



October 20, 2026

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Regulation Crypto Assets, File No. S7–2026–27, 91 Fed. Reg. 54510 (Aug. 21, 2026)

Dear Ms. Countryman:

Better Markets¹ appreciates the opportunity to comment on the above-referenced proposal.² The proposal would create a “tailored offering regime” for investment contracts involving crypto assets.³ This tailored offering regime would create exemptions for the offering of certain crypto investment contract securities from the registration requirements of the federal securities laws, as well as safe harbors that would remove these crypto investment contract securities from the reach of the federal securities laws entirely. Yet the Commission has not justified why the federal securities laws, which exist to protect investors when issuers sell securities to the public, should not apply to crypto investment contract securities offerings or identified the authority that permits it to create a tailored regulatory regime for crypto investment contract securities. As a result, the Commission should withdraw the proposal.

I. The exemption of crypto offerings from the registration requirements of the federal securities laws is inconsistent with the statutory scheme Congress envisioned.

The Commission’s desire to create rules to exempt crypto offerings from the registration requirements of the federal securities laws flies in the face of the purpose of those laws.

The purpose of the Securities Act of 1933 (Securities Act) is to protect the public by requiring ‘full and fair disclosure of information to the public in the [initial] sales of securities.’ The Securities Act requires that securities being sold through means of interstate commerce must be registered with the SEC. The registration requirements include a robust disclosure scheme to allow investors to accurately ascertain the value of the issued security. The disclosures include information on the character of the

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² 91 Fed. Reg. 54,510 (Aug. 21, 2026).

³ *Id.* at 54,510.

business, the purpose of the funds being raised, the issuing company’s financial statements, information on the issuer’s top management and principal shareholders, and information on the pricing of the security. These disclosures are designed to protect the investing public from fraud when evaluating the security.⁴

Congress also “recognized that certain instruments or transactions, because of the contexts in which they take place or the nature of the ‘security’ itself, are less likely to be vehicles for abuse.”⁵ It therefore exempted “these less ‘risky’ instruments or transactions from the Securities Act’s registration requirements.⁶ So Congress “exempted particular securities and specific transactions from the registration regime because it determined that there is ‘no practical need’ for registration or ‘the public benefits are too remote.’”⁷

Under this framework, “registration is the default rule.”⁸ There are exceptions, but they are generally limited to situations “where the ‘intrinsic nature of the issuer or the character of the security [or transaction] itself . . . would make further governmental regulation superfluous.’”⁹ The “narrow categories of securities and transactions” exempted from the registration process that normally precedes the offer and sale of all securities “reflect the judgment of Congress that investors in certain limited situations do not need the protections of the registration process.”¹⁰

There is nothing about crypto offerings that suggests they should fall within the category of offerings for which there is no practical need for registration because investors do not need the protections of the registration process. Indeed, the facts establish the opposite. The FBI’s 2025 Internet Crime Report showed that “cyber-enabled crimes defrauded Americans of nearly \$21 billion, with cryptocurrency and artificial intelligence-related complaints among the costliest,” that “investment fraud remains the primary driver, accounting for nearly 49% of all scam-related losses,” and that Americans “who submitted complaints involving cryptocurrency reported the highest losses, with 181,565 complaints totaling more than \$11 billion.”¹¹ The Financial Crimes Enforcement Network (FinCEN)

⁴ Neal F. Newman, et al., *Capital Formation, the SEC, and Accredited Investors*, 27 U. Pa. J. Bus. L. 130, 150 (2025) (internal citations omitted).

⁵ Marc I. Steinberg and William E. Kaulbach, *The Supreme Court and the Definition of ‘Security’: The ‘Context’ Clause, ‘Investment Contract’ Analysis, and Their Ramifications*, 40 Vand. L. Rev. 489, 513 (1987).

⁶ *Id.*

⁷ Felicia Smith, *Madoff Ponzi Scheme Exposes ‘The Myth of the Sophisticated Investor,’* 40 U. Balt. L. Rev. 215, 218 (2010).

⁸ Eric C. Chafee, *Securities Regulation in Virtual Space*, 74 Wash. & Lee L. Rev. 1387, 1412 (2017).

