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SEC proposes Regulation Crypto Assets: A meaningful offering framework, though key questions remain

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Reg CA would create tailored offering exemptions and disclosure rules for some primary offerings of crypto assets, but would provide less certainty to intermediaries and secondary markets.

The Securities and Exchange Commission has proposed the first comprehensive offering framework tailored to crypto assets: two new exemptions (with three exempt offering pathways), a token-specific disclosure regime, a safe harbor and broad preemption of state "blue sky" laws.

Announced on August 18, proposed Regulation Crypto Assets, or Reg CA, is the most significant component of the SEC's crypto agenda since establishment of the Crypto Task Force in 2025. The proposal would materially improve the ability of developers to fund smaller crypto projects without registering an offering under the Securities Act of 1933.

Offering exemptions. Reg CA would establish three exempt offering pathways: a startup pathway permitting offerings of up to $5 million over four years, a Tier 1 fundraising pathway permitting offerings of up to $20 million over 12 months and a Tier 2 fundraising pathway permitting offerings of up to $75 million over 12 months. The Tier 1 and Tier 2 pathways are formally structured as two tiers of a single fundraising exemption, but they differ materially in offering limits and financial-statement requirements, including an audit requirement applicable to Tier 2.

Crypto offerings of more than $75 million would either need to be registered through a process the proposal acknowledges is not well-suited to the asset class, or rely on another offering exemption or safe harbor, which the proposal acknowledges may undermine a project's ability to achieve network effects.

Consequences for secondary-market trading. As we discussed in a previous client update, the Commission issued an interpretation in March 2026 stating that a crypto asset sold in an "investment contract" transaction could remain subject to the investment contract when transferred in secondary-market transactions. Reg CA builds on the March 2026 interpretation by establishing an investment contract safe harbor.

The safe harbor would provide a mechanism for an issuer that has completed or permanently ceased all promised "essential managerial efforts" to certify that fact publicly on new Form TR, upon which the crypto asset would be deemed no longer subject to the relevant investment contract. The safe harbor is only available to crypto assets sold in an investment contract, and that investment contract may, but need not, have been issued in reliance on a Reg CA offering exemption.

The SEC did not, as part of Reg CA, propose an exemption from exchange, broker, dealer or clearing agency registration requirements for third parties that transact or intermediate transactions in tokens prior to the issuer's certification that essential managerial efforts have ceased. Instead, the proposing release states that the Commission "will continue to consider whether further action with respect to covered investment contracts beyond the proposed rules in this release is warranted." But tackling these thorny secondary-market considerations may be key to enabling the broad distribution and trading needed to achieve the network effects the proposal itself highlights as important to the success of a development project.

Implications of using *Howey* concepts. After the issuer certifies that it has completed all essential managerial efforts, the proposal may not fully resolve one of the questions that matter most to exchanges, brokers, dealers, asset managers and other secondary-market participants: *when can a crypto asset trade with no possibility that transactions remain subject to the federal securities laws?*

This uncertainty follows from the proposed framework's embrace of the *Howey* "investment contract" concept, which originated in the 1946 Supreme Court case *SEC v. W.J. Howey Co*., one of the most heavily cited and debated securities decisions in American law.

To obtain the benefit of the Reg CA investment contract safe harbor, an issuer must first determine that an investment contract exists (or existed) and describe what *Howey* caselaw refers to as the "essential managerial efforts" underlying that contract. Then, to terminate any ongoing obligations under Reg CA and to obtain the benefit of the safe harbor, the issuer must determine that all of those efforts have ended. Other market participants must then decide whether they can rely on the issuer's determination, and on that question the proposal is not clear. Even if the issuer's determination was accurate when made, market participants may also need to consider whether subsequent representations, promises or conduct of the issuer or related persons have created a new investment contract with respect to the asset.

While the proposed rule itself deems the investment contract to have ceased to exist if the issuer has satisfied the substantive conditions of proposed Rule 400 and filed the required Form TR certification regarding the termination of essential managerial efforts, the proposing release indicates that the SEC can dispute that certification – potentially at any time, leaving unclear the extent to which third parties can rely. The proposal may narrow a third party's inquiries by creating a public disclosure record, but it does not make the pivotal exit determination independently verifiable by third parties, nor does it provide express reliance protection to persons trading or intermediating in the crypto asset. The result is a framework that facilitates smaller primary offerings of crypto assets while leaving uncertainty at the critical transition to secondary trading outside the federal securities laws.

The proposal's extensive use of *Howey* investment contract terminology and jurisprudence is a feature (or bug) that it shares with the Clarity Act currently pending before the Senate. As discussed under "Transition questions," and as we have suggested before, we believe a simpler approach for investors and markets would be for policymakers to excise *Howey* from U.S. crypto regulation, together with its terms of art, complexities and vagaries, root and branch.

