No Small Token: The SEC Proposes Regulation Crypto Assets

August 20, 2026

On August 18, 2026, the Securities and Exchange Commission (the "SEC") proposed a new set of rules titled "Regulation Crypto Assets" (the "Proposal") that would create a tailored offering and reporting regime for certain investment contracts involving non-security crypto assets ("covered investment contracts").[1] The proposed rules build directly on the interpretive release that the SEC issued on March 17, 2026, which we discussed in our prior Client Update (the "Interpretive Release").[2] Where the Interpretive Release set out the SEC's view on how the *Howey* test applies to crypto assets and crypto transactions, the Proposal goes several steps further by offering issuers two new registration exemptions, tailored disclosure requirements and a codified safe harbor for determining when a covered investment contract has ceased to exist.

The Proposal reflects the SEC's view that the existing exempt offering framework is a poor fit for capital raising via the distribution of distributed ledger assets that are not themselves tokenized securities. As Chair Atkins commented in his accompanying statement, the SEC's historical approach has included "regulation by enforcement," while requiring issuers to conform to existing rules not designed for these assets amounted to a "square peg in a round hole" and has driven investment offshore.

Key Elements of the Proposal

The Proposal would create a new regulation under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"), titled "Regulation Crypto Assets," including the following key operative provisions:

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1 As set out in the Proposal, the term "covered investment contract" would be defined as "a contract, transaction, or scheme that constitutes an investment contract; provided that the investment contract must meet the following requirements: (1) a crypto asset is subject to the investment contract; (2) such crypto asset is not a security; and (3) no asset other than such crypto asset (including any security or non-security asset) is subject to the investment contract."

2 Crypto Unchained: The SEC's Pivotal Interpretive Release (March 19, 2026), available here.

- **Two New Exemptions.** A "startup exemption" from Section 5 of the Securities Act permitting offerings of up to $5 million over a four-year period, and a two-tier "fundraising exemption" modeled on Regulation A, permitting offerings of up to $20 million ("Tier 1 Offerings") or $75 million ("Tier 2 Offerings") in any 12-month period.

- **Principles-Based Disclosure.** Both exemptions would require issuers to provide tailored, principles-based narrative disclosures addressing 10 topics specific to crypto assets and crypto systems, rather than relying on existing disclosure frameworks designed for traditional securities offerings.

- **Investment Contract Safe Harbor.** A nonexclusive safe harbor from the parallel definitions of "security" in the Securities Act and Exchange Act that would codify concepts from the Interpretive Release and apply if an issuer (i) has completed or otherwise permanently ceased all essential managerial efforts that it represented or promised it would engage in under the covered investment contract, (ii) is not making and does not intend to make any new representations or promises to engage in essential managerial efforts with respect to the crypto asset and (iii) files a transition report certifying that determination. This safe harbor would be available to any issuer satisfying its conditions, regardless of whether they conducted offerings under the startup exemption or the fundraising exemption.

- **Preemption of State Registration and Qualification Requirements.** A new definition of "qualified purchaser" that would include all purchasers of covered investment contract securities in primary offerings under either of the new Section 5 exemptions for purposes of preempting state securities registration and qualification requirements for primary offerings. This definition and the related preemption would also cover secondary market resales of covered investment contracts by persons other than an issuer, underwriter or dealer where the issuer has satisfied the requirements of a Regulation Crypto Assets exemption with respect to the covered investment contract and remains subject to, and current with, the applicable disclosure, filing or periodic reporting requirements.

The Proposal is subject to a 60-day public comment period following publication in the Federal Register, and the SEC has posed more than 150 numbered questions for comment throughout the Proposal, signaling that significant aspects of the framework remain subject to change in response to market feedback.