⁹ Marc F. Holzapfel, *An Analysis of the Section 3(a)(10) Exemption Under the Securities Act of 1933 in the Context of the Public Offering Component of Section 3(c)(1) of the Investment Company Act of 1940*, 8 Fordham J. Corp. & Fin. L. 427, 432-33 (2003) (alteration in original) (quoting J. William Hicks, *Exempted Transactions Under the Securities Act of 1933* §1.01[3][a] (2000)).

¹⁰ Gordon Schneider, *The Sale of a Business Doctrine—Another View*, 37 Sw. L.J. 461, 481 (1983).

¹¹ <https://www.fbi.gov/news/press-releases/cryptocurrency-and-ai-scams-bilk-americans-of-billions>.

recently released an analysis showing that Bank Secrecy Act reports flagged approximately \$12.7 billion in suspected crypto investment scam activity during a two-year period beginning in 2023.¹² Crypto fraud is so pervasive that in 2024 the FBI launched a special initiative “to identify and notify people who are currently falling victim to cryptocurrency investment fraud.”¹³ In light of these statistics, the SEC should subject crypto offerings to stringent regulation and not relieve them of the registration requirements that exist to protect investors.

Indeed, the prevalence of crypto crime suggests that the so-called bad actor provision that the Commission touts is insufficient in the context of crypto offerings. That provision renders the proposed exemptions unavailable if the issuer or persons associated with the issuer are subject to certain disqualifying events such as criminal convictions.¹⁴ But the disqualification only applies if the event occurs after the effective date of the proposed rules.¹⁵ This means that felons could avail themselves of the exemptions so long as they committed their crimes before the Commission finalized the proposed rules. Given the criminality in the crypto industry, this limitation on the bad actor disqualification leaves investors unprotected.

II. The Commission’s justifications for the proposal are unpersuasive.

The Commission does not address the prevalence of crypto fraud in its proposal. Instead, the Commission says the proposal is intended to “facilitate capital formation and accommodate innovation” while “ensuring that investors are adequately protected and provided with the information they need to make informed investment decisions.”¹⁶ Although part of the SEC’s mission is to facilitate capital formation, it is supposed to do that by ensuring investors have the information they need to make informed investment decisions so they can direct their capital to the most productive uses.¹⁷ The SEC is not supposed to “facilitate capital formation” by making it as easy as possible for issuers to raise money from an unsuspecting public. Capital raising is not the same thing as real capital formation and the SEC should not pretend that it is.¹⁸

Nor should the SEC pretend that the registration requirements of the federal securities laws are a barrier to capital formation. The registration requirements do not prevent capital formation; they facilitate capital formation. The “basic idea” is “that the promoters or managers of an enterprise possess privileged access to information about the enterprise’s ability to generate

¹² <https://bankingjournal.aba.com/2026/09/fincen-identifies-nearly-13b-in-suspected-crypto-investment-scams/>.

¹³ *See supra* note 11.

¹⁴ 91 Fed. Reg. at 54,528.

¹⁵ *Id.*

¹⁶ *Id.* at 54,510, 54,511-54,512.

¹⁷ *See* Luis A. Aguilar, Commissioner, Securities and Exchange Commission, *Address at the Council of Institutional Investors Spring Meeting: Facilitating Real Capital Formation* (Apr. 4, 2011), <https://www.sec.gov/newsroom/speeches-statements/spch040411laa-facilitating-real-capital-formation>.

¹⁸ *Id.*

profits for investors.”¹⁹ The disclosures that the registration requirements ensure investors receive “are designed to reduce the asymmetry of information between such insiders and the investors who entrust them with their funds and rely on their efforts.”²⁰ These disclosures “facilitate the allocation of capital to productive enterprises, deter the marketing of fraudulent enterprises, and thereby promote investor confidence, efficiency, and capital formation.”²¹

So it is registration that ensures investors “are adequately protected and provided with the information they need to make informed investment decisions,” which facilitates real capital formation. Yet the SEC is proposing to allow crypto companies to sell their tokens without registering them. This will neither facilitate capital formation nor adequately protect investors. Nor is it clear that rule changes are necessary to facilitate the ability of crypto companies to raise money. Crypto projects have in fact already raised capital while in compliance with SEC rules. In 2018, one *MarketWatch* analysis found nearly 300 separate crypto projects raised money through existing exempt offerings via the SEC, mostly using Regulation D.²² Now, however, the crypto industry wants special rules that will allow it to raise money from retail investors without registering their offerings. The Commission should not exempt these offerings from the federal securities laws to enable their sale to retail investors and their secondary market trading, rather than taking the appropriate path of forcing crypto exchanges to register with the SEC.

