Strategic Perspectives

SEC Proposes "Regulation Crypto Assets" Rulemaking

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On August 18, 2026, the US Securities and Exchange Commission (**SEC**) proposed "Regulation Crypto Assets," its first standalone offering framework for crypto assets. The roughly 400-page proposal creates: (1) two new exemptions from registration under the Securities Act of 1933 (the "**Securities Act**"), each with crypto-specific disclosure requirements; (2) a safe harbor under which an investment contract connected with a token can formally come to an end; and (3) a new pathway that would preempt state securities registration and qualification requirements for certain offerings and secondary market transactions. Comments are due by October 20, 2026.[1]

Since the start of the current administration, and even before Chairman Paul Atkins' confirmation in April 2025, the SEC has taken several important steps toward constructing a new regulatory framework for crypto assets. Until now, these efforts largely had been limited to Commissioner and staff statements on a range of market structure issues, many of which we have outlined in prior writings.[2] While helpful in providing guidance to market participants on the SEC's current stance on these issues, these statements do not constitute action by the Commission and thus do not have any legal force or effect. Regulation Crypto Assets is the SEC's first crypto-specific notice-and-comment rulemaking—and thus marks a significant step forward. This is especially important as the Digital Asset Market Clarity Act (the "CLARITY Act") remains stalled in Congress and the likelihood of new market structure legislation seems increasingly low. Along with the long-awaited "innovation exemption" order the SEC issued on September 17, 2026 (which also requests public comment, and which we will cover in more detail in a future alert), Regulation Crypto Assets, if ultimately adopted, will form a critical component of the new federal regulatory regime for crypto assets.

Regulation Crypto Assets, which was published in the Federal Register on August 21, 2026, builds directly on the "token taxonomy" issued jointly by the SEC and the Commodity Futures Trading Commission (**CFTC**) in March 2026 (the "**Token Taxonomy**").[3] The Token Taxonomy set forth five categories of digital assets, including "digital securities" (i.e., tokenized securities), and further explained that an asset that is not a digital security (e.g., a digital commodity) may nonetheless become subject to, and also may cease to be subject to, an investment contract under the seminal Supreme Court case, *SEC v. W.J. Howey Co.,* bringing the offer and sale of that asset within the federal securities laws for as long as the investment contract continues. Regulation Crypto Assets formalizes the interpretive framework under *Howey* into a proposed rule. In addition, it establishes certain exemptions and safe harbors for such investment contracts: (1) a "startup exemption" for early-stage capital raising; (2) a "fundraising exemption" for larger raises; (3) an "investment contract safe harbor" that can end a token's security status; and (4) a new "qualified purchaser" definition that preempts state securities registration and qualification requirements for offerings under either exemption and for certain resales.

Key Takeaways

- **Raise capital faster, with less friction.** Early-stage projects can raise up to US$5 million under a streamlined startup exemption with no financial statements. More mature issuers can raise up to US$75 million per year under the fundraising exemption—in each case without a full registration under the Securities Act.

1 Regulation Crypto Assets, Release Nos. 33-11434; 34-106150 (Aug. 18, 2026), 91 FR 54510 (Aug. 21, 2026) (the "Proposing Release").
2 *See* The SEC's Revolutionized Approach to Crypto, 59 Rev. Sec. & Commodities Reg. 63 (Feb. 25, 2026), available at https://www.whitecase.com/insight-our-thinking/secs-revolutionized-approach-crypto.
3 Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets, Release Nos. 33-11412; 34-105020 (Mar. 17, 2026).

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- **A defined off-ramp from securities regulation.** Once an issuer completes (or permanently ceases) the managerial efforts it promised investors, stops making new promises of that kind, and files a new transition report, the investment contract is treated as at an end and the token is no longer subject to it, or to the associated federal securities requirements, going forward. The off-ramp is open to any issuer, including for tokens sold before the rules are adopted and those that do not qualify for the two offering exemptions.
- **No resale restrictions, no state blue-sky hurdles.** Covered investment contracts issued under either exemption carry no rule-based resale restrictions, and a new "qualified purchaser" definition preempts state blue-sky registration and qualification requirements for the initial offering and for qualifying secondary trading—opening a path toward more liquid secondary markets. The relief runs to holders; it does not resolve whether trading venues and other intermediaries face Exchange Act registration obligations while an investment contract remains outstanding. We would expect those issues to be addressed through future rulemakings focused on trading and markets issues.
- **Compliance obligations do not disappear.** Both exemptions carry disclosure and ongoing reporting requirements, and issuers remain fully subject to antifraud and antimanipulation liability under the federal securities laws. The safe harbor, for its part, speaks only to the Securities Act and Exchange Act definitions of "security," and not to the Investment Company Act of 1940, as amended (the "**Investment Company Act**"), or the Investment Advisers Act of 1940, as amended (the "**Investment Advisers Act**").

