A Giant Step Forward: The SEC's Proposed Regulation Crypto Assets

Tuesday, September 2, 2026

KEY TAKEAWAYS

- *Fundraising from the general public for blockchain projects through the sale of new crypto assets, typically referred to as "initial coin offerings" or "ICOs", has generally been recognized as a type of securities offering, but one with no practical means of compliance. A new proposal (the "Proposal") from the Securities and Exchange Commission (the "Commission") would, for the first time, create a potential pathway for public funding of blockchain projects.*
- *The Proposal would create two exemptions for offers and sales of what the SEC terms "covered investment contracts": a "Startup Exemption" that would allow an issuer to raise up to $5 million in aggregate over a four-year period, and a two-tiered "Fundraising Exemption" that would allow an issuer to raise up to $20 million (in a "Tier 1" offering) or $75 million (in a "Tier 2" offering) in a 12-month period, the latter being modeled in part on the current Regulation A. In addition, the SEC proposes a conditional Safe Harbor for establishing when an investment contract has ceased to exist.*
- *Importantly, the two new exemptions, as well as the conditional Safe Harbor, are optional for issuers – unlike the framework in Congress' much-discussed Clarity Act bill, token projects can continue to operate as they always have; a strength and a point of vulnerability of the Proposal are that it widens, rather than narrows, the structures that will be used by new and existing token projects.*
- *The SEC explains in the Proposal that the Safe Harbor would codify the "separation" concept introduced in its March 2026 Interpretation of the case law relating to investment contracts, bringing much-needed clarity to an area of the law that has perplexed courts, practitioners, and regulators, but numerous questions nevertheless remain unsettled.*
- *The Proposal would create a new principles-based disclosure framework for issuers using either of the proposed offering exemptions, but the ongoing obligations would differ by exemption. Both exemptions would require issuers to maintain disclosure controls and coordinate public communications, but the Fundraising Exemption would impose the more formal ongoing SEC reporting infrastructure.*
- *One important limitation on the usefulness of the proposed Fundraising Exemption is an "onshoring" condition, which would require the issuer to be a U.S. organization with majority-U.S. management and a majority of its assets located in the U.S.; this would exclude most offshore foundation structures*

commonly used by token projects and potentially substantially increase the tax burden on projects choosing to use this pathway.

- *Broad preemption of state securities registration and qualification requirements, including in the secondary markets, is a key feature of the Proposal, but it comes with some important limitations.*
- *While representing a critical step forward in adapting the securities offering framework for the modern era of fundraising through the use of crypto assets – making securities regulation "fit for purpose," in the words of the Commission – the Proposal nevertheless leaves open many important questions, including in particular around how secondary markets in non-security crypto assets that have not yet separated from a related investment contract will function.*
- *The Proposal was published in the Federal Register on August 21, 2026, and comments are due October 20, 2026.*

1. BACKGROUND

On August 18, 2026, the Securities and Exchange Commission (the "Commission") proposed Regulation Crypto Assets (the "Proposal"), a framework for exempt offerings of certain investment contracts involving crypto assets.[1] The Proposal builds on the Commission's March 2026 Interpretation (the "Interpretation"), which includes related guidance from the Commodity Futures Trading Commission and sets forth the Commission's position that an arrangement considered to be an "investment contract" pursuant to which a non-security crypto asset was sold can continue to impact later transactions in that asset among third parties.

More precisely, the Proposal finds its jurisdictional "hook" over secondary market activity involving non-security crypto assets by concluding that, under certain circumstances, the original securities offering creates a penumbra-type effect that the SEC asserts causes subsequent transactions between persons who are neither the issuer of the investment contract nor an underwriter or dealer nevertheless to involve securities activity when the non-security asset is traded. This position turns on a conclusion that all third parties trading non-security crypto assets are deemed to be relying on any unfulfilled promises or representations made by the issuer at the time of original sale. To address concerns raised by secondary market participants about this position, the Proposal would also create a safe harbor (the "Safe Harbor") that would allow a token project team to establish that the investment contract through which the crypto asset was initially offered and sold has ceased to exist.

Chairman Atkins presented the Proposal as part of the Commission's work to restore American leadership in capital formation through tailored, fit-for-purpose rules that support innovation in the crypto asset markets.[2]

The Proposal comes as Congress and the Commission pursue parallel routes toward a federal crypto market structure. The Digital Asset Market Clarity Act of 2025 (the "Clarity Act") passed the House on July 17, 2025, and was reported by the Senate Banking Committee on June 1, 2026. On August 8, 2026, Senate leadership moved to bring the Clarity Act to the floor by filing a cloture motion on the motion to proceed. The Senate is scheduled to

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[1] Securities and Exchange Commission, Regulation Crypto Assets, Release Nos. 33-11434 and 34-106150, File No. S7-2026-27 (Aug. 18, 2026) (the "Proposal"), available at https://www.sec.gov/files/rules/proposed/2026/33-11434.pdf.

[2] *See* Paul S. Atkins, Chairman, Statement on Regulation Crypto Assets: Fit-for-Purpose Exemptions for Crypto Market Innovation (Aug. 18, 2026), available at https://www.sec.gov/newsroom/speeches-statements/atkins-statement-regulation-crypto-assets-081826.

vote on cloture on September 15, 2026, and a successful vote would move the bill closer to floor consideration. As of the date of this Alert, passage remains uncertain.[3]

The Commission, meanwhile, has continued to act under its existing authority. As discussed in our [March 2026 Client Alert](), the Interpretation, which provides the critical policy scaffolding for the Proposal, set forth the position that a non-security crypto asset might become subject to, and potentially later separate from, an investment contract.[4] That framing, which varies significantly from the approach taken in the Clarity Act, is the key to understanding how the lifecycle of crypto assets will be understood through the lens of securities law if the Clarity Act is not adopted.

The Proposal focuses on two exemptions from registration under the Securities Act of 1933, as amended (the "Securities Act"). A startup exemption (the "Startup Exemption") would provide a limited offering path for smaller early-stage token projects to raise up to $5 million over four years, while larger offerings would have the option to proceed under a fundraising exemption (the "Fundraising Exemption"). The latter is modeled in part on Regulation A and would permit larger raises up to $75 million in a 12-month period, subject to Commission qualification, enumerated disclosure requirements and ongoing reporting.