As for innovation, the SEC cites no provision of the federal securities laws that directs the SEC to adopt rules for the sole purpose of “innovation.” That is because no such provision exists. Indeed, innovation is not included in the description of the SEC’s mission on its website.²³

This makes sense. Innovation is barely mentioned in the statutes that the SEC enforces. The word “innovation” appears only once across the four foundational federal securities laws. It is entirely absent from the Securities Act of 1933, the Investment Company Act of 1940, and the Investment Advisers Act of 1940.²⁴ And its only mention in the Securities Exchange Act of 1934 is with respect to joint rules with the CFTC to permit the offer and sale of securities futures products.²⁵ That is one mention of “innovation” in almost 600 pages of legislative text.

¹⁹ Onnig H. Dombalagian, *Are Crypto Exchanges the Exchange Act’s Trojan Horse*, 21 Berkley Bus. L.J. 327, 357 (2024).

²⁰ *Id.*

²¹ *Id.*

²² Francine McKenna, *SEC action threatens billions raised in initial coin offerings that ostensibly targeted only wealthy investors*, MarketWatch (July 8, 2019), <https://www.marketwatch.com/story/sec-action-threatens-billions-raised-in-initial-coin-offerings-that-ostensibly-targeted-only-wealthy-investors-2019-06-07>.

²³ <https://www.sec.gov/about>.

²⁴ See <https://www.govinfo.gov/content/pkg/COMPS-1884/pdf/COMPS-1884.pdf>; <https://www.govinfo.gov/content/pkg/COMPS-1879/pdf/COMPS-1879.pdf>; <https://www.govinfo.gov/content/pkg/COMPS-1878/pdf/COMPS-1878.pdf>.

²⁵ <https://www.govinfo.gov/content/pkg/COMPS-1885/pdf/COMPS-1885.pdf>, at 79.

Conversely, the federal securities laws mention “investor protection” and the “protection of investors” repeatedly. The Exchange Act references the “protection of investors” over 200 times. The need for the SEC to consider the “protection of investors” appears another 125 times across the SEC’s three other organic statutes. The Supreme Court recognized as recently as three years ago that “Congress established the SEC to protect investors in securities markets.”²⁶ The SEC’s incantation of “innovation” does not justify adopting rules that allow crypto companies to circumvent the investor protections that Congress charged the SEC with enforcing.

III. There is nothing about crypto assets that renders them worthy of special rules.

The SEC’s attempt to justify special rules for crypto offerings based on the nature of crypto assets is no more persuasive than its attempt to justify special rules on the basis of capital formation and innovation. In a tacit admission of the unusual nature of its proposal regarding crypto offerings, the Commission acknowledges that “relying on familiar and well-established legal standards in lieu of tailored rules has some merit.”²⁷ Nonetheless, it says there are “two primary drawbacks” to relying on the normal legal standards in the context of crypto assets.²⁸

First, the SEC says that “it can be difficult to apply” to crypto assets the test the Supreme Court crafted in *SEC v. W.J. Howey Co.* for determining whether assets fall under the purview of the federal securities laws.²⁹ That is simply not true. The courts have had no trouble applying *Howey* to crypto. The problem for the Commission is that the courts have found under the *Howey* test that the federal securities laws apply to crypto assets in almost 100% of cases.³⁰ The Commission does not like this result because it seems intent on taking positions that favor the crypto industry, and the crypto industry does not want the federal securities laws to apply to most crypto assets. That the Commission does not like the fact that under *Howey* most crypto assets are securities, however, is not the same as *Howey* being difficult to apply to crypto.

Second, the SEC says that the Commission’s existing rules are not “fit for purpose” with respect to crypto offerings due to “the unique attributes of crypto assets.”³¹ All this means is that the crypto industry would rather not comply with the existing rules because to do so would make it harder for them to sell their assets to the public. The Commission acknowledges that one of the reasons it says existing rules are not “fit for purpose” is that existing rules “may limit the extent to which an issuer may sell securities to retail investors.”³² But there are good reasons why rules

²⁶ *Axon Enterprises, Inc. v. FTC*, 598 U.S. 175, 180 (2023).