Potential investment company concerns. The proposal's investment contract safe harbor would apply only to the Securities Act and Exchange Act definitions of "security," and not to the nearly identical definitions under the Investment Company and Advisers Acts. This aspect of the proposal, if not resolved in the final rule, will likely cause concern for some asset managers, digital asset treasury companies and protocol foundations about the potential need to register product offerings, or the companies themselves, under the Investment Company Act.

Below we describe the proposal, identify the ways in which it represents meaningful progress and outline some of the issues we expect to surface in the comment process now underway.

Proposed framework

Regulation Crypto Assets is an ambitious effort aimed at establishing an offering, disclosure and transition framework for "covered investment contracts" – investment contracts under which the only asset offered or sold is a crypto asset that is itself not a security.

The proposal builds on the Commission's March 2026 interpretation of how the *Howey* analysis applies to crypto assets. It responds to criticism that full registration and existing exemptions – including Regulation D, Regulation A and Regulation Crowdfunding – were not designed for arrangements in which a crypto asset is initially sold as part of an investment contract but later circulates independently of that contract.

The proposal has five principal components:

- **General provisions** (proposed Rules 100–104): Establishes framework-wide definitions, general provisions, inflation adjustments for offering caps, principles-based disclosure requirements, and bad-actor disqualification rules that apply across Reg CA.
- **Startup exemption** (proposed Rule 200): Creates a temporary exemption from Securities Act registration for certain early-stage covered investment contract offerings, permitting offerings up to $5 million over four years while the issuer works toward completing the managerial efforts promised to investors, subject to disclosure and anti-fraud constraints.

- **Fundraising exemption** (proposed Rules 300–307): Creates two larger capital-raising exemption pathways for covered investment contracts, modeled in part on Regulation A, allowing offerings of up to $20 million (Tier 1) and $75 million (Tier 2) over 12 months through a bifurcated structure with tailored disclosure, filing and ongoing reporting requirements.
- **Investment contract safe harbor** (proposed Rule 400): Provides a non-exclusive safe harbor under which a covered investment contract is deemed terminated, and the related crypto asset is deemed no longer subject to that investment contract for purposes of the Securities Act and Exchange Act definitions of "security," if specified conditions are met and the issuer files a transition report on Form TR.
- **State "blue sky" preemption** (proposed Rule 500): Defines "qualified purchaser" for Securities Act Section 18(b)(3) purposes so that state registration and qualification requirements would be preempted for offers and sales under Reg CA, and for certain secondary-market transactions, while preserving state antifraud and notice-filing authority.

General provisions

Proposed Rules 100–104 contain definitions and other provisions that would apply throughout Reg CA.

Proposed Rule 100's definitions include the pivotal term "covered investment contract," which is a contract, transaction, or scheme involving a crypto asset that constitutes an investment contract and that meets the following requirements:

- a crypto asset is subject to the investment contract;
- such crypto asset is not itself a security; and
- no asset other than such crypto asset (including any security or non-security asset) is subject to the investment contract.

The term "investment contract" is included within the definition of "security" in each of the principal federal securities laws: the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940 and the Investment Advisers Act of 1940.

Importantly for the Reg CA safe harbor, any investment contract that meets the above description can be a covered investment contract, whether or not it was sold under an offering exemption provided in Reg CA, and regardless of whether it was sold before the regulation is adopted. This is a tangible benefit for the industry because it opens a pathway to clarify the regulatory status of thousands of already-circulating crypto assets.

That said, the term "investment contract" is not separately defined in Reg CA; the release instead refers market participants to the SEC's March 2026 interpretation and existing case law interpreting *Howey* and subsequent cases, which define "investment contract" as a contract, transaction, or scheme involving:

- an investment of money,
- in a common enterprise,
- with an expectation of profits derived from the efforts of others.

As most industry participants know, strong differences in opinion between the prior SEC and market participants over whether a particular crypto asset or transaction involved an investment contract under the *Howey* test produced years of stifling regulatory uncertainty and, in the past, accusations that the SEC unfairly engaged in "regulation by enforcement."

The SEC nevertheless would base a new and needed regulatory framework on this concept, which the proposing release itself acknowledges "can be complex and difficult to apply to crypto assets."

Other key terms defined in proposed Rule 100 include "associated crypto network," "associated crypto application," "aggregate offering price" and "aggregate sales."

- An "associated crypto network" is the blockchain or similar distributed-ledger network on which the relevant crypto asset is generated, minted or mined.
- An "associated crypto application" is a smart contract or similar executable software program deployed to the associated crypto network and within which the asset may be used to transmit or store value or facilitate access or participation.
- The definitions of "aggregate offering price" and "aggregate sales" govern the offering limits under the startup and fundraising exemptions. Noncash consideration (e.g., other crypto assets) generally would be valued by reference to

bona fide sales of the consideration made within a reasonable time, or, in the absence of sales, the fair value determined under an accepted standard.

