

Lowenstein Crypto

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SEC Staff Clarifies That Certain Staking Activities Are Not SecuritiesBy [Ethan L. Silver](#), [William Brannan](#), [Macauley Venora](#), [Leo B. Choi](#), and [Aiden D. O'Leary](#)**What You Need To Know:**

- The United States Securities and Exchange Commission's (SEC) Division of Corporation Finance (the Division) has released a statement (the Statement) on the application of the federal securities laws to "staking activities"—specifically, activities that involve staking crypto assets (Crypto Assets) on a blockchain network with a 'Proof-of-Stake' consensus mechanisms (a PoS Network) (Protocol Staking).
- The Division takes the position that certain Protocol Staking Activities, such as (i) self-staking, (ii) self-custodial staking with a third-party node operator, and (iii) custodial staking through a qualified third-party on behalf of the owners of Crypto Assets (collectively, Protocol Staking Activities), do not involve an "offer or sale of securities" and thus do not trigger registration requirements.
- The Division explains that Protocol Staking Activities do not meet the "efforts of others" requirement under the Howey Test.

Protocol Staking Under the Federal Securities Laws

Historically, the SEC has taken issue with certain staking activities under the federal securities laws. The SEC previously alleged that staking-as-a-service programs were investment contracts under the test set forth in *SEC v. W.J. Howey Co.* (the Howey Test), and that certain rewards from staking activities were securities.

The Statement now puts certain Protocol Staking Activities under a microscope, and provides clarity as to whether or not these Protocol Staking Activities can be deemed 'investment contracts' under the Howey Test. The Statement focuses on the fourth prong of the Howey Test—whether profits are derived from the efforts of others—in considering the status of Protocol Staking Activities. In the Division's opinion, Protocol Staking itself is an administrative or ministerial act that does not involve any managerial or entrepreneurial efforts to generate a profit. Under this analysis, Protocol Staking Activities would not satisfy the fourth prong of the Howey Test.

The Statement offers clear guidance that certain Protocol Staking Activities do not involve the offer or sale of securities—a welcome development for staking service providers and those seeking to participate in Protocol Staking Activities.

This analysis extends to the following Protocol Staking Activities:

- Self (or Solo) Staking: where a node operator stakes Crypto Assets it owns and controls using its own resources
- Self-Custodial Staking Directly with a Third Party: where a node operator is granted validation rights of owners of Crypto Assets
- Custodial Arrangements: where a custodian stakes Crypto Assets on behalf of the owners of the Crypto Assets that the custodian holds on their behalf.

In each of the cases above, the Division focuses on the fact that it views Protocol Staking (regardless of the method one takes to engage in Protocol Staking Activities) as an administrative or ministerial act, and not an “essential managerial effort[] which affect[s] the failure or success of the enterprise[,]” which has long been the standard for meeting the “efforts of others” prong of the Howey Test.

Limitations on Custodial Arrangements

Where the owner of the Crypto Assets gives up custody to a third-party custodian, the Division’s Statement is limited to instances where the custodian is merely acting as agent on behalf of the owner, and does not extend to situations where the custodian is able to select whether, when, or how much of an owner’s Crypto Assets to stake. Deposited Crypto Assets must not be (i) used by the Custodian for operational or general business purposes; (ii) lent, pledged, or rehypothecated for any reason; or (iii) held in a manner designed not to subject them to claims by third parties.

However, the Statement is not clear on what level of discretion a custodian would need to exercise in order for their efforts to be deemed “essential managerial efforts.”

Ancillary Services

In addition to Protocol Staking Activities, the Division takes the view that certain ancillary services do not involve the offer and sale of securities. Specifically, the Division considers the following ancillary services to be administrative or ministerial in nature:

- Slashing coverage (reimbursement or indemnification against losses)
- Early unbonding (liquidity before the end of the unbonding period)
- Custom reward schedules (delivering rewards at a cadence or in an amount that differs from a protocol’s set schedule)
- Aggregation (pooling assets to meet a protocol’s staking minimums)

Practical Implications – What’s Next and What’s Missing

The Statement does not provide a complete pass to all staking activities. For example, the Statement expressly excludes liquidity staking, restaking, or liquid restaking activities, and limits custodial staking arrangements to those that are agency based.

In addition, the Statement does not clarify (i) whether or not certain rewards structures, which offer rewards beyond what would typically be provided under a protocol’s rules, would be considered something more than merely an administrative or ministerial act; or (ii) clarity on the extent of discretion that a custodial arrangement would need to involve in order to rise to the level of a managerial or entrepreneurial effort. Nonetheless, the Statement provides long-awaited guidance for market participants who are currently, or plan to be, engaged in Protocol Staking Activities, and should alleviate some of the industry’s concerns after Staking Activities had been a prime target of the previous SEC administration.

Encouragingly, Commissioner Hester Peirce also noted that she expects “the Division and Crypto Task Force will continue to develop views about security status for other activities, products, and services involving participation in network consensus.”

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