²⁷ 91 Fed. Reg. at 54,512.

²⁸ *Id.*

²⁹ *Id.* (citing 328 U.S. 293 (1946)).

³⁰ See Ben Schiffin, *Having Won Almost 100% of its Cases Against the Crypto Industry, The SEC Baselessly Surrenders*, Better Markets (Mar. 12, 2025), https://bettermarkets.org/wp-content/uploads/2025/03/Better_Markets_Fact_Sheet_Crypto_Enforcement-3.12.25.pdf.

³¹ 91 Fed. Reg. at 54,512.

³² *Id.*

limit the extent to which issuers may sell securities to retail investors without fundamental investor protections. That is not a reason to create tailored rules specifically for crypto assets.

Moreover, over the years, plenty of industries have sought an easier pathway to sell securities to retail investors. This includes the biotechnology industry,³³ private funds,³⁴ and the manufacturing sector,³⁵ to name just a few. Issuers raising money via investment contracts with trading enabled by blockchain technology should not get special dispensation when there is a universal desire on behalf of issuers to raise money from the public with fewer disclosures and less legal recourse. While we question the wisdom of easing investor protection in the name of capital formation as a threshold matter, we especially question the need to do so arbitrarily for investment contract securities that happen to have the ability to trade and settle on a blockchain.

The Commission also justifies its approach by saying that, without “fit for purpose” rules, “some issuers may choose to conduct their crypto asset transactions offshore, limiting investment options (and, therefore, the ability to diversify) for U.S. investors or exposing them to additional risks from participating in markets with less robust investor protections.”³⁶ But in light of the fraud that pervades the crypto market, the Commission does not explain why it is bad if issuers conduct their crypto offerings offshore and why it is good if investors are exposed to crypto offerings. Nor does it explain why it believes that, if the SEC forced crypto offerings to comply with the rules that apply to all other securities offerings that protect investors, and crypto companies could not comply with those rules and protections, investors would seek out crypto offerings that would be forced offshore into markets with less robust investor protections. The federal securities laws have helped make the U.S. capital markets the envy of the world, and the fact that crypto companies may choose to conduct their offerings in less well-regulated jurisdictions is not a reason to make our regulatory regime more like offshore venues.

According to the SEC, its proposed rules for crypto asset offerings are similar to its “historical approach of creating bespoke frameworks for certain other unique asset classes (such as asset-backed securities and real estate investment trusts)” where existing disclosures may not be relevant to investors in the asset class.³⁷ But it acknowledges in a footnote that the rules for those asset classes created a framework for conducting *registered* offerings.³⁸ The proposal creates *exemptions from registration*. Indeed, the Commission notes it has previously “adopted Regulation S-K subparts tailored to specific issuers and transactions” to address a

³³ See Tom Popper, *House passes BIO-backed legislation to increase access to capital*, Bio.news (Dec. 12, 2025), <https://bio.news/federal-policy/house-passes-bio-backed-legislation-to-increase-access-to-capital/>.

³⁴ See *MFA submits plan to strengthen U.S. capital markets*, Managed Funds Association (Mar. 31, 2025), <https://www.mfaalts.org/press-releases/mfa-submits-plan-to-strengthen-u-s-capital-markets/>.

³⁵ See *Financial Services Highlights Support for Committee’s Bipartisan INVEST Act*, National Association of Manufacturers (Dec. 12, 2025), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=410955>

³⁶ 91 Fed. Reg. at 54,512.

³⁷ *Id.*

³⁸ *Id.* at 54,512 n.19.

perceived mismatch between existing disclosure requirements and novel asset classes.³⁹ These rule changes allowed for tailored disclosures *in registration statements*.⁴⁰ The Commission does not cite evidence of an historical approach that allows it to exempt offerings from the registration requirements on the ground that, in its view, existing disclosure requirements may not elicit the types of information that are most likely to be material to investors in the relevant asset class.

IV. The specific exemptions in the proposal are inconsistent with investor protection.

The Commission insists that its proposed exemptions for crypto offerings balance its desire to make it easier for crypto companies to sell their assets to the public with investor protection. But if the Commission were serious about investor protection, it would require crypto offerings to comply with the rules for all other securities offerings. Yet the entire purpose of the proposal is to allow crypto offerings to bypass those protections. Still, the Commission claims that the disclosures the proposal requires to accompany crypto offerings also protect investors. They do not.