The Two Exemptions at a Glance

	Startup Exemption	Fundraising Exemption — Tier 1	Fundraising Exemption — Tier 2
Offering limit	$5 million over four years; once per crypto asset	$20 million per 12 months (up to $6 million by affiliate selling securityholders)	$75 million per 12 months (up to $22.5 million by affiliate selling securityholders)
Issuer eligibility	Entity, individual, or group; any jurisdiction	US-organized entity meeting the US-nexus test (majority US officers or directors; more than 50% of assets in the US; principal US administration)	Same as Tier 1
SEC review	None; notice of reliance on Form NOR before any covered transaction	Offering statement on Form 1-CRYPTO must be qualified before sales	Same as Tier 1
Disclosure	Rule 103 narrative disclosure on the issuer's website; updated within 30 days after calendar year-end for material changes	Rule 103 disclosure included in Form 1-CRYPTO	Same as Tier 1
Financial statements	None required	US GAAP; unaudited	US GAAP; audited under US GAAS or PCAOB standards
Investor limits	None; retail participation permitted	Non-accredited investors capped at 10% of the greater of annual income or net worth	Same as Tier 1
Ongoing reporting	Website updates; Form TR closes the four-year period	Annual (Form 1-KC), semiannual (Form 1-SC), and current (Form 1-UC) reports; suspension available below 300 holders of record	Same as Tier 1
Resales and blue sky	Not restricted securities; state registration and qualification preempted for the offering and qualifying secondary trades while the issuer remains current	Same as startup exemption	Same as startup exemption
Exit	Form TR, with safe harbor treatment if Rule 400's conditions are met	Form TR optional; terminates ongoing reporting	Same as Tier 1

Covered Investment Contract

As noted above, the SEC and CFTC have previously made clear that certain crypto assets may be securities. Such "digital securities" are defined in the Token Taxonomy as financial instruments enumerated in the definition of "security" under the federal securities laws as or represented by a crypto asset. In other words, digital securities are tokenized securities, e.g., a share of common stock of a company that is tokenized and represented on a blockchain. Such assets do not fail to be subject to the federal securities laws simply because they are

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tokenized. A tokenized security remains a security. Importantly, Regulation Crypto Assets does not extend to tokenized securities. Tokenized stocks, bonds, or fund interests remain outside this regime and must use existing offering pathways. More precisely, issuers of tokenized securities are not eligible for the startup or fundraising exemptions discussed herein.

Rather, Regulation Crypto Assets offers a regulatory framework for non-securities digital assets that are offered and sold as part of an investment contract under *Howey*. A "covered investment contract" is an investment contract in which (1) a crypto asset is subject to the contract, (2) that crypto asset is not itself a security, and (3) no other asset—security or otherwise—is subject to the contract. In other words, the proposed rules do not regulate crypto assets as such; they regulate a particular contractual arrangement wrapped around a non-security crypto asset. The release states this as a key principle: the security is the covered investment contract, not the crypto asset itself.[4]

As with tokenized securities, a single investment contract that bundles a token with equity or debt of the issuer (i.e., a separate, non-investment-contract security), as in common SAFE-plus-token-warrant packages, falls outside the definition of "covered investment contract", taking the exemptions and the safe harbor with it; the SEC asks for comments on whether the exemptions should extend to such multi-asset investment contracts. Separate documents, signatures, and consideration do not, by themselves, establish eligibility: the definition reaches the entire transaction or scheme, however the parties paper it. The release itself distinguishes an overlying instrument, such as a token warrant, from the underlying covered investment contract: the warrant cannot use the fundraising exemption, while the underlying covered investment contract potentially can.[5] Structures that pair token rights with equity therefore require separate legal analysis of the entire arrangement and of the warrant itself. Significantly, while covered investment contracts are securities, the SEC has stated they are not "equity securities," and so are not subject to registration under Section 12(g) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). That statement is a Commission position rather than rule text, and the SEC asks whether it should codify it by amending Exchange Act Rule 12g5-1.

