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Legal Sidebar

SEC Proposes "Regulation Crypto Assets"

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On August 18, 2026, the Securities and Exchange Commission (SEC) issued a proposed rule that would create a tailored offering and disclosure framework for certain types of crypto assets. In announcing the proposal—titled Regulation Crypto Assets (Reg CA)—SEC Chairman Paul Atkins described it as "the most historic step yet to modernize federal securities regulations for crypto assets." The proposed rule includes new exemptions from securities law registration requirements for crypto asset offerings, a bespoke disclosure regime for issuers that rely on the new exemptions, and a safe harbor codifying SEC guidance as to when crypto assets issued pursuant to an investment contract are no longer subject to SEC oversight. This Legal Sidebar provides an overview of proposed Reg CA and discusses issues that may be of interest to Congress, which is considering comprehensive crypto market-structure legislation.

Background

The status of crypto assets under federal securities law has been a point of contention for some time. The federal securities laws define the term "security" to include a range of traditional financial instruments such as stocks and bonds, in addition to "investment contracts"—a category that courts have used to evaluate whether "[n]ovel, uncommon, or irregular" arrangements fall within the SEC's jurisdiction. Under the Supreme Court's 1946 decision in *SEC v. W.J. Howey Co.*, an arrangement qualifies as an "investment contract" if it involves a "contract, transaction or scheme" whereby a person invests money in a common enterprise with an expectation of profit derived from the efforts of others. The SEC and federal courts have generally used the *Howey* test to evaluate whether specific crypto assets are subject to the securities laws.

Crypto assets include a diverse range of instruments, ranging from Bitcoin to stablecoins to "meme coins." Many of the core disputes involving crypto and securities law, however, involve something like the following fact pattern: A developer seeks to raise capital to create a blockchain-based ecosystem in which a new crypto asset will be used. The developer sells (or presells) the crypto asset to raise that capital. Unlike a stock or bond, the crypto asset does not convey any rights to the cash flow of a business entity. Rather, the crypto asset will (it is hoped) possess intrinsic utility within the to-be-developed blockchain ecosystem. For example, an issuer may represent that a crypto asset will enable users to access software, execute transactions, or pay for goods or services within such an ecosystem. The crypto asset lacks intrinsic utility when initially sold, however, because at that point the

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issuer has yet to develop the related blockchain ecosystem fully. To borrow a non-blockchain analogy from a financial commentator, these types of crypto offerings are similar to an imagined transaction in which the Wright brothers sell airline miles to finance the invention of the airplane.

There is general consensus that initial distributions of the type of crypto asset described above may constitute securities offerings under the *Howey* test. Several courts have held that, where crypto asset issuers led primary-market purchasers to expect profits from the issuers' managerial efforts to develop a related blockchain-based system, the initial sales of those crypto assets represented securities transactions. This conclusion has important legal implications: Under Section 5 of the Securities Act of 1933 (the Securities Act), issuers of securities must register their offerings with the SEC or conduct them pursuant to an exemption from registration. Companies that conduct registered securities offerings must disclose a variety of information about their financial condition and operations. Registered offerings also entail various costs, such as expenses for legal counsel, auditors, and underwriters.

Industry stakeholders have argued that the existing securities registration regime is ill-suited to the stylized type of crypto project described above. For example, some crypto groups contend that the disclosure rules for registered offerings are a poor fit for many crypto issuers. They argue that current regulations require the disclosure of information that may not be material to crypto investors, while failing to elicit important information regarding the technology, governance, and economic characteristics of crypto assets.

Another concern raised by the crypto industry involves the possibility that a crypto asset that is subject to the securities laws when issued may at some point transition out of that status. The SEC has recognized that crypto assets raise this possibility. In March 2026 guidance, the agency explained that a crypto asset issued pursuant to an investment contract remains "subject to" that contract if an issuer offered the crypto asset by inducing an investment of money in a common enterprise with representations or promises to undertake essential managerial efforts from which a purchaser would reasonably expect to derive profits (the basic *Howey* analysis). Under the guidance, secondary-market transactions in a crypto asset that is "subject to" an investment contract represent securities transactions, meaning they fall within the SEC's jurisdiction. The SEC clarified, however, that such a crypto asset does not necessarily remain "subject to" an investment contract in perpetuity. Rather, the guidance indicated that a crypto asset "separates from" an investment contract when an issuer fulfills any representations or promises to engage in essential managerial efforts related to the asset or announces that it is unable to complete such efforts. At that point, the SEC explained, secondary-market transactions in the crypto asset fall outside the scope of the securities laws, provided there is not some independent basis for deeming the asset a security.

Industry participants have argued that the existing regulatory framework inhibits issuers' efforts to reach the point at which a crypto asset "separates from" an investment contract. Certain exemptions from securities registration requirements, for example, restrict the types of investors that are eligible to participate in exempt offerings and impose limitations on the resale of securities issued in such offerings. These restrictions, some contend, may impede efforts to promote widespread use of a new crypto asset, which may in turn interfere with an issuer's ability to develop blockchain ecosystems whose functioning depends on attracting a large number of users.

