asset Guidance

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Today, the SEC published guidance with respect to cryptocurrencies, digital tokens, and similar investments (each a “digital asset”) that is designed to help issuers and others determine whether the applicable digital asset is a “security” as defined by federal securities laws. This long-awaited, critically important guidance confirms the SEC’s stance—hinted at in public statements since late 2017—that digital assets are, in many (if not most) cases, securities.

The SEC’s guidance focuses on the elements of the so-called Howey Test, which is derived from a U.S. Supreme Court case (*SEC v. Howey*) and is used by courts to evaluate whether a transaction or financial instrument represents an “investment contract” that qualifies as a security. [1] While the Howey Test has three elements, the guidance focuses on what has generally been viewed as the key question for digital asset analysis: whether investors in a digital asset have a “reasonable expectation of profits derived from the efforts of others.” As articulated in the guidance, the SEC has taken the position that this element is satisfied in a variety of instances, including when the issuer of the digital asset or some other group has: (i) taken responsibility for developing, improving, operating or promoting the network for the digital asset; or (ii) supported a market for, or price of, the digital asset.

We believe that, under the SEC’s guidance, many (if not most) digital assets issued over the past few years should be considered securities. As such, the issuers should have registered their offerings or ensured that their offerings qualified for an exemption from registration. Issuers that did not take those steps may be subject to SEC enforcement actions and claims brought by investors. We also note that state securities administrators may be bolstered by the SEC’s guidance and, as a result, be encouraged to take their own actions against digital asset issuers under state securities laws that generally parallel federal registration and exemption statutes and regulations.

We encourage you to [read the SEC’s guidance](#) and contact us with any questions you may have.



[\[1\]](#) SEC v. W.J. Howey Co., 328 U.S. 293 (1946).