

May 30, 2025

SEC Staff Issues Staking Guidance

Guidance Clarifies That Certain “Protocol Staking Activities” on Proof-of-Stake Networks Do Not Involve the Offer or Sale of Securities

SUMMARY

On May 29, 2025, the SEC’s Division of Corporation Finance issued a statement¹ providing its view that certain staking activities on blockchain networks that use a proof-of-stake consensus mechanism (as described below, “protocol staking activities”) do not involve the offer or sale of securities under Section 2(a)(1) of the Securities Act of 1933 or Section 3(a)(1) of the Securities Exchange Act of 1934.²

The statement addresses three protocol staking arrangements—self-staking, self-custodial third-party staking, and custodial staking—and concludes that protocol staking activities undertaken in connection with those arrangements are not securities. Accordingly, in the Division’s view, participants in protocol staking activities are not required to register these activities with the SEC or rely on a registration exemption.³

COVERED PROTOCOL STAKING ARRANGEMENTS

The Division’s statement applies to three types of “protocol staking” arrangements:

- 1. Self (or Solo) Staking:** A staking arrangement in which the owner of a “covered crypto asset”⁴ acts as a node operator by running its own node and staking its own covered crypto assets. A solo-staker maintains ownership and control of its covered crypto assets and private keys, which are used to access and transfer its assets. The node operator may be an organization or one or more individuals jointly operating a node and staking its own assets. A solo staker earns all rewards associated with its network validation activity.
- 2. Self-Custodial Staking with a Third Party:** A staking arrangement in which the owner of a covered crypto asset does not operate its own node, but delegates the validation rights associated with its assets to a third-party node operator. The asset owner retains ownership and control of its covered crypto assets and private keys. In this arrangement, the asset owner receives the rewards based on its delegated validation activity, although the third-party node operator may charge a fee that is subtracted from the total rewards provided to the asset owner. Rewards may be distributed directly from the proof-of-stake (“PoS”) network⁵ to the asset owner or indirectly through the third-party node operator.

3. **Custodial Arrangements:** A staking arrangement in which a third-party custodian takes custody of an owner's covered crypto assets and facilitates staking on the owner's behalf. Although the custodian holds the assets, the owner retains ownership of the staked assets. The custodian may stake the assets using its own node or through a third-party node operator that it selects. As with self-custodial third-party staking arrangements, rewards earned through custodial staking are provided to the asset owners, although the custodian (and/or, if applicable, the third-party node operator) may charge a fee that is subtracted from the total rewards provided to the asset owner.⁶

DIVISION'S VIEW ON PROTOCOL STAKING ACTIVITIES

With respect to the three types of covered "protocol staking" arrangements described above, the statement provides that the following activities do not involve the offer or sale of securities within the meaning of Section 2(a)(1) of the Securities Act or Section 3(a)(1) of the Exchange Act:

- Staking covered crypto assets on a PoS network;
- Activities undertaken by third parties involved in the protocol staking process relating to covered crypto assets, such as third-party node operators, validators, custodians, delegates and nominators ("Service Providers"), including their roles in connection with the earning and distribution of rewards; and
- Providing "ancillary services,"⁷ including: (i) slashing coverage;⁸ (ii) early unbonding;⁹ (iii) alternate rewards payment schedules and amounts;¹⁰ and (iv) aggregation of covered crypto assets.¹¹

As a result, the statement provides that participants in protocol staking activities do not need to register transactions with the SEC under the Securities Act, or fall within one of the Securities Act's exemptions from registration in connection with these protocol staking activities.

The statement provides the Division's securities law analysis and concludes that the protocol staking activities do not constitute "investment contracts" (and, therefore, are not securities) under the *Howey* test. In *Howey*, the Supreme Court held that an instrument or arrangement constitutes an "investment contract" where there is (i) an investment of money, (ii) in a common enterprise, (iii) with an expectation of profits derived from the entrepreneurial or managerial efforts of others. All prongs of the *Howey* Test must be satisfied for an instrument to be an investment contract.¹²