The following exemptions and safe harbors extend to covered investment contracts under Regulation Crypto Assets:

The Startup Exemption — Up to $5 Million Over Four Years

The startup exemption is a one-time, non-exclusive exemption that permits an issuer to raise up to US$5 million over a four-year period. The exemption period begins when the issuer files a notice of reliance on new Form NOR with the SEC and ends on the earlier of four years or the filing of a transition report on Form TR. Form NOR requires a certification that the issuer intends to fulfill its promised essential managerial efforts within four years, and it must be amended as soon as practicable for material mistakes or changes. Issuers must make principles-based, narrative disclosures under proposed Rule 103 publicly available on a website identified in Form NOR and must update those disclosures within 30 calendar days after each calendar year-end if material changes have occurred. No financial statements, audited or otherwise, are required. Rule 103 disclosure covers the investment contract itself, including the issuer's promised essential managerial efforts and its progress against them, the offering, the crypto asset, management and related-person conflicts, the associated network and development plan, security and source code, token economics and allocations, governance, the surrounding ecosystem and risk factors. It must be tailored to the project, written in plain language, and consistent with the issuer's white papers and other public statements. The issuer may be an entity, an individual or a group of individuals or entities—it need not be US-organized. General solicitation is permitted, retail (non-accredited) investors may participate without an individual investment cap, and covered investment contracts issued under the exemption are not restricted securities and carry no rule-based resale restriction.

The startup exemption's US$5 million cap also absorbs certain non-capital-raising distributions, including airdrops, staking and governance rewards, and network-testing compensation, to the extent recipients provide consideration. Under the Token Taxonomy, an airdrop for no consideration does not create an investment contract at all and needs no exemption; a distribution conditioned on buying an asset, performing tasks, or providing services may. The proposal supplies no airdrop-specific method for valuing such a distribution against the cap (the SEC requests comment), and an announced airdrop may itself contain representations that the issuer will need to address in its Rule 103 disclosures and any later Form TR analysis. An issuer and its affiliates may rely on the startup

4 Proposing Release at 38.
5 Proposing Release at 35, 124.

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exemption only once for the same or a substantially similar crypto asset. (Additional covered transactions during the same exemption period are permitted.)

The Fundraising Exemption — Up to $75 Million Per Year

The fundraising exemption, modeled in part on Regulation A, is a two-tier, non-exclusive exemption available on a recurring 12-month basis. Tier 1 permits raises of up to US$20 million (including no more than US$6 million from affiliate selling securityholders); Tier 2 permits raises of up to US$75 million (including no more than US$22.5 million from affiliate selling securityholders). In an issuer's first offering and any subsequent offering qualified within one year, sales by selling securityholders may not exceed 30% of that offering's aggregate offering price. An issuer relying on the fundraising exemption must file a new Form 1-CRYPTO containing the same Rule 103 narrative disclosures required under the startup exemption, plus US GAAP financial statements (audited under US GAAS or PCAOB standards for Tier 2; unaudited for Tier 1) and other offering information, and may "test the waters" before filing—but no sales may occur until the SEC qualifies the offering statement. Offerings must be made at a fixed price per unit: "at the market" offerings are prohibited, which on its face rules out the auctions and bonding-curve mechanics many token launches use (the SEC asks whether it should instead permit delayed offerings or variable pricing). Once qualified, issuers in both tiers face ongoing reporting: annual reports on Form 1-KC (due within 120 calendar days after fiscal year-end), semiannual reports on Form 1-SC (due within 90 calendar days after the end of the first half of the fiscal year), and current reports on Form 1-UC (due within four business days of specified triggering events). A transition report on Form TR is not a required end point under this exemption; it is the optional exit that terminates reporting once the covered investment contract has ceased to exist, and reporting may separately be suspended while the class is held of record by fewer than 300 persons. A conforming amendment would also extend the Securities Act Rule 175 safe harbor for forward-looking statements to fundraising-exemption offering materials, but not to startup-exemption website disclosures, which are not filed with the SEC.

Unlike the startup exemption, the fundraising exemption is subject to a US-nexus eligibility test. To rely on it, an issuer must be an entity organized in, and subject to the laws of, the United States and, in addition: (1) a majority of its executive officers or directors must be US citizens or residents; (2) more than 50% of its assets must be located in the United States; and (3) its business must be administered principally in the United States. Development-stage companies without a specific business plan, investment companies registered or required to be registered under the Investment Company Act, business development companies, and issuers subject to certain recent SEC orders (including Exchange Act Section 12(j) orders entered within the past five years) or delinquent in Exchange Act reporting are also ineligible. Most offshore foundation structures, including the Cayman Islands, Swiss, and Singapore foundations common in token projects, would not qualify as proposed; the SEC asks whether it should relax the standard (including whether to admit Canadian issuers, as Regulation A does). Restructuring to qualify is not free: onshoring carries US federal tax consequences, for the token sale itself and for the entity, that require separate and fact-specific analysis.

Both the startup and fundraising exemptions are unavailable to issuers subject to "bad actor" disqualification under proposed Rule 104, which incorporates Regulation A's existing disqualification framework. Conduct predating the rule's effective date would not automatically disqualify an issuer but would need to be disclosed in writing to each purchaser before sale.