Proposed Rule 101 establishes certain general principles:

- Reg CA is non-exclusive: attempted reliance on its exemptions or safe harbor would not prevent an issuer from relying on another available exemption or safe harbor.
- Offerings under the regulation would remain subject to the integration principles in Securities Act Rule 152 – i.e., an issuer cannot divide a single offering into multiple offerings in order to avoid registration requirements.
- Filings would be made electronically through EDGAR in accordance with Regulation S-T.
- An insignificant deviation from a requirement would not necessarily result in loss of the relevant exemption as to a particular purchaser, if the requirement was not directly intended to protect that purchaser, the deviation was insignificant to the offering as a whole and the issuer made a good-faith and reasonable effort to comply. This relief would not, however, prevent SEC sanctions for the failure.

Proposed Rule 102 would require the Commission to adjust the regulation's dollar thresholds for inflation periodically, and at least once every five years.

Proposed Rule 103 would establish principles-based disclosure requirements applicable to the offering exemptions. The information must be tailored to the issuer, the asset and its associated network or application; be presented clearly and without unnecessary technical jargon; reflect the project's current stage of development; distinguish existing conditions from future plans; and be consistent with the issuer's whitepapers, promotional materials and statements through public communication channels.

The required disclosure covers ten topics that the issuer must address:

- **The covered investment contract**: the investment contract's material terms, including the issuer's representations or promises to perform essential managerial efforts and its progress in performing them.
- **The offering**: the number and price of units, the offering period, purchaser qualifications or restrictions, material distribution arrangements, estimated net proceeds and expenses, intended use of proceeds, and the location of whitepapers and other offering materials.
- **The crypto asset**: the asset's material characteristics.
- **Management, related persons and conflicts**: the issuer's management and related persons, conflicts of interest and related-party transactions, and any transfer or resale restrictions applicable to related persons.
- **The associated network or application and development plan**: the network or application, its intended functionality, the development plan and progress against that plan.
- **Security and source code**: material security matters relating to the asset and network or application, and the location of publicly available source code.
- **Tokenomics and allocations**: supply, pricing, distribution methods, lockups, insider holdings, release schedules, minting and burning mechanisms, and methods of verifying transaction history.
- **Governance**: governance mechanisms, smart-contract governance and permissions, including who may make material changes to the asset or network.
- **The token ecosystem**: the current and anticipated on-chain and off-chain ecosystem, including infrastructure, participants and uses.
- **Risk factors**: concise disclosure of the material factors making the offering speculative or risky, including risks relating to the contract, issuer, asset and network or application.

Notably, in addition to these disclosures, the fundraising exemption also requires financial statements, which must be audited for the larger (Tier 2 / $75 million) exemption.

Proposed Rule 104 incorporates Regulation A's bad-actor disqualification provisions. This means the startup and fundraising exemptions would be unavailable if the issuer or specified related persons are subject to a disqualifying event of the type identified in Securities Act Rule 262(a), subject to reasonable-care and waiver provisions. Bad-actor events that occurred prior to the rule's effectiveness would not be disqualifying under Reg CA, but would need to be disclosed.

Startup exemption

The startup exemption in proposed Rule 200 would exempt covered transactions from Securities Act Section 5 if the issuer satisfies six principal conditions. Given its $5 million offering limit, the conditions under the startup exemption are less onerous than those applicable for offerings under the $20 million (Tier 1) or $75 million (Tier 2) fundraising exemption.

- The exemption would be available only during the period beginning after the issuer files Form NOR and ending on the earlier of four years after that filing or the filing of a transition report on Form TR.
- The issuer may be an entity, an individual or a group of individuals or entities. If a group relies on the exemption, each member must sign the Form NOR and Form TR certifications, and the members are individually and collectively responsible for compliance.
- The exemption may be used only once by the issuer and its affiliates for the same or a substantially similar crypto asset. This restriction is intended to prevent circumvention through successive four-year periods, affiliated issuers or superficial modifications to the asset.
- The aggregate offering price of all covered transactions under the exemption may not exceed $5 million. Covered transactions may include sales for cash, and those airdrops or other distributions made in exchange for services such as development, testing or promotion. The value of noncash consideration counts toward the cap.
- The issuer must comply with the exemption's filing, disclosure and transition requirements.
- The issuer must otherwise comply with all of the applicable general provisions.

Before undertaking a covered transaction, the issuer must file Form NOR publicly on EDGAR. The form identifies the issuer and subject crypto asset, provides the address of the website containing the proposed Rule 103 disclosures and includes a certification that the information in the form is true, complete and correct and that the issuer intends to fulfill its promised essential managerial efforts within four years. Filing Form NOR starts the four-year period.

