

The Distributed Ledger

Blockchain, Digital Assets and Smart Contracts

August 18, 2025

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Alexander C. Drylewski

Partner / New York
212.735.2129
alexander.drylewski@skadden.com

Stuart D. Levi

Partner / New York
212.735.2750
stuart.levi@skadden.com

Daniel Michael

Partner / New York
212.735.2200
daniel.michael@skadden.com

Daniel Merzel

Counsel / New York
212.735.2435
daniel.merzel@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

Howey's Still Here: A Recent Reminder on the Limits of the SEC's Crypto Thaw

Executive Summary

- **What is new:** The Ninth Circuit's recent decision in *SEC v. Barry* underscores that, despite a regulatory thaw, the *Howey* test remains the law for determining whether particular digital assets and tokenization projects are subject to the securities laws.
- **Why it matters:** Sponsors of projects seeking to tokenize real-world assets or fractionalize interests must still assess whether ongoing efforts by managers could trigger securities classification.
- **What to do next:** It will be important when structuring tokenization projects to carefully evaluate whether the manager's ongoing efforts and expertise steer the project toward profitability in a way that may trigger the *Howey* test.

The U.S. regulatory environment for digital assets has never been more promising for the industry. Since the change in administration, the Securities and Exchange Commission (SEC) has committed to stemming what it has characterized as the hostility of recent years, and the agency's new leadership has remarked that "despite what the SEC has said in the past, most crypto assets are not securities."

As a result, tokenization projects — where digital assets reflect so-called real-world assets — are surging. Many innovators are experimenting with tokenizing assets ranging from investment funds to precious metals, and some are already offering investors access to tokenized securities.

But while the SEC can do much to foster this kind of innovation, it is also constrained by the securities laws and how courts interpret them. In that regard, a recent decision by the U.S. Court of Appeals for the Ninth Circuit in *SEC v. Barry* serves as a reminder that the *Howey* test has by no means gone away.

Ninety years ago, in the Securities Act of 1933, Congress defined the word "security" to include an "investment contract," and the Supreme Court clarified what that meant with its decision in *SEC v. W.J. Howey Co.*: (1) an investment of money (2) in a common enterprise (3) with an expectation of profits based on the efforts of others.

The court-created *Howey* test is still the law. And unless or until it changes — which may well happen if Congress advances the CLARITY Act or similar legislation — sales of digital assets that satisfy the *Howey* test may continue to be regarded as securities transactions.

Howey's Still Here: A Recent Reminder on the Limits of the SEC's Crypto Thaw

Tokenization projects therefore carry some risk of being deemed securities offerings, notwithstanding the recent regulatory thaw. As SEC Commissioner Hester Peirce noted in July 2025, "tokenized securities are still securities," and the agency's broader efforts confirm that it has not turned its back on *Howey* but rather shown more flexibility when a product offering is on the borderline of being deemed an investment contract.

Case in point, the SEC under Chairman Paul Atkins has dismissed many pending cases (including appeals) that were not in line with current thinking, but the agency did not seek to do so in *Barry*.

SEC v. Barry

The Ninth Circuit's August 11, 2025, decision in Barry underscores the risk that tokenization projects may be deemed securities offerings, even though the case did not concern tokenization. The *Barry* case involved sales of fractional interests in life settlements, meaning fractional interests in payouts from other individuals' life insurance policies.

Brenda Barry and other defendants worked as sales agents for Pacific West Capital Group, a firm that was in the business of buying life insurance policies from elderly policyholders and selling fractional interests in the policies to investors. The investors' investments were meant to cover all the premiums on the life insurance policies for as long as the insured individuals lived, and the investors' profits depended on how soon the insureds passed away.

Pacific did the work of reviewing the insureds' medical information, selecting which policies to offer to investors, fractionalizing the interests, handling payment of all the premiums and maintaining reserves to avoid any shortfall. Problems ensued, including that the insureds lived longer than Pacific had anticipated, the reserves ran out and investors lost their money.

The SEC sued Pacific and the sales agents, contending, among other things, that the fractional interests were investment contracts and thus unregistered securities. That set up a dispute under the *Howey* test.

There was no debate that investors had invested money in a common enterprise, but the defendants argued that the investors' expectations of profits were not based on Pacific's pre-investment review and selection of policies, nor on Pacific's money-management functions (which they characterized as merely administrative), but rather on the unknowable external factor of when the insureds would die.

The Ninth Circuit sided with the SEC, reasoning that three aspects of the transactions showed that the investors' expectations of profits were based on Pacific's efforts, satisfying the *Howey* test.

First, the court looked to Pacific's review and selection process, the purpose of which was to identify good candidates for investment.

Second, the court found that Pacific's money-management functions were not merely administrative but rather essential ongoing efforts to ensure that all the premiums would be paid on time and without shortfall.

And third, significantly, the court observed that the fractionalized nature of the interests meant that the investors did not control individual policies and were entirely dependent on Pacific to exercise control.

Takeaways

As the regulatory thaw opens up new possibilities for tokenization projects, this case serves as a good reminder of the guardrails that remain. Projects that seek to tokenize real-world assets or fractionalize interests must still assess whether the manager's ongoing efforts and expertise steer the project toward profitability in a way that may trigger the *Howey* test.

While *Howey* remains the law, the SEC may begin to find ways to work with projects that offer products that risk being regarded as investment contracts. Indeed, the SEC has shown that it is moving in that direction.

The agency currently is reviewing draft registration statements for a number of tokenization projects, and SEC Commissioner Peirce recently stated that the agency is "willing to work with people who are taking different approaches" and that market forces should decide which forms of tokenizing securities and other real-world assets will win out.

In addition to companies going the registration route, other companies are privately offering tokenized securities and other assets pursuant to legal exemptions from registration.

The SEC's Ninth Circuit win shows the continued relevance of the *Howey* test (and the SEC's continued adherence to it), but Project Crypto and other SEC initiatives suggest that it will no longer be "a scarlet letter," as Chairman Atkins has said, for digital asset transactions to be deemed investment contracts.