The Startup Exemption

The startup exemption is designed to give issuers of covered investment contracts an initial period to work toward fulfilling the essential managerial efforts they have promised investors without triggering registration under the Securities Act. An issuer, which under the Proposal may be an entity, an individual or a group of individuals or entities (reflecting that crypto projects may begin without a formal corporate structure), may raise up to $5 million in the aggregate over a four-year period. The exemption is available only once for a given crypto asset (or substantially similar crypto asset), a restriction intended to prevent circumvention of the four-year and $5 million limits through repeated or affiliated use of the exemption. Notably, the startup exemption imposes no restrictions on where the issuer is organized or where its officers and directors reside, in contrast to the fundraising exemption discussed below.

Rather than filing a full offering statement, an issuer relying on the startup exemption is required to file a short notice of reliance on new Form NOR and to make the disclosures required under proposed Rule 103[3] available on its own website, which must be available free of charge, rather than on EDGAR. This resembles the practice of publishing a project whitepaper on a public website, and is intended to minimize compliance costs for early-stage issuers who may be unfamiliar with SEC filing systems. However, the issuer must update such disclosures annually to reflect any material changes, and must file a transition report on Form TR within four years, addressing the status of the covered investment contract and whether it has ceased to exist.

The Fundraising Exemption

The fundraising exemption is available for issuers seeking to raise more significant amounts of capital but also requires, among other things, that the issuer is organized under U.S. federal, state, territorial or District of Columbia law; a majority of its executive officers or directors are U.S. citizens or residents; more than 50% of its assets are located in the United States; and its business is administered principally in the United States. This proposed exemption is modeled in large part on Regulation A, while substituting a crypto-specific disclosure regime for Regulation A's disclosure requirements. Tier 1 Offerings are capped at $20 million and Tier 2 Offerings at $75 million in any 12-month period, with a further limit on the amount attributable to sales by affiliated selling securityholders. Pre-publication commenters were divided on

[3] These principles-based, narrative disclosures cover 10 topics: the covered investment contract itself; the offering; the subject crypto asset; management, related persons and conflicts of interest; the associated crypto network or application and plan of development; security and source code; the subject crypto asset's economics and allocation; governance; the subject crypto asset's ecosystem; and risk factors.

whether Regulation A could serve as a workable vehicle for these offerings; the SEC ultimately chose to propose a bespoke exemption modeled in large part on Regulation A.

Issuers relying on the fundraising exemption would be required to file an offering statement on new Form 1-CRYPTO, which pairs the same principles-based disclosure items required under the startup exemption with a discussion of the issuer's financial condition (modeled on Regulation Crowdfunding's narrative disclosure requirement) and financial statements prepared in accordance with U.S. generally accepted accounting principles. Financial statements would be required to be audited in accordance with either U.S. generally accepted auditing standards or Public Company Accounting Oversight Board standards for Tier 2 Offerings only. Sales would not be permitted to commence until the offering statement has been qualified by the SEC.

Unlike Regulation A, issuers using either tier under the fundraising exemption would be subject to ongoing reporting obligations through annual reports on Form 1-KC, semiannual reports on Form 1-SC, and current reports on Form 1-UC. The SEC's rationale for this requirement is that an issuer's continued progress toward fulfilling its promised managerial tasks remains directly relevant to the value of the crypto asset regardless of offering size, and that there may be secondary markets for securities issued in either tier. This ongoing reporting duty, however, is not indefinite and may be suspended, treated as satisfied, or terminated as follows: (i) it may be suspended by filing a Form TR once a class of covered investment contracts has fewer than 300 holders of record and the issuer is current in its filings (subject to certain exclusions, such as an active or recently qualified offering); (ii) the duty is treated as satisfied, without any additional filing, for so long as the issuer is, and remains, separately subject to, and current with, parallel reporting under Exchange Act Sections 13 or 15(d); and (iii) it would terminate automatically upon filing a separate Form TR if the safe harbor is satisfied or the covered investment contract otherwise ceases to exist.

Issuers should also note that the fundraising exemption permits "testing the waters" communications at any point prior to qualification, and permits limited continuous or delayed offerings, including sales by selling securityholders—subject to a 30% cap on secondary sales in an issuer's first offering (or any offering qualified within a year of the first offering) under this exemption.