The so-called startup exemption is the most egregious example. Under the startup exemption, issuers “file a short notice and place principles-based disclosures on a public website but provide neither financial statements nor a discussion of its financial condition.”⁴¹ There are no limits on retail access, general solicitation, or resales and no required intermediaries, investment limits, or financial disclosures, because the startup exemption “discards all those compensating protections.”⁴² No other “major federal capital-raising exemption currently combines retail access, general solicitation, immediately transferrable securities, no registered intermediary, no individual investment limit, and no financial statements.”⁴³ It is hard to imagine a regulatory regime more beneficial to the crypto industry, more detrimental to investors, and more antithetical to the one Congress envisioned for selling securities to the general public.

The fundraising exemption at least requires financial information and audited financial statements. But it still entails principles-based disclosures. And the problem with principles-based disclosure is that “it gives company executives discretion over what they tell investors.”⁴⁴ It also “can produce inconsistent information that investors cannot easily compare, making investment analysis—and, thus, capital—more expensive.”⁴⁵ So the “risks of allowing self-

³⁹ *Id.* at 54,529 & n.189.

⁴⁰ *See id.* at 54,523 n.142.

⁴¹ Lee Reiners, *Regulation Crypto Assets: Policymaking by Crypto, for Crypto*, The FinReg Blog (Aug. 20, 2026), <https://sites.duke.edu/thefinregblog/2026/08/20/regulation-crypto-assets-policymaking-by-crypto-for-crypto/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Joint Statement of Commissioners Robert J. Jackson, Jr. and Allison Herren Lee on Proposed Changes to Regulation S-K* (Aug. 27, 2019) (citation omitted), <https://www.sec.gov/newsroom/speeches-statements/statement-jackson-lee-082719>.

⁴⁵ *Id.*

interested issuers to define what is material not only undermines investor protection in terms of preventing or limiting fraud but also raises obvious questions as to whether covered investment contracts will be comparable.”⁴⁶ The fundraising exemption is also modeled on Regulation A,⁴⁷ which the Commission amended after Congress passed Section 401 of the JOBS Act, but just as the Commission excluded asset-backed securities from the list of securities eligible for Reg A because it did not believe “that Section 401 of the JOBS Act was enacted to facilitate the issuance of asset-backed securities,”⁴⁸ it was not enacted to facilitate crypto offerings.

Nonetheless, the Commission justifies the fundraising exemption on the ground that “a number of public commentators, including some Commissioners, have expressed concerns that the existing exempt offering and disclosure framework is not ‘fit-for-purpose’” for crypto offerings.⁴⁹ It cites comment letters from various crypto companies, as well as remarks by Chair Atkins and Commissioner Uyeda, as support for this statement. But the policy preferences of crypto companies and pro-crypto Commissioners do not justify exempting crypto offerings from the federal securities laws. The SEC is supposed to protect the investing public, not the interests of crypto companies. The public interest is not the same as the crypto industry’s interest.

The examples of the “concerns” that commenters have raised also do not justify the proposed exemptions from the registration requirements of the federal securities laws. As an example, the Commission says that “one commenter with ‘extensive experience in trying to fit [covered investment contract] issuances into available exemptions under the Securities Act’ suggested that issuers often encounter ‘too much confusion’ when working within the existing regulatory framework and noted that their ‘experience in many cases has proved frustrating.’”⁵⁰ The SEC does not exist to make it easier for issuers to sell their securities to the public without complying with the federal securities laws. The SEC exists to protect investors when issuers sell their securities to the public. The Commission does not explain why, if crypto companies are unable to fit their offerings into existing exemptions from registration, the answer is to create new registration exemptions based off of exemptions designed for entirely different asset classes with different risk profiles rather than that crypto companies should register their offerings.

V. The Commission should not allow crypto companies to determine for themselves that at a certain time the federal securities laws cease to apply to their tokens.

Although the startup exemption and fundraising exemption endanger investors for the reasons discussed above, the proposed safe harbor that would allow crypto offerings to no longer be considered an investment contract and therefore a security is even worse. The safe harbor allows crypto companies to certify that they have completed or ceased all essential managerial

⁴⁶ John Coates, et al., *Shadow SEC Statement No. 15: Regulation Crypto*, The CLS Blue Sky Blog (Oct. 6, 2026), <https://clsbluesky.law.columbia.edu/2026/10/06/shadow-sec-statement-no-15-regulation-crypto/>.