Central to both exemptions and the Safe Harbor is the concept of "essential managerial efforts," understood as the representations or promises an issuer makes at the time of fundraising about the work it will undertake. The framework measures the life of a covered investment contract (as defined below) by reference to those efforts. To benefit from the Safe Harbor, the issuer would need to have completed or permanently ceased the promised essential managerial efforts, not be making or intending to make any new representations or promises to engage in essential managerial efforts with respect to the crypto asset, and file Form TR. The Safe Harbor would also provide, where applicable, a path to terminating an investment contract issuer's continuing reporting and other obligations under the exemptions.

Both exemptions share a common principles-based disclosure framework under proposed Rule 103, discussed in more detail in Section V below, that would require issuers to describe their promised essential managerial efforts and maintain consistency between required disclosures and public communications. The Exhibit attached to the end of this Alert summarizes the principal filing, disclosure, and reporting requirements under each exemption, including their timing and principal effects.

The Proposal moves the Commission's crypto framework from interpretation toward implementation, but it also leaves open important questions about eligibility, compliance, secondary trading and the practical operation of the Safe Harbor. This Alert summarizes the Proposal, examines those questions and identifies issues that certain market participants may wish to address during the comment period.

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[3] *See* H.R. 3633, 119th Cong., All Actions, Congress.gov (showing House passage and Senate committee and floor actions), available at https://www.congress.gov/bill/119th-congress/house-bill/3633/all-actions. *See* 172 Cong. Rec. S4557 (Aug. 7, 2026) (stating that the cloture vote on the motion to proceed would occur on Sept. 15, 2026), available at https://www.congress.gov/119/crec/2026/08/07/172/130/CREC-2026-08-07-pt1-PgS4557-8.pdf.

[4] Securities and Exchange Commission and Commodity Futures Trading Commission, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Release Nos. 33-11412 and 34-105020 (Mar. 17, 2026), available at https://www.sec.gov/files/rules/interp/2026/33-11412.pdf.

2. SCOPE AND ARCHITECTURE

The Proposal would provide much-needed flexibility for issuers by adding registration exemptions for public offerings of "covered investment contracts," which proposed Rule 100 defines as a contract, transaction or scheme involving a crypto asset that constitutes an investment contract, provided that the crypto asset subject to the investment contract is not itself a security and no other asset is subject to the same contract. The definition builds upon the test established in *SEC v. W.J. Howey Co*., which asks whether a transaction involves an investment of money in a common enterprise with an expectation of profits derived from the essential managerial efforts of others. The Proposal uses the term "issuer" as the regulatory actor for its requirements.

A requirement that no other asset be subject to the same investment contract narrows the Proposal's scope. A transaction in which the same investment contract involves a token alongside a traditional security, such as equity or debt, would fall outside the exemptions (excluding, for example, Simple Agreements for Future Tokens (SAFTs) and the popular SAFE-plus-token warrant structure). However, the Commission requests comment on whether the exemptions should extend to multi-asset investment contracts.[5] The proposed framework would instead cover offers, sales, and, under the Startup Exemption, other distributions of covered investment contracts involving a single non-security crypto asset, subject to the applicable exemption's conditions.

The proposed definition of "crypto asset" tracks the GENIUS Act's definition of "digital asset" as a digital representation of value recorded on a cryptographically secured distributed ledger.[6] Both exemptions would be nonexclusive and could be used alongside another available exemption. A bad actor disqualification modeled on Regulation A would close both exemptions to an issuer with a disqualifying regulatory history.

Proposed Rule 101(b) would direct issuers to Securities Act Rule 152 when evaluating integration. The integration doctrine under Rule 152 would apply when an issuer relies on an exemption available under the Proposal alongside another federal exemption. The Proposal would add conforming provisions to Rule 152 identifying when offerings under the Startup Exemption and Fundraising Exemption commence and terminate. The general Rule 152 integration framework would continue to apply.

The Commission states that covered investment contracts are not equity securities and therefore do not trigger registration under section 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Token projects should treat this as a Commission position rather than a statutory exclusion. The Commission expresses the view in a footnote and asks whether it should codify it by amending Exchange Act Rule 12g5-1.[7] The Proposal also contains a new disclosure rule, Rule 103, to cover the two exemptions. The requirements and implications of that rule are described below.

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[5] Proposal, *supra* note 1, Question 6.

[6] Proposal, *supra* note 1, proposed Rule 100 (definition of "crypto asset"). *See id*. at n.122 (stating that the definition is identical to the definition of "Digital Asset" in section 2(6) of the Guiding and Establishing National Innovation for U.S. Stablecoins Act, Pub. L. No. 119-27, 139 Stat. 419 (July 18, 2025)).

[7] Proposal, *supra* note 1, at n.192 and Question 45 (asking whether the Commission should codify this view by amending 17 CFR 240.12g5-1).

3. THE STARTUP EXEMPTION

Under the proposed Startup Exemption, an issuer, whether an entity, an individual, or a group of individuals or entities, could conduct covered transactions totaling up to $5 million over a period of up to four years, but only after filing a notice of reliance on proposed Form NOR[8] and making the Rule 103 information publicly accessible, free of charge, at the website identified in Form NOR, in each case before any covered transaction takes place. The issuer and its affiliates could not rely on the exemption a second time for the same or a substantially similar crypto asset, except with respect to covered transactions occurring during the same applicable period.[9]

The Startup Exemption would permit general solicitation and impose no retail investment limit. Rule 103 information would have to be publicly accessible, free of charge, at or before the Form NOR filing, remain available until the earlier of the end of the four-year period or the filing of Form TR, and be amended within 30 calendar days after each calendar year-end if there were material changes. Proposed Forms NOR and TR would be filed on EDGAR.