The issuer must amend Form NOR as soon as practicable after discovering a material mistake or error or upon a material change in the information previously reported. That amendment obligation continues until the four-year period expires or the issuer files Form TR.

The required disclosures themselves need not be filed on EDGAR, and would not be subject to a formal SEC staff review and qualification process. They must instead be publicly accessible without charge at the website identified in Form NOR and remain available throughout the issuer's reliance on the exemption. The issuer must assess the disclosure at least annually and update it within 30 days after the end of each calendar year to reflect material developments.

The exemption imposes no financial statement requirements, investor eligibility conditions or individual investment limits. General solicitation is permitted. Covered investment contracts sold under the exemption would not be restricted securities and would not be subject to a regulatory holding period – and thus would not necessarily be subject to resale restrictions – although contractual or other restrictions could apply.

The issuer must file Form TR no later than four years after filing Form NOR, but may file it earlier if the conditions to the form have been met. Form TR ends the issuer's ability to make additional sales under the startup exemption and terminates its Form NOR amendment and website-disclosure obligations.

Form TR can serve two functions where the issuer is able to make the proposed Rule 400 certification: it concludes the issuer's reliance on the startup exemption and perfects the investment contract safe harbor. In that case, the form must identify the contract and asset, certify that the issuer has completed or permanently ceased all promised essential managerial efforts and provide an analysis supporting that conclusion.

If the issuer is not able to certify that it has completed or permanently ceased all promised essential managerial efforts, Form TR must describe the current status of the contract, asset and associated network or application, together with the issuer's future plans. The filing ends the ability to rely on the startup exemption but does not itself establish that the investment contract has ceased to exist. In fact, a filing that the issuer is unable to make the certification would seem to be evidence that the investment contract continues to exist and attach to trades of the crypto asset.

Offerings under the startup exemption would be subject to the anti-fraud and antimanipulation provisions of the federal securities laws.

Fundraising exemption

The fundraising exemption in proposed Rule 300 establishes two separate Regulation A-style pathways ("tiers") for public offerings of covered investment contracts:

- **Tier 1** permits offerings of up to $20 million over a 12-month period, including no more than $6 million offered by affiliated selling securityholders.
- **Tier 2** permits offerings of up to $75 million over a 12-month period, including no more than $22.5 million offered by affiliated selling securityholders.
- During the issuer's first offering and other offerings qualified within the following year, selling-securityholder sales generally may not exceed 30% of the aggregate offering.

Unlike the startup exemption, the fundraising exemption involves an SEC review process, and requires SEC qualification of an offering statement, financial statements and ongoing reporting.

The issuer and its affiliates are aggregated for purposes of the offering limits. Continuous and delayed offerings would be permitted in specified circumstances, including offerings by selling securityholders, employee benefit plan offerings and issuances upon the exercise or conversion of outstanding rights or securities. At-the-market offerings are not permitted.

Eligibility is narrower than under the startup exemption. The issuer must be an entity organized in the United States; a majority of its executive officers or directors must be U.S. citizens or residents; more than 50% of its assets must be located in the United States; and its business must be administered principally in the United States. The exemptions would be unavailable to blank-check companies, registered or required-to-be-registered investment companies, business development companies and certain issuers subject to recent Exchange Act Section 12(j) orders. An issuer must also be current in applicable Reg CA and Exchange Act reporting and not be subject to bad-actor disqualification.

The exemption would allow sales to both accredited and non-accredited investors. Sales to a non-accredited natural person may not exceed 10% of the greater of annual income or net worth; for a non-natural person, the limit is 10% of the greater of annual revenue or net assets. An issuer may rely on a representation of the purchaser when determining compliance with this investment limitation, as long as the issuer does not know at the time of sale that the representation is untrue.

Investment contracts sold under the exemption would not be restricted securities, and thus not subject to Securities Act Rule 144 resale restrictions. General solicitation would be permitted after qualification of the offering statement, and the issuer could solicit nonbinding indications of interest before qualification. Final delivery of offering circulars would generally follow Regulation A's "access equals delivery" model, meaning that delivery requirements can be satisfied by filing on EDGAR.

Before making sales, the issuer must file an offering statement on Form 1-CRYPTO and obtain SEC qualification. Draft offering statements may be submitted for nonpublic staff review but would need to be publicly filed at least 15 calendar days before qualification will be granted.

Form 1-CRYPTO consists of:

- basic information about the issuer and offering;
- an offering circular containing the narrative disclosures required under proposed Rule 103;
- a discussion of financial condition, including material changes in liquidity, capital resources and operating results;
- U.S. GAAP financial statements for the two most recent fiscal years, or the issuer's shorter period of existence; and
- exhibits such as underwriting and subscription agreements, governing instruments, whitepapers, material contracts, escrow arrangements, consents and a legality opinion.

