

October 7, 2026

Via Electronic Submission

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

Re: Comment on SEC Proposed Rule Regulation Crypto Assets
Release No. 33-11434; 34-106150; File No. S7-2026-27

Dear Secretary Countryman

The undersigned respectfully submit this letter commenting on the SEC's Proposed Regulation Crypto Assets rule. We support the views expressed in the attached Shadow SEC Statement 15 and respectfully request that this letter and the attached statement be included in the public comment file for the above-referenced rule.

The attached statement sets forth our views regarding the Commission's proposal and is submitted for the Commission's consideration during the rulemaking process.

Respectfully submitted,

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Shadow SEC Statement No. 15: Regulation Crypto

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October 6, 2026

On September 15, the Clarity Act failed to secure a cloture vote in the U.S. Senate, with four Republicans and all 47 Democrats voting against considering the bill at this time. The Act may come back to life again next congressional session, but for this session it will not be enacted. In a September 14, 2026 release, senators Lummis, Boozman, and Scott described 126 substantive changes made at the request of Democrats to the version of the Clarity Act; the earlier version was critically reviewed in our Statement No. 14, *Reject the Clarity Act*, [published](#) on The CLS Blue Sky Blog on September 10, 2026. Among other revisions, the Act's revised ethics provisions would provide "a meaningful role for state attorneys general in enforcement." This alone was considered inadequate by all Democrats, with Senator Richard Blumenthal, for example, calling the revised ethics rules "a charade" and "a sham."^[1] Senator Mark Warner pointedly added that he voted no because the revised bill failed to address the "fundamental conflicts of interest" related "to Trump's crypto ventures."^[2]

In addition to the Clarity Act, the Commission is now considering Regulation Crypto. Regulation Crypto as proposed is deeply flawed. The Startup Exemption ignores several existing small-issue exemptions which make its utility question-begging. There is no requirement that resales be registered or subject to another exemption such as Rule 144. The Fundraising Exemption largely mimics Regulation A, with modest softening of that Regulation's requirements to simplify MD&A disclosure and permit principles-based disclosure. There are other novelties in the Proposed Regulation. The disqualification provisions in Rule 104 will not apply to earlier-committed bad conduct, which amounts to a free pass for those who earlier committed misconduct and want to remain in the crypto industry. Given the current frequent use of Section 4(a)(2), Regulation D, Regulation A, and Regulation Crowdfunding to register crypto offerings, the fundamental question is, do we need a new Regulation Crypto at all?

At the very least, Regulation Crypto should be repropounded to address two fundamental weaknesses. The case for treating an investment contract based on a digital asset differently than other investment contracts has not been made. Second, nor has the case for principles-based disclosure compliance been effectively made. Management already has considerable discretion in how it complies with such items as Management Discussion and Analysis and Risk Factors. While Regulation Crypto does recognize there are new aspects to the business of digital assets, these can be effectively addressed through amendment to the instructions to the description of the Business in Item 101(a)(1) of Regulation S-K or additional Regulation S-K items.

In August, the Commission proposed Regulation Crypto, which addresses investment contracts involving crypto assets.^[3] This Regulation is narrower than the Clarity Act and largely builds on earlier Atkins Commission releases, notably including its March 2026 Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets and the work and the writing and responses to the Crypto Task Force created on January 21, 2025.

There are five subparts in Regulation Crypto:

Subpart A includes generally applicable rules including Definitions (Rule 100), largely consistent with earlier adopted rules in Regulation A and Regulation D; General Provisions (Rule 101), including integration which would follow Rule 152; Inflation Adjustments for Offering Limits (Rule 102); Disclosure Requirements (Rule 103), notable for its proposal of principles-based disclosure requirements which are applicable to Forms 1-CRYPTO, 1-KC, 1-UC, TR and NOR, Rules 600-605 of Regulation Crypto; and Disqualification (Rule 104), which largely follows Regulation A Rule 262. A key definition addresses a *covered investment contract*, which would be an investment contract that satisfies three criteria: (1) A crypto asset is subject to the investment contract; (2) the crypto asset is not a security; and (3) no asset other than the crypto asset (including any security or non-security asset) is subject to the investment contract.^[4] The definition of *crypto asset* is limited to those assets for which the relevant technology (i.e., cryptographically-secured distributed ledger) is necessary.^[5]