The $5 million cap would extend beyond conventional sales to certain distributions and rewards tied to network use, operation, governance, security, and testing. A distribution would require an exemption only if it involved an offer or sale of a security (for this framework, a covered investment contract under the *Howey* test). The Interpretation describes an airdrop as a dissemination for no or nominal consideration and states that an airdrop of a non-security crypto asset to a recipient who provides no money, goods, services or other consideration does not cause the asset to become subject to an investment contract. By contrast, an airdrop or network reward conditioned on consideration, such as buying another asset, performing a task, or providing services, may involve an investment contract and may require reliance on the Startup Exemption, subject to the cap. Because the Proposal does not provide an airdrop-specific valuation method beyond its general rules for valuing non-cash consideration, an issuer may have difficulty determining how much of the $5 million limit the distribution uses. The Commission requests comment on that issue. An announced airdrop may also include representations or promises that an issuer would need to address in its Rule 103 disclosures and any later Form TR analysis.[10]

Form NOR would include a certification that the issuer intends to fulfill its promised essential managerial efforts within four years. The four-year period would run from the Form NOR filing and end upon the earlier of the filing of a "transition report" on Form TR or the fourth anniversary of the Form NOR filing.

On Form TR, the issuer would provide the information required for its filing basis. If it satisfies Rule 400(a), it could certify that the covered investment contract has ceased to exist and provide a supporting analysis. Otherwise, it would report the current status of (and future plans for) the covered investment contract, the subject crypto asset, and the associated network or application, and could include an analysis if it nevertheless determines that the covered investment contract has ceased to exist. Filing Form TR would end reliance on the Startup Exemption and its website disclosure duties, whether or not the issuer satisfies Rule 400(a).

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[8] Proposal, *supra* note 1, proposed Rule 200 and Questions 58 through 63.

[9] Proposal, *supra* note 1, proposed Rule 200(b)(3). *See id*. at n.206 and Questions 51 and 52.

[10] Proposal, *supra* note 1, proposed Rule 100 (definition of "covered transaction"), Rule 103(b)(1), and Rule 400. *See* Interpretation, *supra* note 4.

4. THE FUNDRAISING EXEMPTION

The proposed Fundraising Exemption would be modeled in part on Regulation A. However, because covered investment contracts are not eligible securities under existing Regulation A, the Commission determined to start with a fresh exemption, rather than attempting to modify Regulation A. The Fundraising Exemption would operate in two tiers.[11] Tier 1 would permit offerings of up to $20 million in a 12-month period, including no more than $6 million offered by selling holders that are affiliates of the issuer (*i.e.*, persons that directly or indirectly control, are controlled by, or are under common control with the issuer, which would generally not include rank-and-file employees). Tier 2 would permit offerings of up to $75 million in a 12-month period, including no more than $22.5 million offered by selling holders that are affiliates of the issuer. Both tiers would require financial statements prepared in accordance with U.S. GAAP. Tier 1 financial statements would not be required to be audited or reviewed, while Tier 2 financial statements would be required to be audited under U.S. GAAS or PCAOB standards.[12] Interim financial statements could be unaudited. Sales could begin only after the Commission qualified an offering statement on new Form 1-CRYPTO. Borrowing from Regulation A's "testing the waters" framework, an issuer could solicit indications of interest before qualification, and written solicitation of interest materials would be filed as exhibits to Form 1-CRYPTO.

Two further Regulation A features would carry over with particular consequence for token offerings. All selling securityholders could account for no more than 30 percent of the aggregate offering price in the issuer's first offering under the exemption and in any offering qualified within one year of the first offering's qualification date. And, similar to the prohibition under Regulation A, "at the market" offerings would be prohibited, with that term defined as any offering of securities at other than a fixed price. Each offering would therefore need a specified fixed dollar price per unit of the covered investment contract, determined by reference to the subject crypto asset. Auctions, bonding curves, and other variable-pricing mechanisms commonly used to launch tokens would not appear to be permitted under the proposed rule, possibly requiring a fundamental change in the offering mechanics for token project teams. The Commission asks whether it should instead permit delayed offerings or variable pricing.[13]

Unlike the Startup Exemption, which uses the broad "covered transaction" concept to encompass certain airdrops, rewards, and similar non-capital-raising token distributions, the Fundraising Exemption is limited to offers and sales of covered investment contracts and does not separately accommodate airdrops. Issuers relying on the Fundraising Exemption therefore have three principal paths for conducting airdrops. First, under the Interpretation, an airdrop is a dissemination for no or nominal consideration. An airdrop of a non-security crypto asset to recipients who provide no money, goods, services, or other consideration does not cause the asset to become subject to an investment contract, so no exemption would be required on that account. Second, because the proposed exemptions are expressly nonexclusive under Rule 101(a), an issuer could rely on the proposed Startup Exemption to conduct airdrops or network rewards that involve consideration and therefore constitute covered transactions

[11] Proposal, *supra* note 1, proposed Rules 300 through 307.

[12] Proposal, *supra* note 1, Part F/S of Form 1-CRYPTO, paragraphs (b)(2) and (c)(1)(iii) (permitting Tier 2 audits under U.S. GAAS or PCAOB standards and providing that the auditor need not be PCAOB-registered); *see also id*. at Section II.C.2.b.iii.

[13] Proposal, *supra* note 1, proposed Rule 300 (limiting selling holders to 30 percent of the aggregate offering price in the issuer's first offering under the exemption and in subsequent offerings qualified within one year of the first offering's qualification date; prohibiting "at the market" offerings and defining the term as an offering of securities at other than a fixed price) and Questions 91 through 94 (asking about delayed offerings, a "token shelf" and variable pricing); *cf*. 17 CFR 230.251(a)(3), (d)(3)(ii) (parallel Regulation A provisions).

subject to the $5 million offering limit, while relying on the Fundraising Exemption for its primary capital raise, provided it does not run afoul of the integration doctrine under Rule 152. Third, an issuer could theoretically structure an airdrop as a qualifying offer and sale under the Fundraising Exemption itself, though the exemption's requirements, including offering circular delivery, fixed pricing, investment limitations for non-accredited investors, and financial statement disclosures, would be impractical for most airdrop programs. Notably, the SEC has requested comment on whether a separate exemption tailored specifically to airdrops should be adopted, signaling that this remains an area of potential further rulemaking.

