

Practical Implications of the SEC Staff's New Staking Guidance

Executive Summary

On May 29, 2025, the SEC's Division of Corporation Finance (the "**Staff**") issued a Staff Statement entitled "Certain Protocol Staking Activities" (the "**Statement**") opining that routine, protocol-level staking of native tokens on public proof-of-stake ("**PoS**") blockchain networks, as well as many types of staking services, do not constitute an "offer or sale of securities" subject to SEC enforcement oversight.

This common-sense clarification should provide significant comfort to businesses that wish to provide a variety of staking services, including node operators and custodial platforms. At the same time, the Statement takes care to exclude similar-sounding yield-generation schemes from the categories of activities that the new guidance deems to be outside the purview of SEC regulations. It bears noting that the Statement only reflects the SEC Staff's current interpretation of the law, does not represent a formal position taken by SEC, and does not change any current law.

Although not binding, the Statement represents a significant shift from the prior administration's enforcement approach, which included settled SEC charges against Payward Ventures Inc. and Payward Trading Ltd. (together, d/b/a Kraken)¹ and enforcement actions against Coinbase Global Inc.² and Binance Holding Limited³ alleging that custodial staking services were investment contract arrangements that involved the illegal sale of unregistered securities, as well as an enforcement action against Consensus Software Inc.⁴ alleging that non-custodial Ethereum (ETH) staking similarly involved illegal sales of unregistered investment contract securities. All three of the non-settled actions have been dropped since the new administration took office.

Several key insights emerge from the Statement:

First, protocol staking does not constitute securities offerings when properly structured within the Staff's framework, allowing U.S. staking service providers to support PoS security without the risk of being required to register their services as a securities offering with the SEC.

¹ SEC Press Release, Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay \$30 Million to Settle SEC Charges (Feb. 9, 2023), at <https://www.sec.gov/news/press-release/2023-25>.

² *SEC v. Coinbase Global, Inc.*, No. 23 Civ. 04738 (S.D.N.Y. filed June 6, 2023).

³ *SEC v. Binance Holdings Ltd.*, No. 23 Civ. 1599 (D.D.C. filed June 5, 2023).

⁴ *SEC v. Consensus Software Inc.*, No. 24 Civ. 04578 (E.D.N.Y. filed June 28, 2024).

Second, the critical distinction is between administrative/ministerial activities versus entrepreneurial/managerial activities—to benefit from the Staff’s position, staking service providers must avoid discretionary decision-making and guarantees of staking rewards.

Third, the Statement addresses three specific staking models with defined requirements, providing a clear roadmap for industry participants to structure their product offerings in compliance with securities law.

This memorandum analyzes the Statement’s consideration of three specific staking models (solo/self-staking, delegated staking, and custodial staking), examines what types of staking arrangements fall outside the Statement’s scope, and discusses the practical implications for protocol developers, validators, and exchanges. The memorandum also reviews the significant U.S. tax uncertainties that remain unaddressed.

Covered Staking Models

The Staff clarified their view that there is no offer or sale of securities when all conditions below are met:

	Who Performs Validation	Who Owns the Tokens	Role of Third Party	Staking Reward Source
Solo / Self-Staking	Token holder runs own node	Token holder	May include others acting together to operate a node	Direct protocol rewards
Delegated Staking	Independent node operator	Token holder	Validator provides <i>ministerial</i> tech service; fixed fee	Direct protocol rewards
Custodial Staking	Custodian or third-party node operator	Custodian has control of the staked tokens, but Customer (of the custodian) retains ownership of tokens	Custodian stakes only per customer instruction; cannot rehypothecate; holds assets in a manner not subject third party claims	Direct protocol rewards collected by Custodian on behalf of token owner
Providing Ancillary Services (e.g., slashing insurance, pooled minimums, early unbonding)	Independent node operator/Custodian or third-party node operator	Token holder/Custodian has control of the staked tokens, but Customer retains ownership	Convenience only; no extra yield; no discretionary asset use	N/A

Under the *Howey* test, an “investment contract” security exists when there is an investment of money in a common enterprise with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. In evaluating protocol staking, the Staff focused on the final *Howey* prong — profits derived from the efforts of others — and determined it is not satisfied in the covered staking scenarios.