⁴⁷ 91 Fed. Reg. at 54,518.

⁴⁸ <https://www.sec.gov/files/rules/final/2015/33-9741.pdf>, at 27.

⁴⁹ 91 Fed. Reg. at 54,536.

⁵⁰ *Id.*

efforts that they represented or promised they would engage in under the covered investment contract and are not making and do not intend to make any new representations or promises to engage in essential managerial efforts with respect to the crypto asset.⁵¹ The safe harbor would be available to issuers that use the startup and fundraising exemptions and issuers that do not use the startup and fundraising exemptions, and thus would allow all crypto issuers to use the safe harbor “to inform investors and other members of the public that the issuer has determined that the protections of the Federal securities laws are no longer applicable” to that crypto asset.⁵²

According to the Commission, the proposed safe harbor would provide issuers “with greater certainty” as to when the federal securities laws no longer apply to a crypto asset.⁵³ But the safe harbor does not provide the certainty the Commission claims. For example, the Commission acknowledges that “it would not prevent other parties from asserting that a crypto asset is subject to an investment contract (or is otherwise a security).”⁵⁴ So the safe harbor would not insulate crypto issuers from private liability. And courts could reach different conclusions about the application of the securities laws to these crypto assets in private securities litigation. As a result, the Commission may invite more confusion through the safe harbor and not less.

The Commission says the ability of issuers to determine for themselves when the federal securities laws should no longer apply to their crypto assets will “facilitate better transaction planning while also protecting investors.”⁵⁵ How? The Commission does not explain how a self-certification that the securities laws are no longer applicable to a crypto asset protects investors. It does the opposite. It allows crypto companies to avoid investor protections based on their own belief that the federal securities laws should no longer apply to the crypto assets that they sold.

Indeed, in a footnote, the Commission says that “purchasers of that crypto asset may choose to take other steps to protect themselves.”⁵⁶ But the Commission is not supposed to leave investors to fend for themselves. It is supposed to protect investors. The safe harbor does not do that. It may facilitate the ability of crypto companies to avoid the requirements of the securities laws. The safe harbor does not provide crypto companies with this relief from regulatory requirements while also protecting investors, and the Commission should not say that it does.

The safe harbor also incentivizes a crypto company to “draft[] its promises narrowly.”⁵⁷ Because the safe harbor is available once an issuer “complete[s] the promises it chose to

⁵¹ *Id.* at 54,554.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 54,555.

⁵⁵ *Id.* at 54,545.

⁵⁶ *Id.* at 54,545 n.371.

⁵⁷ Reiners, *supra* note 41.

make,”⁵⁸ the safe harbor “rewards careful drafting of promotional commitments.”⁵⁹ This means that by limiting what it tells investors at the outset, a crypto company can more easily “exit the securities laws” while “continuing substantial, value-driving work” free of investor protections.⁶⁰

The safe harbor also covers crypto companies that abandon their projects. This allows “continuing securities-law disclosure to switch off when a project abandons the work that induced the investment, which is precisely when investors may most need information about what failed and what insiders will do next.”⁶¹ Crypto companies should be free to abandon their projects, but neither they nor the Commission should not be free to abandon investors.

VI. The proposal lacks a valid basis for its broad preemption of state securities laws.

The proposal also abandons investors in another way. It proposes to preempt State securities law registration and qualification requirements with respect to both crypto offerings pursuant to the startup exemption and fundraising exemption and secondary market transactions in these crypto assets.⁶² This removes vital investor protections for retail investors.

Section 18 of the Securities Act preempts state registration and qualification requirements for covered securities, and it says that a security is a covered security with respect to the offer and sale of the security to qualified purchasers, as defined by the Commission.⁶³ The Commission now proposes to define a qualified purchaser as “any person to whom securities are offered or sold pursuant to an offering under Regulation Crypto Assets or an offering pursuant to a transaction by any person other than an issuer, underwriter, or dealer with respect to a covered investment contract.”⁶⁴ This definition, which would render the qualified purchaser limitation meaningless by including all purchasers as qualified purchasers, nullifies Congress’s intent.