Tier 1 financial statements need not be audited, although an audit obtained for another purpose generally must be filed. Tier 2 financial statements must be audited under U.S. GAAS or PCAOB standards by an auditor that qualifies as independent under Regulation S-X. The offering statement must be amended for material changes and, in an ongoing offering, at least annually to include current financial statements. The Commission may suspend the exemption for specified violations, and procedures modeled on Regulation A govern withdrawal or abandonment.

Both Tier 1 and Tier 2 issuers would be subject to continuing reporting. Annual reports on Form 1-KC would update the offering disclosure and include annual financial statements. Semiannual reports on Form 1-SC would address the investment contract, the issuer's development progress and financial condition and include interim financial statements. Current reports on Form 1-UC generally would be due within four business days after specified events. Unlike Regulation A, ongoing reporting would therefore apply even to Tier 1 issuers.

An issuer may suspend reporting in certain circumstances, including when the relevant class is held of record by fewer than 300 persons, the issuer is current in its reporting and no offering remains active. It may terminate reporting upon filing Form TR if it satisfies the investment contract safe harbor or the covered investment contract otherwise ceases to exist.

Offerings under the fundraising exemption would be subject to the antifraud and antimanipulation provisions of the federal securities laws.

Investment contract safe harbor

Proposed Rule 400 provides that a covered investment contract will be deemed to have terminated, and the subject crypto asset will be deemed not to constitute, represent or be subject to that investment contract for purposes of the Securities Act and Exchange Act definitions of "security" (but not the Investment Company and Advisers Acts definitions), if two conditions are satisfied:

- The issuer must have completed or otherwise permanently ceased all essential managerial efforts that it represented or promised to undertake under the covered investment contract. The issuer also must not be making, and must not intend to make, any new representations or promises to engage in essential managerial efforts with respect to the crypto asset.
- The issuer must file Form TR publicly on EDGAR. The form must identify the issuer, covered investment contract and crypto asset; certify that it has completed or otherwise permanently ceased all essential managerial efforts that it represented or promised it would engage in under the covered investment contract; and provide a sufficiently clear and detailed analysis supporting the certification. If the issuer previously relied on the startup or fundraising exemptions, the analysis would be expected to refer to its disclosures describing the managerial efforts originally promised and its progress in performing them.

Upon satisfaction of both conditions, the SEC states that, from that point forward, it would treat the federal registration, reporting and other requirements associated with that investment contract as no longer applicable – but the Commission would not be precluded from challenging whether an issuer did, in fact, satisfy the conditions of the safe harbor.

Importantly, as proposed, the safe harbor does not extend to a crypto asset's security status under the Investment Company Act or Investment Advisers Act – although the SEC requests comment on this issue. It could leave open the possibility that crypto assets deemed outside the Securities Act and Exchange Act nevertheless would be treated as investment securities under the Investment Company Act, potentially causing a digital asset treasury company, protocol foundation or other operating business to fall within an investment-company definition.

The safe harbor is non-exclusive and available regardless of whether the issuer used an exemption under Reg CA. This means that the issuer of a token that is already in the market could file a Form TR if it satisfied the conditions, and declare that the investment contract pursuant to which the token was sold has ceased to exist.

The SEC confirmed in the proposing release that an investment contract may cease to exist under *Howey* even if the issuer does not rely on proposed Rule 400.

Critically, the safe harbor applies only if its conditions are, in fact, satisfied; the issuer's representations alone are not dispositive. The SEC could challenge the issuer's reliance if a Form TR certification is inaccurate, whether intentionally or otherwise, and take the position that the investment contract has not yet terminated. In addition, although proposed Rule 400 would govern the Commission's administration of the federal securities laws, the proposing release states that it would not prevent "other parties" (i.e., private plaintiffs or state regulators) from asserting that the asset remains subject to an investment contract or constitutes another type of security.

State "blue sky" preemption

Proposed Rule 500 would treat offerees and purchasers in Reg CA offerings as "qualified purchasers" under Section 18(b)(3) of the Securities Act. Covered investment contracts sold under the regulation would therefore be "covered securities" exempt from state "blue sky" registration and qualification requirements.

Subject to specified conditions, the preemption would extend to secondary-market transactions while the issuer remains subject to and current in its disclosure and filing requirements and/or periodic reporting obligations. The release says that, for proposed Rule 500 purposes, “periodic reporting obligations” exclude Form 1-UC current reports, and the proposed rules generally distinguish between “periodic” and “current” reporting.

Blue-sky preemption may be one of the most important yet least-noted components of Reg CA. Because non-security crypto assets are unlikely to be listed on a national securities exchange (which provides another avenue to blue-sky preemption), the need to comply with state blue-sky laws could have prevented many token offerings, even those registered or qualified under the Securities Act.