It is important to note that neither the startup nor the fundraising exemption is exclusive. An issuer is not locked into a single pathway: it may rely on the startup exemption while its network is still developing and later move to the fundraising exemption as its capital needs grow, and it remains free at any point to pursue a registered offering or another available exemption instead. The framework as a whole is likewise optional; existing pathways, including Regulation D and Regulation S, remain available. Sequencing among pathways must be planned rather than assumed, because offers and sales under the regulation remain subject to the integration principles of Securities Act Rule 152. In plain terms, integration is the doctrine that can treat separate offerings run close together as one: a startup-exemption raise next to a Regulation D round risks, absent one of Rule 152's safe harbors, being combined into a single offering that exceeds the US$5 million cap or brings retail solicitation into the private placement. Because the two exemptions can be used in sequence for the same project, issuers with a longer-term roadmap should think about the startup exemption's US$5 million cap and four-year runway not in isolation, but as the first stage of a broader capital-raising plan that may later shift to the fundraising exemption or beyond.

The Investment Contract Safe Harbor

The proposed investment contract safe harbor (Rule 400) provides a rule-based path for establishing that an investment contract has ceased to exist and that the

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token, as a consequence, is no longer subject to it. It creates a non-exclusive safe harbor from the "investment contract" prong of the "security" definitions in Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. An issuer formalizes the determination through a public filing, Form TR, which also serves as the transition report ending the startup exemption's four-year period—so an issuer relying on that exemption must file Form TR regardless of whether it separately invokes the safe harbor. (An issuer that cannot make the certification at that point instead reports the current status of, and its plans for, the covered investment contract.)

The safe-harbor determination requires that an issuer has (1) completed or permanently ceased all essential managerial efforts it represented or promised to undertake for the covered investment contract (and does not intend to make new promises to this effect), and (2) filed Form TR with the SEC certifying that it has met condition (1), along with supporting analysis, identifying information about the issuer, and a description of the covered investment contract and crypto asset. Because failure to satisfy Rule 400 does not, by itself, establish that an investment contract continues to exist, an issuer may also rely on an independent *Howey* analysis outside the safe harbor. An issuer proceeding that way, however, does so without the public, rule-based marker of separation that a compliant Form TR supplies. Form TR takes effect on filing, without SEC review or approval.

If the safe harbor conditions are satisfied, the SEC will 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 the Securities Act and Exchange Act. Federal registration and reporting requirements tied to that investment contract no longer apply going forward.The safe harbor is available whether or not an issuer used the startup or fundraising exemption.

The practical shift is from private judgment to public record: until now, whether a token remains subject to the securities laws has been a legal conclusion held privately by the issuer; a Form TR turns it into a public filing under a rule the SEC administers.

Four important points to keep in mind:

- The safe harbor is open to any issuer for any qualifying investment contract, including tokens distributed before the rules are adopted, which creates a path for already-circulating tokens.
- Its effect is prospective only: it does not cure an earlier unregistered offering, and antifraud liability for statements made while the contract existed survives the filing.
- It reaches only the Securities Act and Exchange Act definitions of "security"; the Investment Company Act and Investment Advisers Act definitions are untouched (the SEC asks in its request for comments whether to extend the safe harbor to them), so a fund, digital asset treasury company, or foundation holding the tokens must still analyze its own status under those statutes.
- And it can be lost going forward: new representations or promises after Form TR would call for a fresh *Howey* analysis and could create a new investment contract, with unclear consequences for tokens already trading.

Importantly, the SEC (including a future administration that may be less crypto-friendly) would retain the ability to challenge whether an issuer satisfied the safe harbor's conditions, and courts, other regulators, and private litigants remain free to take a different view. The proposal specifies no process or timeline for such a challenge and gives intermediaries no express protection for relying on a filed Form TR; if a certification later fails, transactions executed in the interim may be exposed. Some issuers may hesitate to file at all, since a Form TR could be characterized as an acknowledgment that an investment contract once existed, a concern on which the SEC has requested comment. And the courts will have the last word: under *Loper Bright*, a reviewing court owes the Commission's construction of "investment contract" no binding deference, so the framework's durability is itself an open question.[6]

Delayed-delivery structures such as simple agreements for future tokens (SAFTs), under which a fund or other investor pays today for tokens to be issued once a network is built, pose interesting questions under Regulation Crypto Assets. Under the Token Taxonomy, the sale of the tokens occurs when the agreement is signed, and the tokens are subject to the investment contract from that moment regardless of when they are delivered. Delivery does not by itself end the analysis, but no filing or public announcement is required to end it either. The delivered tokens remain subject to the investment contract for as long as purchasers reasonably expect the issuer to carry out the promised essential managerial efforts, and they separate from it when that expectation ends: at delivery, where those efforts are already complete, or afterward, upon their