Both exemptions include a "bad actor" disqualification provision tracking Rule 262 of Regulation A, which would bar reliance on either exemption if the issuer or certain other specified persons are subject to disqualification. The fundraising exemption imposes a separate, investor-facing protection: non-accredited purchasers may not invest more than 10% of the greater of annual income or net worth for natural persons, or the greater of revenue or net assets for the most recently completed fiscal year for non-natural persons, and this limitation would apply to both Tier 1 Offerings and Tier 2 Offerings, unlike the comparable limitation under Regulation A. This limitation applies only to sales by the issuer (or through underwriters or dealers) under the qualified offering statement, not to secondary market transfers, which raise separate considerations discussed below.

Issuers relying on either exemption nonetheless remain subject to the antifraud and antimanipulation provisions of the federal securities laws.

The Investment Contract Safe Harbor

The Proposal's investment contract safe harbor, set out in proposed Rule 400, would be available to tokens issued under a covered investment contract by any issuer that satisfies its conditions, whether or not the issuer relied on either of the proposed new Section 5 exemptions. The Interpretive Release described two circumstances in which a non-security crypto asset separates from its associated investment contract: fulfillment of the issuer's promised essential managerial efforts, or circumstances in which purchasers would not reasonably expect the issuer to fulfill or continue those efforts. Rule 400 would codify aspects of that standard in a formal, nonexclusive safe harbor.

To rely on the safe harbor, the digital asset must have been issued under a "covered investment contract" and the issuer must (i) have completed or otherwise permanently ceased all essential managerial efforts that it represented or promised it would engage in under the covered investment contract, (ii) neither be making nor intend to make any new representations or promises to engage in essential managerial efforts with respect to the crypto asset and (iii) file a transition report on Form TR certifying satisfaction of that condition and providing an analysis supporting the certification. If those conditions are satisfied, the SEC would treat the covered investment contract as having ceased to exist, and the crypto asset as no longer subject to that investment contract, for purposes of the "security" definitions in both the Securities Act and the Exchange Act.

The safe harbor is nonexclusive, and an issuer could still rely directly on the Interpretive Release without making a Form TR filing. The SEC would also reserve the right to challenge a certification it believes to be inaccurate.

The Proposal discusses, as an alternative, whether reliance on the safe harbor should require the crypto asset subject to the covered investment contract to have sufficient functionality, and the associated crypto network or application to have become sufficiently decentralized, rather than resting solely on the cessation of managerial efforts.

Importantly, while the Interpretive Release did not attempt to define what constitutes "essential managerial efforts" for purposes of the *Howey* test or to directly address whether the existence or nonexistence of such efforts turns on the functionality of a network or application to which a crypto asset is tied, the Proposal begins to address this topic. Specifically, the text of the preamble states that once a "network or application is functional, it is our view that services to secure, maintain, improve, or enhance such a network or application or its functionality, or to facilitate network effects, . . . would not constitute essential managerial efforts." The Proposal later characterizes this discussion as building on the Interpretive Release and "providing further clarity . . . on what types of actions would not constitute essential managerial efforts." The scope and basis for this statement are unclear and are likely to be subject to comment. However, it suggests at a minimum that achieving functionality will be relevant to the SEC's application of the cessation standard, even if it is not an independent condition of the safe harbor.

Preemption of State Registration and Qualification Requirements

The Proposal would also define "qualified purchaser" for purposes of Section 18(b)(3) of the Securities Act, a definition specific to this context and distinct from the similarly named term under the Investment Company Act of 1940, thereby preempting state Blue Sky registration and qualification requirements for offerings conducted under either of the two new exemptions. In contrast to the treatment of Regulation D and Regulation Crowdfunding offerings, this preemption would extend to certain secondary market resales of covered investment contracts for as long as the issuer remains subject to, and current with, the applicable disclosure, filing and periodic reporting requirements. Given the inherently borderless, internet-based nature of crypto asset distributions, the SEC views state-by-state compliance as a particularly acute burden for this asset class, and one that could otherwise substantially undermine the utility of the new exemptions.