ISSUER ELIGIBILITY AND THE ONSHORING CONDITION

An issuer would qualify only if it is organized under and subject to U.S. law and meets significant U.S.-nexus requirements concerning its management, assets and principal place of administration.[14] Many token projects use foundations organized in the Cayman Islands, Switzerland, or Singapore and would not qualify as proposed, and the Commission accordingly asks whether it should relax the eligibility standard.[15] Regulation A is slightly broader and is also open to issuers organized under the laws of, and with their principal place of business in, the United States or Canada, and the Commission asks specifically whether the Fundraising Exemption should permit Canadian issuers.[16]

The proposed Startup Exemption would impose no comparable restriction. Foundations, development companies and other persons supporting offshore token projects should assess early on whether the Fundraising Exemption's higher offering limit would justify any restructuring that may be required to achieve eligibility. The onshoring condition would apply to the relevant issuer and may materially limit use of the exemption.

INVESTOR LIMITS AND ONGOING REPORTING

Non-accredited purchasers could invest no more than 10 percent of the greater of annual income or net worth, or, for non-natural persons, the greater of revenue or net assets for the most recently completed fiscal year-end. Unlike Regulation A, the limit would apply in both tiers and would include no carve-out for exchange-listed securities.

Both tiers of the Fundraising Exemption would require annual reports on Form 1-KC, semiannual reports on Form 1-SC, and current reports on Form 1-UC after qualification. Annual reports would be due within 120 calendar days after the end of the fiscal year and semiannual reports within 90 calendar days after the end of the first six months of the issuer's fiscal year. Current reports would be due within four business days after a specified event occurs. The specified current report events focus on the issuer rather than the network, and the Commission asks whether the reports should instead address network-level developments and whether Tier 1 issuers should report at all. Reporting could be suspended under specified conditions, including fewer than 300 holders of record and filing all

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[14] Proposal, *supra* note 1, proposed Rule 300(b). An issuer is required, among other things, to be organized under and subject to U.S. law, have a majority of its executive officers or directors be U.S. citizens or residents, have more than 50% of its assets located in the United States, and administer its business principally in the United States.

[15] Proposal, *supra* note 1, Questions 85 and 86.

[16] 17 CFR 230.251(b) (limiting Regulation A to issuers organized under the laws of, and with their principal place of business in, the United States or Canada); Proposal, *supra* note 1, Question 86 (asking whether the eligibility criteria should be expanded to permit Canadian issuers).

required reports for the applicable look-back period, and would terminate when the covered investment contract ceases to exist and the issuer files Form TR.[17]

A conforming amendment would extend the Securities Act Rule 175 safe harbor for forward-looking statements to Fundraising Exemption materials. That protection may make token projects more willing to describe development roadmaps and technical milestones. The amendment would reach statements in an offering statement or solicitation of interest materials under the Fundraising Exemption. It would not cover the Startup Exemption's website disclosure, which is not filed with the Commission.[18]

5. COMMON DISCLOSURE REQUIREMENTS UNDER RULE 103

Rule 103 would require principles-based disclosure concerning the covered investment contract, offering, subject crypto asset, management and related persons, associated network or application and development plan, security and source code, economics and allocations, governance, ecosystem, and risks. Issuers could tailor the disclosure to their facts. Startup Exemption issuers would post the relevant disclosure on the website identified in Form NOR, while Fundraising Exemption issuers would include the disclosure in Form 1-CRYPTO. Rule 103(b)(4) would require disclosure of related-person transfer or resale restrictions and their material terms. The Commission did not propose, but requested comment on, an alternative condition requiring policies designed to impose a minimum period, such as one year, before related-person resales.

Most important for the Safe Harbor, Rule 103(b)(1) would require the issuer to clarify and disclose the specific representations or promises it is making to engage in "essential managerial efforts" and its progress toward completing them. This requirement would create a centralized disclosure baseline against which a later Form TR filing could measure completion. It would not, however, establish a complete record of later statements or statements by parties other than the issuer, such as by a foundation or on the website of a DAO. The disclosures would also need to remain consistent with statements by the issuer in official channels, including whitepapers and social media, linking the issuer's public communications to its compliance record.

6. THE INVESTMENT CONTRACT SAFE HARBOR

The Safe Harbor would implement the "separation" concept introduced in the Interpretation.[19] Importantly, the Proposal would translate that principles-based concept into a formal mechanism for an issuer to establish and publicly document its determination that the covered investment contract has "separated" from the subject crypto asset and ceased to exist, subject to both a substantive condition and a filing condition.

To benefit from the Safe Harbor, the issuer would need to complete or permanently cease those essential managerial efforts that it represented or promised it would engage in under the covered investment contract and to

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[17] Proposal, *supra* note 1, proposed Rules 305(c) and (d), Section II.C.2.f, and Question 123.

[18] Proposal, *supra* note 1, proposed amendment to 17 CFR 230.175(b)(1)(i) (covering statements made in a registration statement, or in an offering statement or solicitation of interest materials under Regulation A or subpart C of Regulation Crypto Assets).

[19] Proposal, *supra* note 1, Section II.D.2 and proposed Rule 400 (stating that the Safe Harbor would be available to any issuer that satisfies its conditions, including an issuer that has not used either exemption). *See also* Interpretation, *supra* note 4.

refrain from making new representations or promises to engage in essential managerial efforts with respect to the crypto asset.

Because the proposed condition focuses on efforts that the issuer represented or promised it would undertake, the framework could create a perceived incentive to limit or qualify public commitments: disclosed development plans may extend the period that must be addressed, while the treatment of material activities not reflected in those representations or promises is less clear. Whether that creates a meaningful advantage for opacity would depend on how the Commission applies the proposed standard (including that the antifraud provisions of the federal securities laws, including Section 17(a) of the Securities Act and Rule 10b-5 under the Exchange Act would apply to the disclosures provided in connection with the Fundraising Exemption). The filing condition would require the issuer to include in Form TR a certification and supporting analysis clear enough for a reasonable investor to follow. For an issuer that used either exemption, the analysis would draw on its Rule 103(b)(1) disclosure. An issuer that never used an exemption would have no comparable disclosure record.