The Staff opined that, under *Howey*, both solo stakers and participants in “standard” staking services do not rely on the entrepreneurial or managerial efforts of others, because: (i) any staking rewards received are determined by the protocol code, not a service provider; (ii) any services provided to the user are appropriately considered administrative or ministerial (rather than “entrepreneurial”); and (iii) no third party guarantees or enhances the amount of the user’s returns. In addition, in each covered model, the Staff states that users maintain “ownership” of their crypto assets (including in the case of custodial staking where token holders are intended to retain ownership of their tokens). However, with respect to those staking programs where multiple users’ tokens are pooled together at a single address, market participants should carefully consider whether users in fact continue to retain ownership of their tokens.

What the Statement Does Not Cover

It should be noted that the Statement does not address all forms of staking, including the below examples of popular staking-related arrangements that do not fall under the scope of the Covered Staking Model:

- *Liquid Staking Tokens*: So-called *liquid staking* arrangements where users receive a separate and transferable asset representing their staked position (such as stETH or rETH), often with its own market value, entitling the holders of the liquid staking token to the underlying staking rewards;
- *Restaking Tokens*: Emerging concepts like *restaking* (re-using staked assets as collateral to secure other protocols or to earn additional yields), which typically involves more complex arrangements, potentially with multiple layers of risk arising from multiple layers of blockchain-based protocols (for more on Liquid Staking and Restaking, see our article [Restaking and the Evolution of Blockchain Security](#)⁵);
- *Guaranteed or Fixed-Yield Staking Products*: Any staking program advertising a fixed interest rate or guaranteed return (for example, a crypto exchange offering a staking program with a guaranteed 10% annual yield regardless of network conditions);
- *Cross-Chain Staking*: Cross-chain staking arrangements where tokens from one network (such as BTC) are used to secure different protocols; and
- *Tokens with Profit Rights or Intrinsic Yields*: Crypto assets that have “intrinsic economic properties” like passive yield or rights to future income, profits, or assets of a business independent of whether the assets are staked to secure a blockchain network.

In addition, the Staff’s analysis does not specify whether the source of staking rewards affects its conclusions—particularly for networks where rewards are derived from transaction fees rather than token inflation that is a component of the protocol, such as Layer 2 sequencer operations where validators earn processing fees that fluctuate with network usage.

⁵ L. Cohen, G. Strong, & S. Chen, *Restaking and the evolution of blockchain security*, Global Legal Insights: Blockchain & Cryptocurrency Laws and Regulations 2025 (Oct. 25, 2024), at <https://www.globallegalinsights.com/practice-areas/blockchain-cryptocurrency-laws-and-regulations/restaking-and-the-evolution-of-blockchain-security/>.

Practical Implications for Crypto Companies

Protocol Developers should consider:

- Implementing transparent, programmatic, algorithmic reward distribution systems that avoid built-in yield enhancement mechanisms and allocate rewards directly to addresses that have staked or delegated assets;
- Minimizing discretionary parameters in smart contract architecture;
- Governance mechanisms not affecting individual staking rewards;
- Providing clear delegation features for third-party validators, with network economics that are clearly documented and predictable;
- Building protocol documentation to support compliance analysis by clearly defining the administrative nature of validation activities.

Validators / Staking Infrastructure Providers should consider:

- Limiting operations to technical validation functions while maintaining detailed records that demonstrate their ministerial role;
- Focusing service scope on implementing robust security and uptime measures with transparent reporting on validator performance;
- Clearly disclosing all fees upfront, structured as fixed percentages or flat rates while avoiding performance-based arrangements;
- Emphasizing network participation over returns, focusing on technical capabilities and reliability while avoiding language that suggests investment management.

Exchanges & Custodians should consider:

- Implementing clear customer asset segregation with detailed records of beneficial ownership and real-time visibility into staking positions;
- Avoiding use of customer assets for platform operations or other purposes;
- Clearly defining ownership rights in user agreements with comprehensive risk disclosures explaining “unbonding” periods and potential slashing risks;
- Including systems to track protocol versus platform-generated returns in compliance, maintaining audit trails for all customer transactions, and developing procedures for handling network forks, upgrades, and slashing events.

US Tax Considerations Regarding Staking

Because the Statement is provided by the Staff of the SEC, it does not address U.S. tax implications. Unfortunately, staking through a U.S. delegate remains subject to significant tax uncertainty which market participants should bear in mind. In particular:

- *ETFs and power to vary.* A crypto exchange-traded fund (an “**ETF**”) would fail to qualify as a grantor trust, and could instead be subject to U.S. corporate tax, if there were “a power under the trust agreement to vary the investment of the certificate holders,” which the Internal Revenue Service (the “**IRS**”) has defined as managerial power over the trustee funds to take advantage of variations in the market. Because validators earn execution-layer staking rewards by conducting real-time auctions for block space, staking by a crypto

ETF might be viewed as an exercise of managerial power that violates the “no power to vary” requirement, even if the SEC views validation as ministerial.