6 *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

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completion or evident abandonment.[7] In other words, a token can stop being subject to an investment contract under the ordinary *Howey* analysis, without any filing. The safe harbor is a separate, optional route: an issuer that wants the certainty of Rule 400 files Form TR, and the filing makes the separation a matter of public record under an SEC rule. A Form TR covering the arrangement reaches both the purchase agreement and the tokens delivered under it. While tokens remain subject to an investment contract, resales require an exemption from registration and attention to underwriter status; where a particular arrangement stands is a facts-and-circumstances judgment that holders should make rather than assume.

The proposing release speaks to these structures expressly: as discussed above, it distinguishes an overlying token warrant from the underlying covered investment contract, and it places an investment contract to which any asset other than the token is subject outside the framework altogether. Each arrangement, and any warrant above it, accordingly requires its own legal analysis. Issuers that sold the same token in several rounds on different promises should expect a Form TR to identify, and address completion under, each arrangement, and investors should confirm that their arrangement is covered.

State Law Preemption

The proposed rules add a new "qualified purchaser" definition for purposes of Section 18(b)(3) of the Securities Act. This has the effect of treating offers and sales made under either the startup exemption or the fundraising exemption as "covered securities" that are not subject to state securities law registration or qualification requirements. The SEC has used Section 18(b)(3) this way before: the DC Circuit upheld the analogous "qualified purchaser" definition for Regulation A Tier 2 offerings in *Lindeen v. SEC*.[8]

The proposed rules separately preempt state securities law registration and qualification requirements for secondary market transactions by any person other than an issuer, underwriter or dealer, provided the units are part of a covered investment contract for which the issuer has satisfied a Regulation Crypto Assets exemption. Fungible units of the same covered investment contract initially sold under another federal exemption benefit as well, but a standalone offering under Regulation D or another federal exemption does not, by itself, trigger the preemption. This secondary-market preemption continues for as long as the issuer remains current with the applicable disclosure, filing and periodic reporting requirements for that covered investment contract; it is not a one-time benefit tied only to the original offering (current reports on Form 1-UC are excluded from the condition, since outside market participants may not know whether a reportable event has occurred). Preemption lapses during noncompliance and resumes upon cure, and for a startup-exemption issuer it ends when Form TR is filed at the close of the four-year period with the investment contract still outstanding, after which secondary trading requires a state-by-state analysis unless another exemption applies. The preemption is limited to state registration and qualification requirements; it does not affect state securities regulators' antifraud authority, state notice-filing and fee requirements, or other state-law provisions unrelated to registration and qualification. Nor does it displace state broker-dealer, agent or investment adviser registration requirements, which rest on separate statutory footing and continue to apply to intermediaries dealing in covered investment contracts.

Pending Market-Structure Legislation

The framework offered by Regulation Crypto Assets tracks the CLARITY Act, which passed the House with bipartisan support in July 2025 and was reported by the Senate Banking Committee in May 2026. Senate leadership filed a cloture motion on the motion to proceed on August 8, 2026, but the motion failed on the Senate floor on September 15, 2026, on a 49 to 50 procedural vote, well short of the 60 votes required, and the bill's path forward is uncertain. The CLARITY Act would legislatively divide regulatory jurisdiction between the SEC and the CFTC and establish a comprehensive market-structure framework.

Regulation Crypto Assets addresses only the offering side of that framework and leaves trading, custody, and exchange regulation to separate rulemakings that remain on the SEC's 2026agenda. The proposal's definition of "crypto asset" is identical to the definition of "digital asset" in the Guiding and Establishing National Innovation for U.S. Stablecoins Act (the "**GENIUS Act**"), and the startup exemption's four-year window tracks the CLARITY Act's timeline for a token project to reach a "mature blockchain system."

If the CLARITY Act or other market structure legislation is ultimately enacted, it could supersede, modify or formalize parts of Regulation Crypto Assets; if it is not, the SEC's rules will remain the primary source of regulatory clarity for crypto offerings—though, as agency rules rather than statute, they would be easier for a future SEC to revise or rescind. With the

7 Token Taxonomy at 29-32.

8 *Lindeen v. SEC*, 825 F.3d 646 (D.C. Cir. 2016).

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legislation stalled, this proposal stands, for now, as the primary vehicle for near-term regulatory clarity in crypto offerings, which raises the stakes of the comment process accordingly. The CFTC has indicated that it will proceed with crypto market -structure rulemakings under its existing authority; given the close coordination between the two agencies, we would expect any CFTC rulemaking to be consistent with the SEC's.