Subpart B in proposed Rule 200 created a Startup Exemption for one-time offerings of up to \$5 million with a four-year duration for eligible issuers who file Form NOR, a notice of reliance, a Form TR, a transition report, and periodic updates. Issuers that rely on the Startup Exemption would remain subject to the antifraud provisions of the federal securities laws, including Section 17 of the 1933 Act and Section 10 of the Securities Exchange Act.^[6] The Commission has several existing small-issue exemptions, including those under Regulation A and Regulation Crowdfunding. The proposed Startup Exemption is a serious departure from the nearly century experience of the U.S. securities laws. One novelty is the specificity of a four-year duration, a limit to a one-time use, and the intent to permit airdrops and distributions related to staking, governance, and gas fees. Airdrops essentially are gifts—delivery of crypto assets without the necessity of payment.^[7]

There is no requirement under the Startup Exemption for disclosing financial information or providing narrative disclosures regarding the issuer’s financial condition; the sole limitation is the four-year duration during which \$4 million can be raised.^[8] The NOR is a simple identification of the issuer, the name of the crypto asset, a website address, and certification that information in Form NOR is true, complete, and correct.^[9] Rule 200(e) also would require the issuer, not later than four years after the date on which the issuer filed a TR, to inform investors, the Commission, and members of the public that the issuer has ceased relying on the Startup Exemption.^[10]

Further novelty appears in the treatment of resales of securities acquired pursuant to the Startup Exemption. The Commission committed a notable overreach.^[11] This is markedly different than all other investment contracts which only can be resold if they are subsequently registered under Section 5 or subject to another exemption such as Rule 144 or Rule 144A. Indeed, it is the zealous commitment to resale restrictions that fulfils the policy justification underlying the exemption relied upon by the issuer to effect the offering.

Regulation A as it now reads would not consider covered investment contracts to be “eligible securities” under Regulation A.^[12] This could be addressed by a simple amendment to Regulation A. The Commission believed: “Even if covered investment contracts were eligible securities under Rule 261, we agree with commenters that Regulation A’s disclosure requirements as well as some of its offering mechanics and conditions, limit the exemption’s suitability for offerings of covered investment contracts.” The mechanics and conditions largely consist of the issuer eligibility requirements in proposed Rule 202(b)(1) and the requirement that the Rule 103 disclosure requirements are freely accessible, free of charge at the issuer’s website. This could be addressed simply by amendments to Regulation A or Instructions to Regulation A.

Subpart C delineated in proposed Rules 300 to 307 would create a Fundraising Exemption for offerings up to \$75 million for covered investment contracts in a 12-month period. This exemption “is modeled in part on Regulation A.” As with Regulation A, there are two tiers in complying with the Fundraising Exemption—Tier 1 for offerings under \$20 million, including not more than \$6 million offered to all selling shareholders of the issuer that are affiliates, and Tier 2 for offerings that do not exceed \$75 million, including not more than \$22.5 million offered to all selling shareholders that are affiliates of the issuer.^[13] As with Regulation A, there is an Offering Statement^[14]; an Offering Circular^[15]; a Preliminary Offering Circular^[16]; provision for Solicitations of Interest and Other Communications^[17]; Periodic and Current Reporting and Transition Report^[18]; Suspension of Exemption^[19]; and Withdrawal or Abandonment of Offering Statements.^[20]

As with Regulation A, these requirements reflect an “access equals delivery” model for final offering circulars when sales are made on the basis of offers conducted during the prequalification period and the final offering circular.^[21] Proposed Rule 303(c)(3) like Regulation A permits continuous and delayed offerings under the Fundraising Exemption.^[22] The Fundraising Exemption does not permit delayed-at-the-market offerings beyond what is currently permitted under Regulation A.

Form 1-CRYPTO consists of non-financial Items 1-12 and Financial Statements in Item 13 prepared in accordance with U.S. GAAP and audits conducted in accordance with U.S. Generally Accepted Auditing Standards or the standards of the Public Company Accounting Oversight Board satisfying in either event the independence standards of Rule 2-01 of Regulation S-X. Nonetheless, the Commission insists that “Form 1-CRYPTO would incorporate the principles-based narrative disclosure requirements in Rule 103 rather than a

separate set of non-financial disclosures.” This is an overstatement. It is not news that the Commission intends to assert that “these disclosures are based on the unique attributes of these offerings and issuers and are designed to capture the information most relevant to investors in these offerings.” This is the purpose of allowing, as the standards currently do, management to have broad discretion in how they respond to Regulation S-K items such as Management Discussion and Analysis and Risk Factors. While principles-based disclosures will give issuers more freedom in how they comply with specified requirements, the principles-based disclosures apply to specific disclosure requirements. This is not entirely principles-based or rule-based, but a combination of the two.