Practical Implications for Market Participants

The Proposal raises a number of practical considerations for issuers and market participants, including the following:

- **The Safe Harbor Offers Greater Certainty.** Rule 400 would give issuers a formal mechanism to establish that a covered investment contract has ceased to exist, but reliance on it would require a public Form TR certification and supporting analysis. That may make the safe harbor attractive where regulatory certainty is particularly valuable, while other issuers may prefer to rely directly on the Interpretive Release. Indeed, the SEC itself asks whether issuers may avoid Rule 400 because using it could be viewed as a tacit admission that an investment contract previously existed. Moreover, the SEC, and presumably federal and state courts, would retain discretion to determine that the issuer did not complete or terminate all essential managerial efforts that it represented or promised to investors, potentially undermining the utility of the safe harbor.

- **Issuer Promises Will Matter.** The Proposal would make an issuer's description of its promised essential managerial efforts particularly important. Those written descriptions of its actual representations or promises would not only inform investors at the time of an offering; they would also help determine when the covered investment contract has ceased to exist. Issuers therefore will need to be deliberate in describing their development milestones and other commitments in whitepapers, roadmaps and other public communications, particularly because Rule 103 would require offering disclosures to be consistent with statements to investors and promotional materials.

- **Secondary Market Limitations.** Until a covered investment contract is deemed to cease to exist, secondary market trading in the related digital asset would be subject to the full set of Exchange Act and Securities Act requirements, including registrations for intermediaries and their compliance with applicable intermediary rules. Depending on whether and how the SEC addresses Exchange Act requirements related to crypto assets generally, this may be a substantial limit on liquidity.

- **Compliance Costs Are Not Trivial.** The SEC's own economic analysis estimates per-issuer compliance costs of approximately $973,000 for the fundraising exemption, compared with approximately $49,000 for the startup exemption. Issuers should factor these costs into any decision about which offering pathway best matches their capital needs, and should note that nothing in the Proposal forecloses continued reliance on registered offerings, Regulation D or Regulation Crowdfunding as alternatives.

- **State Preemption Could Be a Significant Practical Benefit.** The Proposal's preemption provisions may be particularly important for crypto projects seeking broad distribution and secondary-market liquidity. By preempting state registration and qualification requirements for Regulation Crypto Assets offerings and certain secondary transactions, the Proposal would remove a potentially significant source of friction that existing exempt offering frameworks do not always eliminate.

Chair Atkins' accompanying statement emphasizes that legislation remains "indispensable" to durable reform and expresses the SEC's support for the CLARITY

Act, the pending federal digital-asset market structure legislation. Market participants should therefore treat Regulation Crypto Assets, if adopted, as a meaningful near-term reform effort, but should continue to monitor legislative and regulatory developments that could reshape or displace the Regulation or elements of the existing legal framework. Given the volume and specificity of the SEC's requests for comment, significant aspects of the Proposal remain subject to change, including the scope of the safe harbor and whether ongoing reporting obligations should apply to Tier 1 Offerings.

We will continue to monitor developments and provide further updates as the rulemaking progresses.

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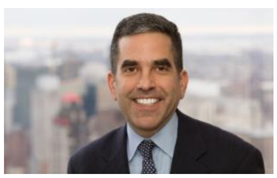
Please do not hesitate to contact us with any questions.



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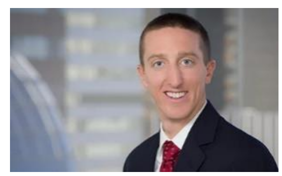

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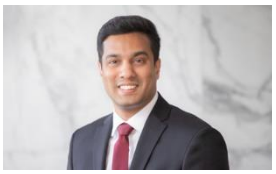

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