“Legislative history suggests any definition should ‘be rooted in the belief that “qualified” purchasers are sophisticated investors, capable of protecting themselves in a manner that renders regulation by State authorities unnecessary.’”⁶⁵ Yet the Commission proposes to define a qualified purchaser as including retail investors—the very investors who, as Congress recognized, need the protections that state registration and qualification requirements provide. The Commission recognizes that Section 18 requires that it “may define the term ‘qualified purchaser’ differently with respect to different categories of securities, *consistent with the public*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 91 Fed. Reg. at 54,555.

⁶³ *Id.*

⁶⁴ *Id.* at 54,557.

⁶⁵ William K. Sjostrom, Jr., *Carving a New Path to Equity Capital and Share Liquidity*, 50 B.C. L. Rev. 639, 670 (2009) (quoting H.R. Rep. No. 104-622, at 31 (1996), as reprinted in 1996 U.S.C.C.A.N. 3877, 3893).

*interest and the protection of investors,”*⁶⁶ yet it does not explain how defining a qualified purchaser as all purchasers of crypto offerings is in the public interest and protects investors.

The Commission also ignores its own previous statements. In 2001, the Commission proposed to define a “qualified purchaser” as an “accredited investor.”⁶⁷ In so doing, the Commission said that the “legislative history indicates that qualified purchasers for purposes of Securities Act preemption of state regulation should include investors that, by virtue of their financial sophistication and ability to fend for themselves, do not require the protections of registration under the state securities laws.”⁶⁸ The risky nature of crypto assets makes the qualified purchaser limitation and state registration and qualification requirements all the more important. The Commission does not explain why it ignores Congressional intent in the proposal.

The proposal would “substantially weaken state regulators’ ability to stop fraudulent and abusive crypto offerings before the damage is done, leaving them largely to pursue bad actors after investors have already lost their money.”⁶⁹ The Commission should prevent this result.

VII. The Commission lacks the authority to adopt the proposal.

Perhaps most importantly, it is not clear from where the Commission derives the statutory authority to exempt crypto securities offerings from the federal securities laws. “Agency rulemaking must stay within the bounds of the statutory authority conferred by Congress.”⁷⁰ Yet the Commission does not mention statutory authority in its discussion of the startup exemption.

With respect to the fundraising exemption, the Commission says repeatedly that it is modeled on Regulation A. But the Commission adopted Regulation A pursuant to its authority under Section 3(b)(2) of the Securities Act, and Section 3(b)(3) of the Securities Act limits exemptions enacted under Section 3(b)(2) to equity or debt securities.⁷¹ Section 3(b) does not give the Commission the authority to use Regulation A as a model to create an exemption for entirely different assets for which there is no similar statutory exemptive authority.

The Commission claims Section 28 of the Securities Act as the source of its statutory authority for the fundraising exemption (and presumably for the entire proposal).⁷² Congress

⁶⁶ 91 Fed. Reg. at 54,556 (emphasis added).

⁶⁷ *Defining the Term Qualified Purchaser under the Securities Act of 1933*, Securities Act Rel. No. 8041, 2001 WL 34681692 (Dec. 19, 2001).

⁶⁸ *Id.* at *4.

⁶⁹ Reiners, *supra* note 41.

⁷⁰ John L. Orcutt, *Did the SEC Expand ‘Blue Sky Notice Filings’ When It Raised Regulation Crowdfunding’s Offering Limit to \$5 Million and Adjusted Its Investment Limits*, 11 HLRe 99, 105 (2021).

⁷¹ <https://www.sec.gov/files/rules/final/2015/33-9741.pdf>.

⁷² 91 Fed. Reg. at 54,536.

added Section 28 to the Securities Act in 1996.⁷³ It authorizes the Commission to “exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision” of the Securities Act “to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”⁷⁴

The problem is that the Commission is not simply exempting certain assets from certain provisions of the Securities Act; it is, in its own words, creating a “tailored offering regime for certain investment contracts involving crypto assets.”⁷⁵ Such a dramatic departure from the rules governing public securities offerings “could easily be viewed by a court as beyond the scope of what Congress envisaged when it granted the SEC authority to create ‘exemptions.’”⁷⁶

Indeed, when it comes to Section 28, the Commission “has not used this power often.”⁷⁷ And when it has, it has been for “relatively small-bore” exemptions.⁷⁸ It has not used Section 28 to create an entirely new tailored regulatory regime for a novel asset class.