There are some notable changes in the requirements of Form A disclosures. Issuer’s Management Discussion and Analysis need only comply with the simpler Regulation Crowdfunding version of the MD&A item because “many of the issuers . . . would be in an earlier stage of development, with narrower operational focus and with less complex operations. . . .”^[23] Issuers in Tier 1 offerings would not be subject to a financial statement assurance requirement as would Tier 2 offerings which would be subject to auditing standards.^[24] But most of the provisions in this Part such as the filing, amendment, and qualification standards in proposed Rules 301, 306, and 307 are substantially similar to Regulation A as are the offering circular requirements in Rules 302 and 303, which are substantially similar to Rules 253 and 254 of Regulation A, and the testing-waters proposed Rule 304, which is modeled on Regulation A Rule 255, and ongoing reporting under proposed Rules 305(a), (b) and (c).^[25] Proposed rules 305(c) and (d) would require transition reporting like that applicable to the Startup Exemption.

Subpart D in proposed Rule 400 would allow a covered investment contract that has ceased to exist no longer to be subject to the federal securities laws definition of *security* in Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Securities Exchange Act. Rule 400(a) conditions Rule 400 on the covered asset contract permanently ceasing all managerial efforts that it represented or promised it would engage in under the investment contract and that it does not intend to make any new representations or promises to engage in essential managerial efforts with respect to the crypto asset. These conditions codify the Commission’s views expressed in its 2026 Interpretation concerning some of the circumstances under which a covered investment contract ceases to exist.

Subpart E would add proposed Rule 500, which includes a definition of *qualified purchaser*. The significance is that offerings so qualifying would under amended Section 18(b)(3) of the Securities Act of 1933 be outside state securities registration and qualification with respect to any offer and sale of a covered investment contract under a Regulation Crypto exemption as well as secondary market transactions with respect to these securities by any person other than an issuer, underwriter, or dealer. This represents a further significant departure from current regulation.

The most fundamental question with respect to Regulation Crypto is, do we need it at all? The current system of Securities Act exemptions, including Section 4(a)(2), Regulation D, Regulation A, and Regulation Crowdfunding, is working. Between 2013 and 2024, according to CoinMarketCap, 9746 crypto assets were listed or started trading on one or more exchanges in the United States or abroad.^[26] Between 2009 and 2024, 581 issuers undertook 682 crypto-related offerings under Regulation D.^[27] These issuers raised \$4.7 billion between 2017 and 2024.^[28] Between 2015 and 2024, 14 issuers qualified crypto-related offerings under Regulation A, raising \$546 million.^[29] Between 2016 and 2024, 41 issuers conducted 42 crypto-related offerings under Regulation Crowdfunding, raising \$13.6 million.^[30]

The Commission’s basic argument for creating the new Regulation is premised on the following assertions:^[31]

First, although the Commission acknowledges that under the definition of an *investment contract*, part of the definition of a *security* as developed in *SEC v. W.J. Howey Co.*^[32] and its progeny may apply when a crypto asset is first offered or sold, a crypto asset may subsequently cease to be an investment contract because there would no longer be requisite managerial or entrepreneurial efforts.^[33] This issue was fully addressed by the Commission in its 2026 Interpretation, Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets. At most, Rule 400 codifies existing law.

Second, the Commission urges in its Proposal Release: “[M]any of the Commission’s existing rules require issuers to provide disclosures that may not be relevant to investors in covered offerings.” Here, the Commission melds two approaches: First, Rule 103, which specified disclosure requirements for exempt offerings, allows issuers to employ principles-based approaches to these requirements. “This principles-based approach is intended to give issuers the flexibility to tailor the disclosure for their particular facts and circumstances (and avoid compelling disclosure of irrelevant information) while still eliciting material information to investors.”^[34] Principles-based information is in contrast to current Regulation S-K, which specifies “detailed information that must be provided.”^[35] Second, the Commission echoed the submissions to the Crypto Task Force and other public commentary that the Commission’s existing disclosure requirements in Regulation S-K and Form 1-A “do not elicit the types of information that are likely to be material to investors in covered investment contracts.”