The statement emphasizes that protocol staking activities fail the third prong of the *Howey* test because they do not involve the type of significant or essential managerial efforts made by parties other than the purported investor that affect the success or failure of the enterprise.¹³ Rather, the Division views the efforts of, as relevant, node operators and custodians in conducting activities related to the protocol staking process, including ancillary services, as merely "administrative or ministerial in nature," which do not satisfy the last *Howey* prong.¹⁴ This position is consistent with the Division's recent statement clarifying that conceptually similar activities to secure and validate "proof-of-work" blockchain networks (*i.e.*, "mining") also fail to satisfy the *Howey* test on the same basis.¹⁵ The Division also states that staking rewards are not "profits" within the meaning of the *Howey* test. Rather, rewards are payments made by the applicable protocol "to the node operator in exchange for the services it provides to the network." As explained by Commissioner Peirce, Chair of the SEC's Crypto Task Force, in an accompanying statement, the two

statements from the Division collectively express the Division's view that "providing security [to a network] is not a 'security.'"¹⁶

IMPLICATIONS

The Division's statement offers clarity with respect to the Division's view of certain types of common staking activities and is consistent with other recent digital asset-friendly actions taken by the SEC and other regulators.¹⁷ Those engaged in protocol staking activities, as well as others involved in the digital asset ecosystem, will welcome the greater legal certainty offered by the statement. The statement may also facilitate greater participation in staking services, as well as innovation throughout the digital asset markets.

However, the statement also imposes several limitations. In particular, firms and other market participants should consider the following matters:

- **Fact-Specific Analysis:** The Division emphasized that determinations regarding staking activities are fact- and circumstance-dependent. Staking arrangements that differ from those described in the statement may be subject to different legal conclusions regarding security status.¹⁸
- **Covered Networks:** The statement applies solely to staking activities on *public* and *permissionless* PoS Networks. It does not address staking arrangements or related activities on private and/or permissioned networks.
- **Crypto Asset Characteristics:** The statement does not apply to crypto assets that convey *intrinsic economic rights*, such as rights to share in profits, dividends, or distributions from a business enterprise, or assets that generate passive yield (e.g., yield-bearing stablecoins). Instead, as noted, the statement is limited to "the staking of crypto assets that are intrinsically linked to the programmatic functioning of a public, permissionless network, and are used to participate in and/or earned for participating in such network's consensus mechanism or otherwise used to maintain and/or earned for maintaining the technological operation and security of such network."¹⁹ By its terms, the statement would apply to native tokens of PoS Networks (e.g., Ethereum's ETH), but seemingly would not apply to governance tokens associated with decentralized finance applications or liquid staking tokens.
- **Other Staking Arrangements:** The statement is limited to the identified Protocol Staking models, and does not necessarily extend to other staking arrangements such as liquid staking, restaking, or liquid restaking.²⁰ However, the Division noted that certain activities providing enhanced liquidity, such as "where a Service Provider allows covered crypto assets to be returned to an owner before the end of the protocol's unbonding period," do not alter the conclusion that the at-issue protocol staking models are not a security.²¹ This consideration will be relevant as firms assess whether forms of liquid staking could be deemed to be securities.
- **Reward Guarantees:** The statement assumes that third-party node operators and custodians will not "guarantee or otherwise set or fix the amount of the rewards owed to covered crypto asset owners." Although third-party node operators and custodians may subtract fees from earned rewards and may reimburse or indemnify a staking customer against losses resulting from slashing, deviation from the arrangements set forth in the statement (e.g., providing greater reward amounts) could result in the Division reaching a different legal conclusion regarding a particular staking arrangement.²²
- **Custodian Discretion:** The statement recognizes that a custodian may elect to stake customer crypto assets using a third-party node operator without creating an investment contract. If a custodian exercises discretion over other aspects of the staking process, including whether, when, or how much of a customer's crypto assets to stake (or with respect to any other decisions regarding the staking of an owner's crypto assets beyond the selection of a third-party node operator), the activity would fall

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outside the scope of the statement. In such cases, the Division could view the custodian's role as more than "ministerial or administrative in nature," depending on the facts and circumstances.²³

- **Custodians' Use of Staked Assets:** The statement applies only to custodial protocol staking arrangements where the custodian uses an asset owner's assets solely for Protocol Staking Activities. The Division expressly carved out from its analysis situations where an owner's assets are "used by the custodian for operational or general business purposes[,] ... lent, pledged, or rehypothecated for any reason."²⁴