As proposed, Rule 400 would provide a conditional, nonexclusive Safe Harbor from the term "investment contract" in the Securities Act and Exchange Act definitions of "security," allowing an issuer to establish, subject to the rule's conditions, that a covered investment contract has ceased to exist for purposes of those definitions. An issuer could seek to establish cessation directly under the *Howey* test without filing Form TR, but would then lack the widely disseminated and unambiguous public announcement contemplated by the Interpretation, which a compliant Form TR would satisfy. The filing would not constitute Commission approval or a conclusive determination that the covered investment contract has ceased to exist. An issuer that did not rely on either proposed exemption could still seek to use the Safe Harbor if it satisfies Rule 400's conditions, including for token distributions that occurred before adoption of the framework. Any Safe Harbor effect would be prospective and would not cure an earlier unregistered offering or eliminate antifraud liability for prior material misstatements or omissions.[20]

Accordingly, proposed Rule 400 would operationalize the Interpretation without resolving a number of its central questions,[21] including when statements that relate to essential managerial efforts are attributable to the issuer (as opposed to third parties), open-ended commitments, and the scope of representations or promises. It would clarify the form and dissemination of a separation announcement and would reflect the Commission's view that covered investment contracts are not equity securities.

LIMITATIONS ON THE SAFE HARBOR

The Safe Harbor would have three principal limitations.

- The Commission could subsequently challenge the certification or supporting analysis. A filing that does not satisfy the proposed conditions would not provide the Safe Harbor and would create a public record of the filer's analysis.

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[20] Proposal, *supra* note 1, Section II.D.2 (stating that the Safe Harbor would be available to issuers that have not used either proposed exemption); Interpretation, *supra* note 4, Section IV.B, at 34 (stating that subsequent separation does not cure an earlier unregistered offering or eliminate antifraud liability for material misstatements or omissions made while the investment contract existed).

[21] CahillNXT, *Breaking Up Is Hard to Do:* Howey *and the SEC's Crypto Asset Classification Guidance* (Mar. 24, 2026) (the "March 2026 Client Alert"), Sections III.A through III.C, available at https://www.cahill.com/publications/client-alerts/2026-03-24-breaking-up-is-hard-to-do-howey-and-the-sec-crypto-asset-classification-guidance. *See* Interpretation, *supra* note 4, Section IV; Proposal, *supra* note 1, proposed Rule 400.

- The Safe Harbor would govern only the Commission's administration of the federal securities laws. Private plaintiffs and state enforcement authorities could still argue that a crypto asset remains subject to an investment contract.
- The Safe Harbor would cover only the Securities Act and Exchange Act. It would not extend to the corresponding definitions of "security" in the Investment Company Act of 1940, as amended, or the Investment Advisers Act of 1940, as amended. The Commission asks in the Proposal whether the Safe Harbor should extend to those statutes. If an entity held crypto assets, it may remain subject to the Investment Company Act or Investment Advisers Act even after an issuer filed Form TR. If a fund or vehicle held a portfolio consisting predominantly of crypto assets that were once subject to investment contracts, it may need to analyze its own status under those statutes regardless of the issuer's Form TR determination. Satisfying Rule 400 would not by itself resolve separate questions under those statutes.[22]

The Commission also asks whether issuers will avoid Form TR because the filing could be characterized as an acknowledgment that an investment contract once existed.[23] A filing may provide greater certainty in the Commission's administration of the federal securities laws, but it may also strengthen an adverse party's account of the token project's history. The Safe Harbor may therefore be least attractive to issuers seeking the most certainty.

7. PREEMPTION OF STATE REGISTRATION AND QUALIFICATION

Under Rule 500, the Proposal would treat purchasers in qualifying offerings as "qualified purchasers" under Section 18(b)(3) of the Securities Act, preempting state securities registration and qualification requirements for primary offerings under either exemption and for certain secondary transactions by persons other than an issuer, underwriter or dealer.[24] The Commission has defined "qualified purchaser" under Section 18(b)(3) for Regulation A Tier 2 offerings, and the D.C. Circuit upheld that use against a challenge by state regulators in *Lindeen v. SEC*.[25] State antifraud authority, notice-filing requirements, and fee-collection authority would be preserved. Covered investment contracts sold under either exemption would not be considered "restricted securities" within the meaning of Securities Act Rule 144, removing the Rule 144 holding period. Exchange Act obligations, contractual restrictions, and intermediary requirements applicable to resales would remain in effect.[26]

The exclusion would turn on the capacity in which a seller acts in a particular transaction, not on the firm's registration status. A broker-dealer selling as a dealer would fall outside the provision, while the same firm acting in another capacity could qualify.

Secondary-market preemption would also depend on the issuer having satisfied a Regulation Crypto Assets exemption with respect to the covered investment contract and remaining subject to, and current with, the applicable disclosure and filing requirements and/or periodic reporting obligations, as applicable. Preemption would lapse during noncompliance and resume after cure. The Rule 500 filing and reporting condition would exclude

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[22] Proposal, *supra* note 1, Question 135.

[23] Proposal, *supra* note 1, Question 134.

[24] Proposal, *supra* note 1, proposed Rule 500; 15 U.S.C. § 77r(b)(3).

[25] *Lindeen v. SEC*, 825 F.3d 646 (D.C. Cir. 2016); *see* 17 CFR 230.256 (Regulation A Tier 2 "qualified purchaser" definition); Proposal, *supra* note 1, at nn.381 and 387 (citing *Lindeen*).

[26] 15 U.S.C. § 77r (preserving specified state authority, including antifraud authority and notice filing and fee requirements).

current reports on Form 1-UC because an unaffiliated market participant may not know whether a reportable event has occurred.

Preemption would extend to fungible covered investment contracts sold under another federal exemption if they are the same covered investment contract for which the issuer has satisfied a Regulation Crypto Assets exemption. The other-exemption sale need not itself be made under Regulation Crypto Assets. A standalone offering that relies solely on Regulation D or another federal exemption would not, by itself, trigger Rule 500 preemption for secondary transactions in those tokens.