For an issuer relying on the startup exemption, secondary-market preemption would end when the issuer files Form TR and its disclosure and filing obligations conclude, unless the covered investment contract has itself ceased to exist. For an issuer relying on the fundraising exemption, the result would depend on whether the filing suspends or terminates its reporting obligations.

All that said, federal and state definitions of “security” may differ in text and interpretation, and a state could claim tokens are securities (or that an associated investment contract continues to exist) under its own laws, even if the SEC does not view the tokens as securities, or does not view the investment contract as continuing.

Substantial progress on regulatory certainty of crypto asset offerings

The proposal represents substantial progress towards ending the regulatory uncertainty that has dogged the crypto industry since inception, and Chairman Atkins and Commissioners Peirce and Uyeda deserve credit for taking action that could and should have been taken under prior SEC administrations.

The disclosure topics reflect a sophisticated understanding of token offerings, clearly informed by the 300-plus industry comment letters received in response to Commissioner Peirce’s requests. The three-pathway structure calibrates obligations to offering size. The treatment of unincorporated developer groups, airdrops, network testing and other nontraditional distributions reflects how crypto projects are actually organized and launched.

The proposal also improves on a regime in which market participants have had to apply *Howey* without a prescribed disclosure record or formal transition mechanism. Requiring an issuer to identify its representations and promised managerial efforts may narrow later disputes about what the issuer undertook to do. Form TR would create a public point at which the issuer states its position that the relevant efforts have ended.

Those improvements should not be understated. Reg CA would provide primary-market pathways for some projects where registration or existing exemptions may not be workable.

The proposed framework does leave an obvious gap: What about proposed offerings greater than $75 million? Those would remain subject to the same registration or exemption regimes that the Commission recognizes are ill-suited to crypto assets.

Secondary-market trading questions

The proposal addresses the offer and sale of tokens, but it does not resolve the regulatory status of intermediaries that trade or facilitate trading in those tokens in the secondary market, or of entities that hold substantial amounts of them.

As a result, until the issuer files its Form TR transition report under the investment contract safe harbor declaring that essential managerial efforts have concluded, an intermediary trading in those tokens may still be subject to registration under the federal securities laws as an exchange, broker, dealer or clearing agency. Large holdings may also raise Investment Company Act issues for the holder.

We have often observed that the central challenge in applying the federal securities laws to crypto assets is not the need for an exemption to sell them in primary offerings – which Reg CA addresses for offerings up to $75 million – but rather the application of those laws to the secondary market.

Securities trade through highly regulated markets and SEC-registered intermediaries such as exchanges, brokers and dealers, while crypto assets trade through entities and protocols that are not generally subject to the same registration requirements. Until a safe harbor transition report has been filed for the tokens, they may be excluded from listing on some crypto trading platforms, which in turn may limit the protocol's ability to achieve broad usage and network effects.

In the comment process, we expect the SEC to be urged to consider exempting crypto trading platforms and other intermediaries from the registration requirements that apply to exchanges, brokers and dealers when transacting in crypto assets sold pursuant to a Reg CA exemption. In the proposing release, the SEC itself noted that a workable secondary-market trading environment is essential for these assets to circulate efficiently within the crypto ecosystem and, in turn, for the underlying protocol to achieve broad adoption, liquidity and network effects.

Transition questions

The proposal retains a *Howey* characterization standard, and therefore 80 years of judicial exposition on top of the SEC's March 2026 interpretation, at each consequential stage. To enter the framework, a developer must determine that its transaction involves an investment contract. To comply with the framework, it must identify its "representations or promises to engage in essential managerial efforts." To exit, it must determine that those efforts have been "completed or otherwise permanently ceased." Exchanges, brokers, dealers and asset managers must then assess the legal consequences of a potential error in that determination.

These are not necessarily four wholly independent *Howey* analyses. The disclosures made during the offering may narrow the exit inquiry by identifying the efforts the issuer promised to undertake. But the proposal does not eliminate the central question: whether those efforts were "essential" and "managerial" and whether they have, in fact, been completed or permanently ceased. Having analyzed many crypto assets and protocols over the past decade, we are well-acquainted with the diligence and cost that this effort entails.