Both assertions are question-begging. The Commission’s willingness to revise its disclosure requirements for covered investment contracts in Regulation Crypto largely is based on comments, often from issuers or related persons who have an interest in reducing disclosure requirements. Notably, there is no effort to estimate fraud in crypto offerings and its relationship to the disclosure requirements.^[36] We know that crypto offerings and platforms have been involved in several substantial frauds such as those involving FTX, Binance, and Terraform Labs,^[37] and crypto has been used in several schemes to steal cryptocurrency, such as allegations that North Korea had stolen as much as \$6 billion in cryptocurrency over the past decade.^[38] The Commission’s focus is on facilitating new capital fundraising, not deterring or penalizing fraud. Whether traditional mandatory disclosure requirements should be viewed as immaterial to investors in covered investment contracts is not adequately analyzed until fraud risk is taken into account. The risks of allowing self-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.

Historically the Commission has adopted several techniques to tailor existing disclosure requirements to the vast array of issuers subject to the Securities Act, including organizing the Corporate Finance Division by types of issuer to achieve industry appropriate comments, individual comment letters to registrants, allowing management to tell its own story through Management Discussion and Analysis, and to summarize what it views as relevant Risk Factors. Issuers can proceed under Rule 506(b) of Regulation D by limiting sales to accredited investors.^[39] Small issues can proceed under reduced mandatory disclosure requirements such as those applicable to Regulation A, Regulation D Rule 504, and Regulation Crowdfunding. It distorts the current framework of mandatory disclosure to mischaracterize it as “inflexible.”^[40] The key to SEC enforcement under the mandatory disclosure system has been to adopt the applicable rules to the realities of each industry and, where appropriate, each issuer.

Third, the strongest point that the Commission made in its Regulation Crypto proposal was that existing disclosure requirements do not address a number of topics that are relevant to investors in covered investment contract offerings, “including the technical governance and economic characteristics of crypto assets; and description of the project; asset allocations, liquidity and tradability; crypto asset and network security and unique technological, market and redemption risks.”^[41] Rule 103(5) – (9) specifically requires disclosure of (5) Associated crypto network/application; plan of development; (6) Security: source code; (7) Subject crypto asset economics and allocations, including “the subject crypto assets supply, pricing, lockups, distribution methods, holdings of related persons, and release schedules, the associated crypto network or associated crypto application’s mechanisms for generating and destroying crypto assets, and methods to verify the subject crypto asset’s transaction history”; (8) Governance, including “A description of the material aspects of the subject crypto asset’s and associated network’s or associated crypto application’s governance mechanisms, smart contract governance mechanisms, and permissions”; and (9) Subject crypto asset ecosystem, that is “(the system or network of contributors or participants that support and interact with the subject crypto asset and associated crypto network of associated crypto application), ‘onchain’ and ‘offchain,’ including information regarding the technology infrastructure, types of participants, and other parties and systems using the subject crypto asset and associated network or associated crypto application.”

But these data when material already are required under Regulation S-K or could be easily addressed by new Instructions to Regulation S-K and Regulations A and Crowdfunding or new items in these regulations. Under the existing standards of Regulation S-K Item 101(a)(1), a registrant is required to disclose information “material to an understanding of the general development of the business of the registrant.”^[42] Item 303(a) states: “The objective of the ‘management’s] discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flow from outside sources.”^[43] When necessary, the Commission has amended Regulation S-K to particularize requirements for specific applications, such as Item 106 which addresses cybersecurity; Item 1200, which addresses oil and gas-producing activities; Item 1300, which addresses mining operations; Item 1400, which addresses banks and savings and loans; and Item 1600, which addresses Special Purpose Acquisition Companies.

There are other novelties in the proposed rules. For example, “the disqualification provisions in Rule [104] would not apply with respect to any conviction, order, judgment, decree, suspension, expulsion or bar that occurred or was issued before the date on which Rule 104 became effective.” The purpose of the disqualification provisions is to keep bad actors out of the securities industry. But as proposed, Regulation Crypto’s disqualification provisions give a free pass to become involved in the crypto asset industry after earlier misconduct. Compare broker-dealer and associated person disciplinary standards in Sections 15(b)(4) and (6), which contain no similar limit on the applicability of disqualification standards.