If an issuer relying on the Startup Exemption files a Form TR at the end of the four-year period while the covered investment contract remains outstanding, its disclosure obligations and the Proposal's preemption for secondary transactions would end. Subsequent secondary transactions would require a state-by-state analysis unless another exemption applies.

Proposed Rule 500 would make secondary-market preemption depend on the issuer's compliance with the applicable disclosure, filing and periodic reporting requirements, facts that unaffiliated market participants may be unable to verify. The Commission asks whether the standard should instead turn on a purchaser's reasonable conclusion that the issuer satisfied or relied on an exemption, or whether preemption should continue while the issuer remains subject to the reporting regime without requiring full compliance with those obligations.

8. OPEN QUESTIONS

WHEN HAVE ANY PROMISED "ESSENTIAL MANAGERIAL EFFORTS" ENDED?

The Safe Harbor would require the issuer to complete or permanently cease all essential managerial efforts that it represented or promised it would engage in under the covered investment contract and to refrain from making new representations or promises to engage in essential managerial efforts. A token project whose whitepaper commits an "issuer" to continuous protocol improvement or ecosystem development may have no natural endpoint. It remains unclear whether the issuer of such a token project could ever certify completion or whether abandoning those commitments would constitute permanent cessation or a breach of its promises. The Commission asks whether the Safe Harbor needs a more objective standard and whether it should cover fulfillment alone.[27] The Commission is explicit that it is not proposing decentralization or functionality criteria. Where an issuer represented or promised that a network would achieve decentralization, whether it has been achieved would be measured by how the issuer defined or described decentralization, not by a general market conception.[28] The issuer's own representations would therefore be central to the exit analysis.

In its discussion of Rule 103, the Commission states that services performed to secure, maintain, improve or enhance a functional network or application are not essential managerial efforts. That statement appears to assume that the issuer has already completed or permanently ceased the promised work. It may help a token project that has finished development and continues ordinary maintenance, but it does not explain when open-ended commitments have ended. Further, there may be a fine line between "improving or enhancing" a network or application and the managerial efforts necessary to keep the project alive and relevant.

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[27] Proposal, *supra* note 1, Questions 131 through 133.

[28] Proposal, *supra* note 1, Section II.B.2 (stating that whether an issuer has achieved decentralization "would be based on how the issuer defined or otherwise described decentralization, not a general market conception of what constitutes decentralization").

The framework may also encourage token project teams to limit the public statements they make about their commitments. Narrow promises are easier to complete and may also weaken the case that an investment contract arose. That incentive sits uneasily with the Proposal's disclosure goals, particularly for early-stage token projects whose investors depend on information about future development. It also risks creating a two-tier information market where insiders and early investors have private access to more relevant information than general non-affiliated public token holders.

WHO FILES FORM TR?

Form TR assumes that a person remains available to reconstruct the issuer's historical representations or promises and make the required certification. That assumption may fail when a development company dissolves, a foundation and a separate developer divide responsibility, or a group of individuals disbands. The proposed framework offers no clear filing path when the parties that made the relevant promises are no longer available.

CAN SECONDARY MARKET PARTICIPANTS RELIABLY DETERMINE WHETHER PREEMPTION APPLIES?

A market maker's or trading platform's ability to rely on state-law preemption would depend on whether the issuer has made the required filings and disclosure updates. The market participant cannot compel those filings and may not learn of a lapse before executing a transaction. The Commission excluded Form 1-UC from the Rule 500 filing and reporting condition but asks how participants should monitor the remaining requirements.[29] Platforms would need to track each issuer's filing status, yet the Proposal provides no usable verification mechanism.

WHAT HAPPENS IF A TOKEN PROJECT MAKES NEW PROMISES AFTER FILING FORM TR?

Form TR would measure the issuer's representations and intent as of the filing. If the issuer later makes new representations or promises before another token sale, that sale would require a fresh *Howey* analysis and could create a new investment contract. It remains unclear how that later contract would affect the prior certification or tokens already in secondary circulation. Because the tokens are fungible, the question affects the market for the token as a whole.

WHAT HAPPENS IF THE COMMISSION CHALLENGES A FORM TR?

The Proposal does not establish a formal process for Commission review or approval of a Form TR filed in reliance on the Safe Harbor. Instead, the issuer makes its own determination that the covered investment contract has ceased to exist, files its certification and supporting analysis, and the Commission remains free to challenge that position after the filing. The Proposal does not clearly address how such a challenge would proceed, whether or when the issuer would have an opportunity for formal review or appeal, or what rules would govern while the disagreement remains unresolved. This uncertainty is especially significant because the existence or non-existence of the covered investment contract directly affects whether the crypto asset remains subject to the federal securities laws. If the Commission later concludes that the covered investment contract had not in fact ceased to exist, that determination would mean the investment contract remained outstanding throughout the period of dispute, with potential implications for secondary-market transactions that occurred in reliance on the issuer's Form TR certification. It is unclear whether Rule 500 preemption would remain available during that period or whether market participants could face liability for transacting in what the Commission later deems an unregistered security.

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[29] Proposal, *supra* note 1, Questions 141 through 144. *See also id*. at n.192.

HOW DO THE EXCHANGE ACT REGISTRATION PROVISIONS APPLY TO COVERED INVESTMENT CONTRACTS?

The offering exemptions in the Proposal address only the initial sale of covered investment contracts. They would not be determinative of whether a trading venue operates as a securities exchange, a market maker acts as a dealer, or custody and settlement arrangements require transfer agent or clearing agency registration. Those questions would remain governed by existing law and the Interpretation. Critically, while a covered investment contract remains outstanding, crypto assets subject to that contract may be "securities" for purposes of Exchange Act intermediary registration requirements, meaning platforms, dealers, and custodians may face registration obligations that depend on a determination the Proposal does not itself resolve.