Three aspects of the proposal make that residual uncertainty important, particularly if the SEC does not create exemptions for intermediaries that transact in crypto assets sold under Reg CA offering exemptions, as discussed under "Secondary-market trading questions":

- **The guidance retains facts-and-circumstances subjectivity, and thus uncertainty.** The March 2026 interpretation's line-drawing, as recited in the release, is expressed in the same conditional voice that rendered the SEC's now-withdrawn Framework for "Investment Contract" Analysis of Digital Assets nearly impossible to apply. Detailed business plans "likely would" create profit expectations while vague plans "likely would not;" post-"functionality" services to secure, maintain or enhance a network would not constitute essential managerial efforts. Every operative word is itself a judgment call – above all "functional," a status that is not binary for networks that launch in stages, upgrade continuously and are supported by core teams in shifting degrees. That said, assuming a network is "functional," the Commission expanded its March 2026 interpretation to state that ongoing "services to secure, maintain, improve, or enhance such a network or application or its functionality, or to facilitate network effects, whether through sponsoring or funding development projects or other similar activities, would not constitute essential managerial efforts."
- **The pivotal determinations are self-certified by a party with a potential conflict.** The conditions to certify that essential managerial efforts have terminated and file Form TR are internal to the issuer – what it promised, whether it finished, and what it intends – and the issuer may be the party with the most to gain from certification. The release confirms the SEC may challenge a Form TR certification after the fact, and that a misrepresentation "either intentionally or otherwise" could mean the covered investment contract never terminated, in which case otherwise-applicable federal registration, reporting and other requirements continued to apply. That could expose intervening transactions and market participants to potentially serious – and in some cases effectively retroactive – regulatory and litigation consequences.
- **Third parties inherit the uncertainty.** There is no unambiguous reliance safe harbor for exchanges, brokers, dealers, asset managers or other intermediaries that deal in a crypto asset after a Form TR is filed. The release affirmatively notes that the filing of a Form TR would not prevent parties other than the Commission from asserting that an asset remains subject to an investment contract or is otherwise a security.

Similar administrability problems arise under proposed Rule 500's state law preemption provisions. For example, comment requests 140–142 ask whether secondary-market participants can identify issuance provenance, determine whether the issuer satisfied an exemption, and monitor whether it remains current in its disclosure and reporting obligations. The Commission's decision to ask those questions underscores that the proposal does not yet supply a ready answer.

The proposal also raises fungibility questions. The general provisions of Reg CA equate one unit of the covered investment contract with one unit of the token, yet a single fungible crypto asset may comprise units distributed under the startup exemption, sold under Tier 2, sold or airdropped outside any investment contract, placed under Regulation D or acquired offshore. If legal status traces to the initial issuance and provenance is unobservable at the point of trade, it will be difficult for intermediaries to determine the legal status of the specific crypto assets at issue. The Commission poses this question in Request 140; the proposal does not answer it.

The deeper point: A catchall is being used in place of a definition

The concerns noted above are not drafting defects that better guidance alone can cure. They follow from the SEC's March 2026 interpretation and Reg CA's reliance on the *Howey* investment contract concept.

"Investment contract" is a residual category of security – appended to the enumerated instruments to catch what Congress could not foresee, and construed flexibly by the Supreme Court precisely so that novel and irregular schemes could not outrun the statute. That design is well suited to the cases that built the doctrine: idiosyncratic investment schemes with no common structure, such as those involving orange groves, chinchilla breeding, whiskey warehouse receipts and payphone sale-leasebacks. A catchall's vagueness is an acceptable price when the arrangements are marginal and unforeseeable – and probably unlikely to morph into a multi-trillion-dollar trading market.

These conditions do not describe crypto assets in 2026. Seventeen years after the Bitcoin genesis block, the asset class comprises thousands of negotiable instruments built on standardized interfaces, traded on organized venues and analyzed by a professional industry. The most compelling witness is the release itself: the Commission defines "crypto asset," "associated crypto network" and "associated crypto application;" taxonomizes airdrops, staking, governance and gas distributions; prescribes ten disclosure topics tailored to the asset class; and estimates compliance costs to the dollar. A 401-page release containing more than 80 pages of bespoke regulatory text for the asset class demonstrates that the class is describable, making it more suited to a specific regime than a catchall category.

Although the proposal creates tailored offering exemptions, it could do more. The tradition of federal securities regulation, when an instrument class matures, is to name it and regulate it by description: Regulation AB defined asset-backed securities by structure; the Dodd-Frank Act defined "security-based swap" rather than leave swaps to case-by-case investment contract, note or recharacterization litigation; and Securities Act Rule 151 resolved decades of variable annuity status disputes with a criteria-based safe harbor. Even the Supreme Court analyzes notes under the *Reves* family-resemblance framework rather than forcing them through *Howey*. This proposal breaks that pattern – it is, to our knowledge, the first time the SEC has proposed to build a permanent regime on top of the investment contract catchall for an asset class it simultaneously demonstrates it can define.