Next Steps

These are proposed rules, not final rules. Comments are due by October 20, 2026, after which the SEC will consider the comments received before deciding whether to adopt a final rule that could differ materially from the current proposal. Given the breadth of the release—which includes more than 150 discrete requests for comment—the final rules may look meaningfully different, and we would not expect final rules before the first quarter of 2027.

Businesses that expect to rely on Regulation Crypto Assets should consider submitting a comment letter. Likely themes include the safe harbor's exclusion of the Investment Company Act and Investment Advisers Act, the absence of an intermediary exemption or of reliance protection around Form TR, the custody and financial responsibility treatment of tokens subject to a covered investment contract in the hands of broker-dealers and advisers, protective Form TR filings, the treatment of SAFTs, token warrants, legacy tokens, and multi-asset investment contracts, the fixed-price offering requirement, the onshoring condition, and how market participants are to verify an issuer's reporting compliance. Issuers planning a raise in the next 12 to 24 months should begin positioning now, since prefiling communications can jeopardize the startup exemption's availability (see below).

A note on method: comments may be submitted in a company's own name, by counsel on behalf of an unnamed client, or through a trade association, which aggregates industry positions at some cost in specificity, and the routes are often combined. Quantitative data is especially well received. Anticipating the arguments of those likely to oppose the framework can be as valuable as advancing one's own: a record with both point and counterpoint is easier for the SEC to rely on in a final rule, and a well-developed comment record makes the final rule more durable against future efforts to unwind it.

Issuer and sponsor considerations:

- **Choose the right pathway.** The startup exemption is open to entities, individuals, or groups, requires no SEC qualification of an offering statement, and can be used only once per crypto asset—but its US$5 million cap and four-year duration limit it to early-stage development. Raises above the US$75 million Tier 2 cap have no Regulation Crypto Assets pathway at all; registration or another exemption remains the only route.
- **Check eligibility early.** The fundraising exemption allows larger raises but is limited to US-organized issuers meeting the US-nexus test (majority US officers/directors, more than 50% of assets in the US, and principal US administration). Only entities qualify; individuals and unincorporated groups cannot use the fundraising exemption. Offshore foundations weighing an onshoring restructuring should bring tax advisers in early.
- **Budget for compliance.** Tier 2 fund-raising-exemption issuers must obtain audited financial statements, and issuers in both tiers must satisfy ongoing annual, semiannual and current reporting on new SEC forms (Form 1-KC, Form 1-SC and Form 1-UC); only the audit requirement is limited to Tier 2.
- **Document managerial efforts from day one.** The description of "essential managerial efforts" an issuer promises to investors will later serve as the benchmark for whether those efforts have been completed or permanently ceased for safe-harbor purposes—detailed, concrete commitments are more useful here than vague or aspirational promises. Completion is measured against the issuer's own words: decentralization, for example, means what the issuer defined it to mean, not a general market conception. Open-ended commitments to continuous improvement may have no natural end-point, leaving an issuer unable to certify completion without arguably walking away from its promises. And whatever is promised must align with the white paper and the issuer's other public channels, which Rule 103 makes part of the compliance record.
- **Antifraud liability does not go away.** Both exemptions leave antifraud and antimanipulation liability fully in place, and the safe harbor addresses only the investment-contract prong of the security definition; a regulator or private plaintiff could still argue the asset is a security on another theory (or challenge the issuer's investment contract representations). Liability for the period the investment contract existed survives a Form TR filing, and Tier 2's audited financial statements and public reporting create a record on which private plaintiffs can draw.
- **Watch gun-jumping risk under the start-up exemption.** The startup exemption covers only transactions occurring after Form NOR is filed on the SEC's Electronic Data Gathering, Analysis, and Retrieval system. Any earlier communication may constitute an unregistered "offer" outside the exemption. Issuers already marketing a project publicly should assess their prior communications for exposure before relying on the exemption.
- **Issuers of tokens already outstanding should start the file now.** The safe harbor

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is open to tokens sold before the rules are adopted, but the certification looks backward. An issuer must reconstruct every representation or promise of essential managerial efforts (white papers, roadmaps, governance posts, social media, conference remarks), often across changed teams and channels; determine who the "issuer" is where a development company and a foundation divided the work, since the proposal offers no filing path where the persons that made the promises are gone; and impose communications discipline so that statements made between now and a filing do not enlarge the record. Form TR is a public legal position, and it should be prepared like one, with litigation posture in mind.