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ENDNOTES

- 1 SEC Division of Corporation Finance, *Statement on Certain Protocol Staking Activities* (May 29, 2025) (the “statement”), <https://www.sec.gov/newsroom/speeches-statements/statement-certain-protocol-staking-activities-052925>.
- 2 See also Comm’n Hester Perce, *Response to Staff Statement on Protocol Staking Activities: Providing Security is not a “Security”* (May 29, 2025), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-protocol-staking-052925>; Comm’n Caroline Crenshaw, *Response to Staff Statement on Protocol Staking Activities: Stake it ‘Till You Make It?* (May 29, 2025), <https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-protocol-staking-052925>.
- 3 The Division’s view “is not dispositive as to whether any specific [p]rotocol [s]taking [a]ctivity ... involves the offer and sale of a security,” as any such determination requires a facts-and-circumstances analysis of the specific protocol staking activity. See Statement *supra* note 1.
- 4 The statement defines a “covered crypto asset” as a crypto asset that is (i) intrinsically linked to the programmatic functioning of a public, permissionless network and (ii) used to participate in and/or earned for participating in the network’s consensus mechanism or otherwise used to maintain and/or earned for maintaining the technological operation and security of such network.
- 5 A “PoS network” is a blockchain network that employs a proof-of-stake (“PoS”) consensus mechanism, allowing network users to participate in the network’s operation, including validating new transactions.
- 6 The statement applies only to custodial arrangements where: (1) the custodian does not use the assets for operational or general business purposes; (2) the assets are not lent, pledged or rehypothecated; (3) the assets are held in a manner designed to prevent third-party claims; and (4) the custodian does not engage in leverage, trading, speculation, or discretionary activities with the assets.
- 7 The statement provides that “[w]hether offered separately or as a group of services, the Service Provider does not act in a managerial or entrepreneurial way if it provides any or all of these services.”
- 8 Slashing coverage refers to circumstances where the Service Provider reimburses or indemnifies a staking customer against loss resulting from slashing. A node operator or validator may have its staked covered crypto assets forfeited or “slashed” if it engages in certain detrimental activities or fails to adhere to the PoS Network’s technical requirements. The Division notes that protection against errors “is similar to [protections] offered by service providers in many types of traditional commercial transactions.”
- 9 Early unbonding refers to circumstances where a Service Provider allows covered crypto assets to be returned to an owner before the end of the protocol’s unbonding period. According to the Division, “[t]his service merely shortens the protocol’s effective unbonding period as a convenience to the covered crypto asset owner by reducing the burden of the unbonding period.” The “unbonding period” is a length of time set by the protocol to “unstake” a covered crypto asset. Each protocol has its own bonding and unbonding periods, which can be hours, days, or weeks.
- 10 Alternate rewards payment schedules and Amounts refers to circumstances where the Service Provider delivers earned rewards at a cadence and in an amount that differs from the protocol’s set schedule and/or where the rewards are paid earlier or less frequently than the protocol awards. However, reward amounts cannot be fixed, guaranteed, or greater than those awarded by the protocol. The Division notes that, similar to early unbonding, this is merely an optional convenience afforded to covered crypto asset owners in connection with the administration of rewards allocation and delivery.

ENDNOTES (CONTINUED)