There are some valuable aspects of Regulation Crypto, such as its delineation in proposed Rule 103(5) – (9) of several aspects of crypto asset offerings, which are different than those in other business entities.

But Regulation Crypto as it now stands should be repropose to address two fundamental overreaches. First, if a covered investment contract involving crypto is an investment contract, the case for treating it as different than other investment contracts in terms of compliance with such issues as resale has not been made. An investment contract is an investment contract. Resale, as the Securities Act clearly directs, requires either registration or an exemption. It does not permit the creation of a new breed of sacred cows regardless of how much industry commenters would prefer this.

Second, the emphasis on principles-based disclosure compliance is overdone. The Commission’s insistence on the continuing application of fraud provisions such as Sections 12 and 17 in the Securities Act and Section 10(b) in the Securities Exchange Act implicitly recognizes this. The Commission should instead emphasize that compliance with the restated disclosure requirements for covered investment contracts will allow management broad discretion as currently exists under Regulation S-K Items including Management Discussion and Analysis.

This post comes to us from the Shadow SEC, whose members are professors John Coates at Harvard Law School, John C. Coffee, Jr. at Columbia Law School, James D. Cox at Duke University School of Law, Merritt B. Fox at Columbia Law School, and Joel Seligman at Washington University School of Law.

ENDNOTES

- [1] David Yaffe-Bellany, Senate Vote Stalls Business-Friendly Legislation for Crypto, *N.Y. Times* (Sept. 16, 2026).
- [2] Vicky Ge Huang & Dylan Toker, Landmark Crypto Fails to Advance, *Wall St. J.* (Sept. 16, 2026).
- [3] Sec. Act Rel. 11,434 (2026) (proposal).
- [4] *Id.* at n. 115.
- [5] *Id.* at n. 123.
- [6] *Id.* at 70-71.
- [7] See Carol Goforth & Yuliva Guseva, Regulation of Cryptoassets 763 (West Academy Third Edition 2026).
- [8] See Sec. Act Rel. 11,434, *supra* at n. 78.
- [9] *Id.* at n. 85.
- [10] *Id.* at nn. 216-220.
- [11] See text before n. 168.
- [12] See n. 249.
- [13] Rule 300(a).
- [14] See Rule 301 filed on Form 1-Crypto.
- [15] See Rule 302.
- [16] See Rule 303.
- [17] See Rule 304.
- [18] See Rule 305, notable for Form 1-SC which replaces quarterly reporting with semiannual reporting as well as the annual report requirements in Form 1-KC.
- [19] See Rule 306.
- [20] See Rule 307.
- [21] See Sec. Act Rel. 11,434, *supra* at n. 289.
- [22] See *id.* at nn. 293-310.
- [23] *Id.* at n. 315.
- [24] See *id.* at nn. 322-324.
- [25] See *id.* at nn. 348-351.
- [26] See Sec. Act Rel. 11,434, *supra* at 200-201.
- [27] *Id.* at 202.
- [28] *Id.* at 203.
- [29] *Id.* at 204-205.
- [30] *Id.* at 207.

[31] See text at nn. 8-10.

[32] 328 U.S. 293 (1946).

[33] See Proposed Rule 400, *supra* and *id.* at 55-57.

[34] *Id.* at 53.

[35] *Ibid.*

[36] Compare SEC Shadow Statement No. 9: Shock and Awe—The Commission’s 1934 Act Blunderbuss Revisions, including data on percentage of registrants reporting management’s assessment of ineffective internal control financial reporting and restatements.

[37] See e.g., 1 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation 77-103 (Wolters Kluwer 2024) and 2026 Ann. Supp. at 33-37.

[38] See Patricia Kowsmann & Timothy Martin, North Korean Hackers Steal Billions in Crypto to Keep Regime Afloat, *Wall St. J.* (Apr. 4, 2025).

[39] See Rule 501(a).

[40] See Sec. Act Rel. 11,434, *supra* at 49.

[41] *Id.* at 49-50.

[42] See generally 2 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation 257-274 (Wolters Kluwer 7th ed. 2024).

[43] *Id.* at 318-371.