Investor considerations:

- **Investment limits differ by exemption.** Under the fundraising exemption, a non-accredited investor's purchase price is capped at 10% of the greater of their annual income or net worth. The startup exemption, however, imposes no individual investment limit and no accredited-investor requirement.
- **Disclosure is lighter than in a registered offering, but liability is not.** Startup-exemption disclosures are principles-based and self-certified by the issuer, without SEC qualification review, so the issuer, not the SEC, owns every statement in them.
- **The safe harbor is not a guarantee.** A Form TR filing does not bind courts, other regulators or private litigants, who remain free to argue that a crypto asset is still subject to an investment contract. The SEC itself can challenge a certification after the fact, with no specified process and possible consequences for transactions executed in the interim.

Broker-dealer, exchange and trading venue considerations:

- **Verifying issuer status will be a practical challenge.** State law preemption for secondary transactions depends on the issuer remaining current with its disclosure, filing and periodic-reporting obligations—not merely having qualified the original offering—and the SEC has asked for comment on whether purchasers and intermediaries can practically confirm this on an ongoing basis. Monitoring can identify filed reports and obvious delinquencies, but it cannot reveal an unfiled website amendment or establish that two fungible tranches trace to the same covered investment contract; platforms should consider contractual information rights from issuers whose compliance affects the platform's regulatory position.
- **Track related rulemakings.** This proposal should be read alongside the three crypto rulemakings that remain on the SEC's 2026 regulatory agenda, none of which have yet been proposed: (1) amendments to the broker-dealer financial responsibility and recordkeeping rules (Exchange Act Rules 15c3-1, 15c3-3, 17a-3, and 17a-4) to address crypto assets; (2) market-structure amendments governing the trading of crypto assets on alternative trading systems and national securities exchanges; and (3) amendments to the custody rules under the Investment Advisers Act and the Investment Company Act. Two related actions have already been taken: on September 1, 2026, the SEC proposed amendments to the transfer agent rules to accommodate distributed ledger recordkeeping, and on September 17, 2026, it issued the "innovation exemption" for tokenized NMS stock discussed in the next bullet.
- **Platform registration questions remain open.** The proposing release expressly does not resolve whether platforms facilitating secondary trading in covered investment contracts must register as exchanges, broker-dealers or alternative trading systems under the Exchange Act—the SEC states only that it "will continue to consider whether further action with respect to covered investment contracts beyond the proposed rules in this release is warranted." State-law preemption for secondary trading should not be read as resolving these separate federal-law registration questions. While a covered investment contract remains outstanding, tokens subject to it may be "securities" for Exchange Act intermediary purposes, so a platform listing a token during the startup exemption's four-year window must analyze its own registration status, and the preemption's carve-out for "dealer" transactions turns on the capacity in which a firm acts in each trade, not on its registration status. Thus, a registered firm executing a customer order as agent is a broker, not a dealer, whereas a firm selling from inventory or on a riskless principal basis is a dealer, and its resale must then find its own state exemption. Form TR is neither SEC approval nor a conclusive determination: its presence does not establish that the contract ended, and its absence does not establish that it continues. Custodians face the parallel question of whether holding tokens still subject to a contract triggers custody-related registration obligations. The five-year innovation exemption issued on September 17, 2026, which exempts venues trading tokenized NMS stock from the "exchange" definition and certain automated market maker liquidity providers from the "dealer" definition, is confined to

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tokenized NMS stock and supplies no relief for venues trading covered investment contracts; it does, however, confirm that the SEC is prepared to act on the trading side by exemptive order rather than await legislation.

- **The proposal contains no intermediary exemption, so Section 15(a) governs everyone who sells or facilitates.** Unlike Regulation Crowdfunding, which created "funding portals," Regulation Crypto Assets provides no exemption from broker-dealer registration for launchpads, platforms or other persons that facilitate startup-exemption or fundraising-exemption offerings for compensation. A platform that hosts a covered offering and receives transaction-based compensation is likely acting as a broker and must be registered or rely on an existing exemption. The same analysis applies to the issuer's own selling effort: general solicitation is permitted under both exemptions, but employees, "ambassadors" and referral programs compensated by reference to sales fall outside the Rule 3a4-1 safe harbor for associated persons of an issuer and raise unregistered broker questions for the individuals and for the issuer that pays them.
- **FINRA and retail conduct rules apply in full.** Regulation Best Interest governs any recommendation of a covered investment contract to a retail customer, and the startup exemption's absence of investor limits places the entire burden of suitability on the recommending firm. FINRA has asked member firms to notify it before commencing digital asset securities activities, and adding this business may require a continuing membership application under FINRA Rule 1017. FINRA's corporate financing rule, which reaches offerings made pursuant to an offering circular, appears on its terms to apply to fundraising-exemption offerings in which a member participates, and the communications rules will apply to any member's marketing of these securities.