A platform listing a crypto asset during the four-year Startup Exemption period would still need to analyze its own registration status, because the existence of the covered investment contract during that period may bring the crypto asset within the Exchange Act's intermediary framework. The exclusion of dealer transactions from secondary-market preemption could compound that uncertainty. Intermediaries should treat Form TR as neither Commission approval nor a conclusive determination that the covered investment contract has ceased to exist. Its presence does not establish cessation, and its absence does not establish continuation. Each intermediary must conduct its own analysis of whether a covered investment contract remains outstanding, and the Proposal leaves intermediary-registration questions unresolved.

HOW DURABLE IS THE FRAMEWORK?

The Proposal relies on the Commission's existing Securities Act authority for the offering exemptions, while proposed Rule 400 would interpret "investment contract" under the Securities Act and the Exchange Act.[30] Aspects of the Proposal could be challenged as exceeding the Commission's authority or as inconsistent with *Howey*. A token project considering the Proposal should account for the possibility that a reviewing court could set aside part of the framework when assessing the status of the covered investment contract or subject crypto asset under the federal securities laws. The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[31] which held that courts must exercise their independent judgment rather than defer to an agency's interpretation of an ambiguous statute, may inform how reviewing courts approach the Commission's construction of "investment contract" in the Safe Harbor and other elements of the framework.

WHAT IS A "REPRESENTATION OR PROMISE"?

The framework rests on a term the Proposal does not define. Proposed Rule 103(b)(1) would require disclosure of the issuer's representations or promises. Form NOR would require a certification of intent to fulfill them; proposed Rule 400 would condition the Safe Harbor on their completion or permanent cessation. Yet the Proposal does not elaborate with precision what separates a binding commitment from ordinary commercial promotion.

Our March 2026 Client Alert asked whether a single statement seen by few viewers could taint a crypto asset, how statements made outside official channels should be weighed, and how long before a sale a statement remains relevant. Those questions now carry filing consequences. An issuer preparing Form TR must certify, subject to later Commission challenge, that an undefined category of statements has been exhausted. A legacy token project

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[30] Proposal, *supra* note 1, "Statutory Authority" section. *See also id*. at nn.222 and 249 and Question 79.

[31] 144 S. Ct. 2244 (2024).

relying on the Safe Harbor without either exemption must reconstruct that inventory years after the fact, often across changed teams, revised websites, and updated channels.[32]

IS THERE TENSION BETWEEN ENCOURAGING DISCLOSURE AND EXTENDING THE FRAMEWORK?

The Proposal sits on both sides of its own incentive. The proposed Rule 175 amendment would extend the forward-looking statement safe harbor to Fundraising Exemption documents, and proposed Form 1-CRYPTO would encourage management projections that have a reasonable basis. At the same time, each representation or promise of essential managerial efforts may prolong the covered investment contract and enlarge the record a later Form TR must reconcile. An issuer could be invited to file its roadmap, and qualifying projections made in good faith with a reasonable basis may receive Rule 175 protection, while the same roadmap may postpone its exit from the framework. The protection is also asymmetric. The proposed Rule 175 amendment would reach filed documents, so a startup issuer whose disclosures appear only on a website would receive no comparable protection, although early-stage token projects are the issuers most likely to describe ambitious future development.[33]

WHAT ARE THE U.S. TAX CONSEQUENCES OF THE ONSHORING CONDITION?

U.S. tax law may make the Proposal less widely used than the SEC hopes, given the U.S. organization requirement. The federal tax treatment of a token sale, an equity or debt issuance, and an airdrop depends on the facts, including the characterization of the transaction and the issuer's tax status. Token sales and distributions may also raise information-reporting or withholding questions. These issues require separate and highly fact-specific tax analysis.

9. PRACTICAL CONSIDERATIONS FOR MARKET PARTICIPANTS

TOKEN PROJECT TEAMS

Token project teams should begin with their development stage and funding needs. If adopted, early-stage projects could find the proposed Startup Exemption sufficient, while those seeking larger raises should evaluate the proposed Fundraising Exemption's eligibility criteria early, particularly the onshoring condition, because it may affect entity-structuring decisions. Mature token projects could also seek to rely directly on proposed Rule 400 by filing Form TR without first using either proposed exemption, subject to Rule 400's conditions.[34]

Under the Proposal, Form TR would be central to the framework: it could end reliance on the Startup Exemption, suspend or terminate Fundraising Exemption reporting obligations, and satisfy the Safe Harbor's filing condition. Where an issuer seeks to rely on the Safe Harbor, Form TR would publicly memorialize the issuer's determination

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[32] Proposal, *supra* note 1, proposed Rules 103(b)(1), 200(b), and 400. *S*ee March 2026 Client Alert, *supra* note 21, Sections III.A through III.C.

[33] Proposal, *supra* note 1, proposed amendment to 17 CFR 230.175(b)(1)(i); Part II(c) of proposed Form 1-CRYPTO ("The Commission encourages the use of management's projections of future economic performance that have a reasonable basis").

[34] Proposal, *supra* note 1, proposed Rule 400 (providing that the Safe Harbor would be available to any issuer that satisfies its conditions, including an issuer that has not relied on either proposed exemption).

that the covered investment contract has ceased to exist, but would not itself establish that conclusion or prevent the Commission or private parties from challenging the issuer's analysis. Issuers should assess their litigation posture before filing and prepare the supporting analysis with the care that a public legal position warrants.

Token projects should formulate a Form TR strategy well before they expect to file, including maintaining a record of representations and promises, tracking progress against disclosed managerial efforts, and identifying who will be responsible for the filing. Public communications are especially important: Rule 103 would tie required disclosures to statements by the issuer in official channels and establish the baseline for any later Form TR analysis. Token project teams should inventory existing statements about roadmaps and future development and govern new statements accordingly.

Issuers relying on the Fundraising Exemption would face an ongoing public reporting regime requiring coordination among management, finance, technical teams, and outside advisers to prepare annual, semiannual, and current reports. Startup Exemption issuers face a lighter regime but must still maintain Rule 103 disclosures and update them for material changes. Under either exemption, reliance would not displace the antifraud provisions, leaving issuers exposed to liability for material misstatements or omissions.