Moreover, action under Section 28 “must be taken in accordance with the public interest and consistent with the protection of investors.”⁷⁹ The proposal does not satisfy this standard.

The Commission must . . . explain why removing registration protections from these retail token offerings satisfies both requirements. The record makes that a difficult case. Bitcoin trades near \$73,000, roughly half its October 2025 all-time high of \$126,210, while total crypto market capitalization has fallen from roughly \$4.2 trillion to just over \$2 trillion, making the first half of 2026 the market’s worst since 2022. Unlike traditional stocks and bonds, the tokens covered by the proposal generally convey no conventional claim on an issuer’s cash flows or assets, leaving their value heavily dependent on continued demand in highly volatile secondary markets. Yet the proposal would facilitate greater retail participation while allowing immediate transferability and, under the startup exemption, requiring no financial statements, intermediary, individual investment limit, or mandatory insider lockup. The Commission’s own economic analysis acknowledges the informational advantages enjoyed by insiders and evidence supporting lockups, then declines to require one. . . . Section 28 requires more than a generalized preference for

⁷³ Joseph F. Morrissey, *Rhetoric and Reality: Investor Protection and the Securities Regulation Reform of 2005*, 56 Cath. U. L. Rev. 561, 601 (2007).

⁷⁴ 91 Fed. Reg. at 54,536 n.222.

⁷⁵ *Id.* at 54,510, 54,511.

⁷⁶ Morrissey, 56 Cath. U. L. Rev. at 603.

⁷⁷ Usha R. Rodrigues, *Financial Contracting with the Crowd*, 69 Emory L.J. 397, 456 (2019).

⁷⁸ *Id.* at 457.

⁷⁹ Morrissey, 56 Cath. U. L. Rev. at 604.

innovation; the SEC will have to explain why investor protection means allowing insiders to leave sooner while retail investors arrive earlier.⁸⁰

The Commission will have a hard time coming up with a plausible explanation. It is readily apparent that the proposed rules “on their face seem to oppose the interests of investor protection and instead are more concerned with providing ease of access to the capital markets for issuers.”⁸¹ This is a problem for the Commission because “dismantling the regulatory system that has protected investors in the past in the name of improving efficiency and access to capital markets is not in accord with section 28, which demands that the SEC act to protect investors.”⁸²

The purpose of Section 28 is not to allow the Commission “to gut many of the valuable investor protection requirements of the securities laws.”⁸³ Yet that is exactly what the Commission invokes Section 28 to do. This is yet another reason to withdraw the proposal.

Finally, the Commission ignores the fact that Congress has spent the last 18 months debating whether or not to amend the federal securities laws in order to create a framework similar to the proposal. Specifically, Congress considered—and rejected—legislation that would have allowed issuers offering investment contract securities traded on secondary markets enabled by blockchain technology to disclaim away entrepreneurial efforts with a self-certification. After significant debate, Congress rejected those changes. Now, the SEC attempts to move forward unilaterally using existing authority notwithstanding the message from the legislature.

This is precisely the type of overreach that the Supreme Court rejected in establishing the “major questions doctrine.” Under that doctrine, in cases where an agency claims broad authority to make major policy decisions of “economic and political significance,” the agency “must point to ‘clear congressional authorization’ for the power it claims.”⁸⁴ That is because the Supreme Court presumes “that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”⁸⁵ This means that administrative agencies such as the SEC cannot read novel and new authorities into extant statutes in the face of congressional silence, let alone when Congress speaks clearly and rejects precisely the changes now being proposed via rule amendment. The changes at issue here are precisely the types of changes with vast economic and political significance that the Court sought to safeguard from administrative overreach.

⁸⁰ Reiners, *supra* note 41.

⁸¹ Morrissey, 56 Cath. U. L. Rev. at 604.

⁸² *Id.* at 605.

⁸³ 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 4:118 (May 2026 update).

⁸⁴ *West Virginia v. EPA*, 597 U.S. 697, 721-23 (2022) (internal citations omitted).

⁸⁵ *Id.* at 723 (internal citation omitted).

Conclusion

We hope these comments are helpful as the Commission considers this matter.

Sincerely,

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