Investment advisers, fund sponsors and other holders considerations:

- **The Investment Advisers Act and Investment Company Act gap is critical for managers.** Both statutes define "security" to include an investment contract in terms that track the Securities Act definition and have generally been interpreted consistently with it. Rule 400 as proposed reaches only the Securities Act and Exchange Act definitions, and the release asks whether it should extend to the other two. Unless it does, a compliant Form TR would end the token's Exchange Act security status while leaving open whether the same token remains a security for purposes of adviser registration, the securities-portfolio test that determines regulatory assets under management for separately managed accounts, the Investment Company Act status of any vehicle holding it, and the reach of the Advisers Act's substantive rules. A manager advising solely on tokens that have passed through Form TR also cannot safely conclude that it is outside the Advisers Act, and a digital asset treasury company or other public holder should expect those tokens to count as investment securities under the 40% test of Section 3(a)(1)(C) unless and until the safe harbor is extended or its own analysis concluding that no investment contract remains. Private funds relying on Section 3(c)(1) or 3(c)(7) are unaffected on the exclusion side, but their advisers are not. Extension of Rule 400 to both statutes is likely the single most important comment the asset management industry can make on this proposal.
- **Custody arrangements should not change on the strength of a Form TR.** Tokens subject to a covered investment contract are client "securities" for purposes of the custody rule, Advisers Act Rule 206(4)-2, and must be maintained with a qualified custodian, which in practice means a bank or trust company, a registered broker-dealer operating under the December 2025 custody statement, or a qualifying foreign financial institution. Self-custody and custody with an unregulated crypto platform do not expressly satisfy the rule. Because the proposed safe harbor does not reach the Advisers Act definition, a Form TR does not by itself take the token outside the custody rule, and advisers should not relax custodial arrangements on the strength of an issuer's filing alone. The SEC's separate custody-rule rulemaking on its 2026 agenda, which is expressly to address crypto assets, is the vehicle for resolving this, and advisers should consider addressing both releases in a single comment letter.
- **Compliance programs key off the statutory definition, not the Securities Act.** Several Advisers Act obligations turn on the Advisers Act definition of "security" rather than the Securities Act or Exchange Act definitions. Personal trading in tokens subject to a covered investment contract is reportable under the code of ethics rule, Rule 204A-1, and will remain so after a Form TR unless the safe harbor is extended. Form ADV and Form PF reporting of fund holdings, valuation policies and the marketing rule's treatment of performance are affected in the same way. Advisers should define the token universe in their compliance policies by reference to the covered investment contract, as the release does, rather than by reference to the token, and should build a process for tracking issuer Form NOR, Form 1-CRYPTO and Form TR filings for assets they hold.
- **Other key points for funds and advisers.** Advisers relying on the venture capital exemption must remain vigilant. Because the Commission does not regard covered investment contracts as equity securities, they are not qualifying investments under the Advisers Act Rule and count against the 20% basket of non-qualifying investments, which is consistent with the prevailing practice of treating token positions as non-qualifying but now carries the Commission's own reasoning. Advisers

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must also think about their investment exit strategies. While the covered investment contract is outstanding, a fund's resale of tokens requires its own exemption, and an affiliated fund should confirm how the conditions of Rule 144 would be satisfied, including the current public information condition, which the proposal does not appear to address.

Additionally, companies holding crypto assets should watch how the safe harbor affects assets they already hold. If a company holds crypto assets that were originally sold subject to an investment contract, a Form TR filing by the issuer confirming the safe harbor's conditions are met could change how those holdings are treated going forward, including for financial reporting and disclosure purposes. Companies with meaningful crypto holdings should monitor issuer Form TR filings relevant to their positions. Because the safe harbor does not reach the Investment Company Act or Investment Advisers Act definitions of "security," a fund or treasury vehicle whose portfolio consists largely of tokens once sold under investment contracts may also need to analyze its own status under those statutes, regardless of any Form TR.

Operating companies with token-adjacent programs should revisit loyalty, gaming, and network-participation programs that involve token distributions to determine whether they would be considered covered investment contracts under Regulation Crypto Assets. Businesses that distribute crypto assets through airdrops, staking or governance rewards, or similar programs outside a traditional capital raise, should assess whether those distributions, to the extent they meet the investment contract test, could be structured to rely on the startup exemption's broader coverage of non-capital-raising transactions.

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We will continue to monitor developments regarding Regulation Crypto Assets, including the rulemaking's progress through the public comment period, and will provide further updates as material developments occur.

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