TRADING PLATFORMS AND MARKET MAKERS

Token trading platforms should monitor whether issuers of listed or available tokens have made the required filings and disclosure updates and whether they have filed Form TR. A Form TR should remain one part of the platform's diligence because the Commission or a private party may challenge the issuer's position. However, a Form TR filing would not itself constitute Commission approval or confirmation that the covered investment contract has ceased to exist. Platforms relying on the filing may therefore need to assess the issuer's supporting analysis and consider contractual protections addressing subsequent Commission challenges or issuer noncompliance. Further, monitoring can identify filed reports and obvious delinquencies, but it cannot reveal an unfiled website amendment or establish that two fungible tranches involve the same covered investment contract. Platforms should therefore consider obtaining contractual information rights from issuers whose compliance affects the platform's regulatory position.

BROKER-DEALERS AND CUSTODIANS

Broker-dealers and custodians face distinct considerations under the Proposal. For broker-dealers, the capacity in which they act in each transaction is critical because Rule 500's secondary-market preemption would exclude sales made as an issuer, underwriter or dealer. A broker-dealer effecting customer transactions on an agency basis may benefit from preemption, but the same firm acting as a dealer, buying and selling for its own account, would fall outside that protection. Dealing activity may therefore remain subject to state registration and qualification requirements, including during any period when the issuer is out of compliance with its disclosure or reporting obligations.

For custodians, the central question is whether holding crypto assets that remain subject to a covered investment contract triggers custody-related registration obligations under the Exchange Act. Custodians must therefore independently assess whether the covered investment contract remains outstanding and, if so, what registration or compliance obligations apply to their custody activities.

CONCLUSION

The Proposal would give token projects two tailored fundraising paths and, for the first time, a formal process for establishing that an investment contract has ceased to exist. The issuer certification and supporting analysis under Rule 400 would provide a more concrete public mechanism for addressing that question, but the underlying standard would remain unsettled. The framework is a giant step forward, but in the meantime, it also invites public comment about important questions relating to eligibility, disclosure, integration, preemption, reporting, intermediary obligations, legacy token projects, and the interaction with other federal statutes. Market participants considering reliance on the Proposal should monitor the rulemaking process and assess how adopted rules may differ from the proposed text.

We are available to discuss the Proposal's implications for your specific circumstances and to assist with comment letters, compliance planning, and Form TR strategy.

The Proposal was published in the Federal Register on August 21, 2026, and comments are due by October 20, 2026.[35]

[35] 91 FR 54510, 54510 (Aug. 21, 2026).

EXHIBIT: REPORTING ROADMAP

STARTUP EXEMPTION

Stage or Filing	Timing	Location	Core Requirement	Principal Effect
Form NOR	Before any covered transaction	EDGAR	Certification of intent to fulfill promised essential managerial efforts within four years; and identification of the website for Rule 103 disclosure	Starts the four-year Startup Exemption period and triggers the Rule 103 website disclosure obligation
Startup Rule 103 Website Disclosure	Available at or before Form NOR filing	Issuer website identified in Form NOR	Offering, project, crypto asset, network, development plan, governance, economics, security, risks, related-person restrictions (Rule 103(b)(4))	Establishes a baseline for Form TR analysis. Supports continued eligibility for Rule 500 preemption while the issuer remains subject to and complies with the Startup Exemption's requirements.
Startup Annual Website Update	Within 30 days after calendar year-end	Issuer website	Updated disclosure reflecting material changes, if any	Keeps the disclosure record up to date.
Startup Form TR (Rule 200(e))	No later than four years after Form NOR	EDGAR	Status of the covered investment contract, crypto asset, network or application, and plans, or the Safe Harbor certification and supporting analysis under Rule 400	Ends Startup Exemption reliance and website disclosure duties. If Rule 400's conditions are satisfied, Form TR provides the proposed Safe Harbor treatment.

FUNDRAISING EXEMPTION

Filing	Timing	Offering or Reporting Requirement	Financial Statements	Principal Effect
Form 1-CRYPTO (Tier 1)	Must be qualified before sales begin	Offering and issuer information, Rule 103 disclosure	U.S. GAAP; no mandatory audit or review; unaudited statements must be labeled unaudited	Permits sales up to $20 million per 12 months; triggers ongoing reporting
Form 1-CRYPTO (Tier 2)	Must be qualified before sales begin	Offering and issuer information, Rule 103 disclosure, audited financial statements	Audited under U.S. GAAS or PCAOB standards; interim statements may be unaudited	Permits sales up to $75 million per 12 months; triggers ongoing reporting
Form 1-KC (Annual Report)	Within 120 days after fiscal year-end	Annual disclosure update, progress on essential managerial efforts	Tier 1 financial statements need not be audited or reviewed. If a qualifying audit is obtained for another purpose, the audited financial statements and audit opinion must be filed. Tier 2 financial statements must be audited under U.S. GAAS or PCAOB standards.	Maintains ongoing reporting; helps maintain eligibility for Rule 500 preemption
Form 1-SC (Semiannual Report)	Within 90 days after semiannual period-end	Semiannual update	May be condensed, unaudited, and unreviewed	Maintains ongoing reporting; helps maintain eligibility for Rule 500 preemption
Form 1-UC (Current Report)	Within four business days after specified event	Disclosure of specified reportable events (issuer-focused)	N/A	Timely market disclosure. Excluded from the Rule 500 filing and reporting condition.
Form TR (Rule 305(c) Suspension)	Upon meeting conditions	Certification that the class has fewer than 300 holders of record and that all reports required under Rule 305 have been filed for the shorter of the period since reporting began or the issuer's most recent three fiscal	N/A	Suspends Fundraising Exemption reporting obligations (subject to conditions)

Filing	Timing	Offering or Reporting Requirement	Financial Statements	Principal Effect
		years plus the current year to date; suspension is unavailable during specified offering or reporting circumstances.		
Form TR (Rule 305(d) Termination)	Upon meeting conditions	Certification and analysis that the covered investment contract has ceased to exist or the Rule 400 conditions are satisfied; Form TR filed	N/A	Terminates Fundraising Exemption reporting obligations when the Rule 305(d) conditions are satisfied and Form TR is filed.

CONTACT

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