- *Deductibility of staking service fees.* Many retail staking services report staking yield to their customers net of fees. It is unclear whether deducting fees from staking yield is appropriate for tax purposes unless staking is a “trade or business” for U.S. tax purposes. Investment expenses, such as broker fees, typically are nondeductible to individuals.
- *Taxation of consensus-layer rewards.* The IRS’s informal position is that all staking yield is taxable as ordinary income when a U.S. taxpayer has the ability to dispose of the staking rewards. However, many U.S. taxpayers take the position that U.S. tax law does not authorize the IRS to tax the first owner of property (e.g., farmers when they harvest crops, miners when they extract ore, or validators when they are credited newly minted tokens for proposing or attesting to blocks). Those U.S. taxpayers pay tax on their execution layer rewards, but do not pay tax on their consensus layer rewards until they dispose of the newly-minted tokens.
- *Income tax on foreigners.* The IRS appears to believe that staking income is income from services performed for users of the relevant blockchain. The regular and continuous performance of services from within the U.S. generally is a U.S. trade or business (a “USTB”). Foreigners generally are subject to U.S. income tax, and are required to file U.S. tax returns, on income from a USTB. Accordingly, foreigners risk being subject to U.S. income tax if they stake through a U.S. validator operator.
- *Withholding tax on foreigners.* Foreigners generally are subject to 30% U.S. withholding tax on U.S.-source income that is not connected to a USTB. Income from services is sourced by reference to where the services are performed. Accordingly, even if staking is *not* a USTB, foreigners risk being subject to withholding tax if they stake through a U.S. validator operator. If staking gives rise to U.S. withholding tax, U.S. validator operators could be liable for failing to withhold on rewards paid.
- *UBTI for tax-exempts.* U.S. retirement accounts and other tax-exempt entities are subject to U.S. tax on income from businesses unrelated to their tax-exempt purpose (so-called unrelated business taxable income, or “UBTI”). Accordingly, if—as the IRS appears to believe—staking is a service, tax-exempt entities risk recognizing UBTI from staking directly or through a delegate.

Conclusion

The Staff has concluded that core, protocol-level staking of network native tokens—whether performed directly, through delegated validators, or via custodial pass-through programs—in many cases does not involve an “offer or sale of securities.” Applying *Howey*, the Staff reasoned that staking rewards are coded into the network and flow programmatically rather than from anyone’s entrepreneurial efforts; validators and custodians provide only ministerial infrastructure services; and token holders retain ownership of staked tokens and bear network-level risks. Commissioner Hester M. Peirce applauded the clarification, stressing that it removes a “regulatory cloud” that had chilled U.S. participation in proof-of-stake consensus and aligns staking with the Staff’s earlier view that proof-of-work mining is likewise outside the securities regime.

However, it is important to bear in mind that the Statement constitutes only Staff guidance, not binding law or even an official SEC Statement, meaning future interpretations or SEC actions could modify this position. In addition, the sole current Democrat appointed SEC Commissioner, Carolyn A. Crenshaw, published a dissent warning that the Staff guidance may not survive judicial scrutiny and could foster “regulatory whiplash” if future Commissions change course.

For crypto developers, validators, and custodial platforms willing to keep staking strictly limited to protocol-driven rewards—with no fixed yields, profit-sharing rights, discretionary reinvestment, or derivative “liquid-staking” tokens—the Staff guidance offers a workable compliance blueprint. Yet departure from the relatively narrow fact pattern provided by the Staff, or any resurgence of investor-reliance factors, could revive securities-law risk. Staking service providers should therefore be prepared to recalibrate if the Commission’s balance between network functionality and investor protection shifts again.

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The CahillNXT team co-chaired by Cahill partners Samson A. Enzer and Lewis R. Cohen is available to evaluate specific staking products, liquid-staking tokens, yield programs, or other questions you may have in light of this guidance. If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Lewis R. Cohen (partner) at 202.862.8912 or lrcohen@cahill.com; Samson A. Enzer (partner) at 212.701.3125 or senzer@cahill.com; Gregory Strong (partner) at 302.884.0001 or gstrong@cahill.com; Sarah W. Chen (partner) at 212.701.3759 or swchen@cahill.com; Jason D. Schwartz (partner) at 212.701.3890 or jdschwartz@Cahill.com; or Jonathan Galea (counsel) at +44.20.7947.9315 or jgalea@cahill.com; or email publicationscommittee@cahill.com.