Defining new categories of assets, of course, is primarily the job of Congress, not the SEC. But the pending Clarity Act, which passed the House in July 2025 and awaits Senate floor action, takes the same approach: its Title II is organized around the treatment of "investment contract assets" and of secondary transactions in digital commodities "that originally involved investment contracts," so that the statutory boundary between SEC and CFTC jurisdiction could itself be litigated on endlessly arguable, *Howey*-confounded grounds. Whether by rule or by statute, a framework whose boundaries are subjective descriptions – *essential*, *managerial*, *functional* – risks generating the same classification disputes that burden the market today, only with more procedural steps.

Another, more administrable, framework might be for the SEC to define the crypto assets and transactions subject to the federal securities laws by objective characteristics, require tailored disclosure while identified developers and distributors continue material development or fundraising activities, and provide express protection for unaffiliated market participants that rely on current public filings without actual knowledge of their material falsity. *Howey* would remain available in its traditional residual role to address schemes structured to evade those rules.

What crypto market participants can do now

Any impacted firm should consider submitting a [comment letter](). The SEC takes these seriously in discharging its obligations under the Administrative Procedure Act. Be aware that comment letters will appear on the SEC website.

Protocol developers that issued tokens in the past may have a series of decisions that need to be made with care. The investment contract safe harbor is non-exclusive and does not depend on prior use of an offering exemption, so the issuer of a token distributed before Reg CA is adopted could file a Form TR if it can make the required certification.

That path may ultimately be more challenging than at first glance, because the certification requires the issuer to reconstruct – and then affirmatively characterize – a public record created without any expectation that the record would later be read this way. An issuer considering this route may need to consider:

- assembling the complete record of public statements that could constitute “representations or promises to engage in essential managerial efforts,” including whitepapers, roadmaps, governance forum posts, social media, conference remarks and materials submitted to trading venues, and identifying which of those promises remain outstanding;
- assessing which entity or persons would be treated as the issuer where a foundation, a development company and unaffiliated contributors have each made public statements about the network’s development;
- distinguishing continuing activities that the proposal indicates would not constitute essential managerial efforts – services to secure, maintain or enhance a functional network – from development work that would, and recognizing that this line may not be clear for a network that upgrades regularly;
- imposing communications discipline going forward, given that Form TR requires a certification that the issuer is not making, and does not intend to make, new representations or promises of essential managerial efforts – and that statements made between now and any Form TR filing could form part of the record supporting or undermining the certification; and
- documenting the supporting analysis contemporaneously, because a certification that proves inaccurate “either intentionally or otherwise” could mean the covered investment contract has not terminated, potentially with retroactive consequences for interim transactions.

Past issuers may also want to consider a threshold strategic question: a project that has consistently maintained that the associated crypto asset was never offered or sold as part of an investment contract may see a Form TR filing as conceding the opposite. A topic for potential comment is whether the SEC would permit prophylactic Form TR filings that certify that no essential managerial efforts are being or will be undertaken – without conceding that they ever were.

Because no Form TR can be filed until a final rule is adopted, which is unlikely before the first quarter of 2027, issuers have time to build the record deliberately – and a distinct interest in the comment process, where the treatment of already-distributed tokens and the absence of secondary-market reliance protection are worth addressing directly.

Protocol developers contemplating an offering may want to map completed and planned distributions against both proposed exemptions. Relevant questions include:

- how pre-effective-date distributions affect integration, the characterization of the covered investment contract and the availability of the startup exemption and fundraising exemption for future distributions;
- whether the startup exemption’s four-year period and $5 million cap fit the project’s development plan;
- whether a Tier 1 or Tier 2 offering under the fundraising exemption would be more appropriate;
- how SAFTs, token warrants and other outstanding contractual rights would be treated;
- how existing public statements would translate into the required disclosures’ “representations or promises”;
- which persons or developer groups would be treated as the issuer;
- whether current governance, token-allocation and treasury arrangements can support the required disclosure; and
- what evidence would support a later determination that essential managerial efforts have ended.

Exchanges, brokers, dealers, asset managers and other intermediaries should begin to think about policies and procedures around:

- crypto assets issued in the past that are not covered by a Form TR;
- whether available public information may contradict an issuer’s Form TR certification;
- how the absence of express reliance protection affects their potential exposure; and
- the extent to which existing *Howey*-based listing or approval frameworks should be modified.

Comment process

Reg CA is a significant and constructive proposal. It could create practical offering pathways and improve the disclosure record available to market participants. Its principal unresolved issues are narrower, but fundamental: whether crypto market participants can trade in crypto assets issued under one of the exemptions, and whether an issuer’s Form TR provides a sufficiently verifiable and legally reliable basis for unrestricted secondary trading.

The Commission has asked the right questions. Comments should focus not only on whether the proposed standards are conceptually sound, but also on whether issuers and intermediaries can administer them in real time.

Comments are due by October 20, 2026. Because of the complexity of this rulemaking, we would not expect final Commission action until the first quarter of 2027, at the earliest.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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