- ¹¹ Aggregation of covered crypto assets refers to circumstances where the Service Provider offers, as a service, the ability for covered crypto asset owners to aggregate their covered crypto assets to meet the protocol's staking minimums. The Division notes that (i) this service is part of the validation process, which itself is administrative or ministerial in nature and (ii) without more, aggregating the covered crypto assets of owners to help enable staking is similarly administrative or ministerial in nature.
- ¹² *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).
- The Division does not view protocol staking generally, or the protocol staking activities, specifically, as involving notes or other evidences of indebtedness triggering the *Reves* test for security notes. See *Reves v. Ernst & Young*, 494 U.S. 56 (1990).
- ¹³ See, e.g., *SEC v. Glenn W. Turner Enters, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973).
- ¹⁴ See, e.g., *First Fin. Fed. Sav. & Loan v. E.F. Hutton Mortgage*, 834 F.2d 685 (8th Cir. 1987) (activities performed were merely administrative and ministerial in nature and therefore did not constitute the managerial or entrepreneurial efforts of others); *Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc.*, 651 F.2d 1174 (6th Cir. 1981) (administrative tasks and services are not managerial or entrepreneurial under *Howey*). See also *Donovan v. GMO-Z.com Trust*, 2025 U.S. Dist. LEXIS 27871 (S.D.N.Y. 2025) ("Ministerial, technical, and clerical tasks often are 'necessary' for an investment scheme to operate and thereby generate a profit, but courts have long found such efforts to be insufficient under *Howey's* third prong.").
- ¹⁵ See SEC Division of Corporation Finance, *Statement on Certain Proof-of-Work Mining Activities* (Mar. 20, 2025), <https://www.sec.gov/newsroom/speeches-statements/statement-certain-proof-work-mining-activities-032025>.
- ¹⁶ Comm'r Hester Peirce, *Providing Security is not a "Security" – Division of Corporation Finance's Statement on Protocol Staking* (May 29, 2025), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-protocol-staking-052925>.
- ¹⁷ For more information about these prior actions, refer to our prior Client Memoranda. See, e.g., S&C Memo, *FDIC Simplifies process for Banks to Engage in Crypto-Related Activities* (Apr. 2, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/FDIC-Simplifies-Process-Banks-Engage-Crypto-Activities.pdf>; S&C Memo, *OCC Clarifies Permissible Crypto-Asset Activities* (Mar. 9, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/OCC-Clarifies-Permissible-Crypto-Asset-Activities.pdf>; S&C Memo, *SEC Staff Issues Stablecoin Guidance* (Apr. 14, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/SEC-Staff-Issues-Stablecoin-Guidance.pdf>; S&C Memo, *CFTC Staff Seeks Public Comment on 24/7 Trading and Perpetual Derivatives* (Apr. 21, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/CFTC-Staff-Seeks-Public-Comment-24-7-Trading-Perpetual-Derivatives.pdf>; S&C Memo, *Federal Reserve Board and FDIC Withdraw Crypto-Asset Activities Guidance* (Apr. 25, 2025), available at <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/Federal-Reserve-Board-FDIC-Withdraw-Crypto-Asset-Activities-Guidance.pdf>; S&C Memo, *OCC Clarifies Bank Authority to Engage in Crypto Custody and Execution Services* (May 9, 2025), <https://www.sullcrom.com/SullivanCromwell/Assets/PDFs/Memos/OCC-Clarifies-Bank-Authority-Engage-Crypto-Custody-Execution-Services.pdf>.
- ¹⁸ Statement, *supra* note 1, at n.10 ("The Division's view is not dispositive as to whether any specific [p]rotocol [s]taking [a]ctivity ... involves the offer and sale of a security. A definitive determination requires analyzing the facts relating to the specific Protocol Staking Activity. Where facts vary

ENDNOTES (CONTINUED)

- from those presented in this statement, the Division's view as to whether the specific [p]rotocol [s]taking [a]ctivity involves the offer and sale of a security may be different.”).
- 19 *Id.* at n.3 (“This statement only addresses certain activities involving covered crypto assets that do not have intrinsic economic properties or rights, such as generating a passive yield or conveying rights to future income, profits, or assets of a business enterprise.”).
- 20 *Id.* at n.4 (“This statement addresses [p]rotocol [s]taking generally rather than all of its variations. Further, this statement does not address all forms of ‘staking,’ such as so-called ‘liquid staking,’ ‘restaking’ or ‘liquid restaking.’ The specific staking activities covered by this statement are discussed below in ‘Protocol Staking Activities Covered by this Statement.’”).
- 21 *Id.*
- 22 See Statement, *supra* note 1.
- 23 See Comm’n Caroline Crenshaw, *Response to Staff Statement on Protocol Staking Activities: Stake it ‘Till You Make It?* (May 29, 2025), <https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-protocol-staking-052925> (“The caveats are as usual found in the footnotes, where staff excludes staking services that decide “whether, when, and how much of” a customer’s crypto assets to stake as outside the scope of the statement and, therefore, possible investment contracts. But staff does not explain what it means in practice for a staking service to make such decisions. Does this implicate technical infrastructure and staking strategies, such as those addressed in the prior court staking decisions? What about staking services that automatically re-stake earned rewards on behalf of customers?”).
- 24 Statement, *supra* note 1.

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