Proposed Regulation Crypto Assets

Proposed Reg CA is intended to address the concerns discussed above and, in the words of Chairman Atkins, "provide crypto asset entrepreneurs and market participants with clear pathways to raise capital under the federal securities laws." The proposal includes

- two exemptions from the registration requirements of Section 5 of the Securities Act for certain investment contracts involving crypto assets;

- tailored disclosure requirements for issuers that rely upon these exemptions;
- a safe harbor codifying the SEC's March 2026 guidance as to when crypto assets issued pursuant to an investment contract "separate from" that contract; and
- a provision preempting state law registration and qualification requirements for covered investment contracts issued pursuant to a Reg CA exemption.

The following subsections of the Sidebar discuss these aspects of proposed Reg CA.

Registration Exemptions

Proposed Reg CA includes two exemptions from the registration requirements of Section 5 of the Securities Act: the *startup exemption* and the *fundraising exemption*. Both exemptions would be available to "covered investment contracts," defined to mean a "contract, transaction, or scheme involving a crypto asset that constitutes an investment contract," provided the crypto asset is "subject to" the investment contract, the crypto asset is not itself a security, and no asset other than the crypto asset is "subject to" the investment contract.

The startup exemption would (subject to certain conditions) exempt from Section 5's registration requirements offerings of covered investment contracts of up to $5 million for a period of four years. The exemption would be intended to provide issuers with a "regulatory runway during which they could attempt to fulfill their representations or promises to engage in essential managerial efforts under covered investment contracts." It would be available for both small capital raises and crypto transactions that do not raise capital but may nevertheless qualify as securities offerings in certain circumstances—for example, airdrop distributions or the payment of rewards to network participants.

Issuers relying on the startup exemption would be required to file a notice of reliance (a new Form NOR) with the SEC. Form NOR would include basic information about the issuer; identify the subject crypto asset; provide a website address at which certain required disclosures (discussed below) would be available free of charge; and include a certification that the issuer intends to fulfill, within four years of filing, the essential managerial efforts it represented or promised investors it would engage in under the covered investment contract. To rely on the startup exemption, an issuer would be required to file a transition report (a new Form TR) disclosing whether it has completed these essential managerial efforts no later than four years after filing Form NOR. Unlike certain existing registration exemptions, the startup exemption would not limit issuers' ability to sell covered investment contracts to retail investors or impose resale restrictions.

The fundraising exemption would be intended to facilitate larger capital raises than the startup exemption. It would—similar to existing Regulation A—consist of two tiers. Under Tier 1, issuers would (subject to certain conditions) be permitted to offer and sell up to $20 million of covered investment contracts in a 12-month period, including no more than $6 million offered by holders who are affiliates of the issuer. Under Tier 2, issuers would (subject to certain conditions) be permitted to offer and sell up to $75 million of covered investment contracts in a 12-month period, including no more than $22.5 million offered by affiliated holders.

The fundraising exemption would include more demanding requirements than the startup exemption. Unlike the startup exemption, the fundraising exemption would require issuers to file an offering statement (a new Form 1-CRYPTO) with the SEC containing more extensive disclosures than Form NOR, including financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles. Unlike the startup exemption—which requires no SEC review of offering materials—the fundraising exemption would preclude sales of covered investment contracts until the SEC qualifies an offering statement. Issuers conducting Tier 2 offerings under the fundraising exemption would be required to have their financial statements audited; Tier 1 offerings would not be subject to this requirement.

While the fundraising exemption would allow sales to both accredited and nonaccredited investors, sales to nonaccredited investors would be limited to 10% of the greater of a natural person's annual income or net worth and 10% of the greater of a nonnatural person's annual revenue or net assets. Covered investment contracts issued pursuant to the fundraising exemption would not be subject to regulatory resale restrictions.

Tailored Disclosure Requirements

The startup exemption and the fundraising exemption would include tailored disclosure requirements. Required disclosures would involve nonfinancial narrative information covering ten topics, including the covered investment contract; the subject crypto asset; an issuer's management and related persons; an associated crypto network and the issuer's development plans; and the economics and allocation of the subject crypto asset (e.g., supply, pricing, lockups, release schedules, and mechanisms for generating or destroying the asset). The requirements would be "principles-based," meaning they would require issuers to describe the material aspects of the applicable topics but would not prescribe in detail the information that must be provided. This approach, the proposed rule explains, would be intended to give issuers the flexibility to customize disclosures to their particular circumstances while still eliciting material information and providing sufficient flexibility to accommodate future developments in crypto markets.

Issuers relying on the startup exemption would be required to amend their initial disclosures with any material changes on an annual basis. Issuers relying on the fundraising exemption would be subject to annual, semiannual, and current reporting requirements. Those requirements would terminate, however, upon an issuer's filing of a transition report on Form TR if the issuer satisfies the conditions of the investment contract safe harbor, which is discussed in the following section.

Investment Contract Safe Harbor

Proposed Reg CA would include a nonexclusive safe harbor from the term "investment contract" in the Securities Act and the Securities Exchange Act of 1934. The safe harbor would provide that a covered investment contract will be deemed to have ceased to exist, and a subject crypto asset will be deemed not to constitute, represent, or be subject to that investment contract, if the issuer

- has completed or permanently ceased all essential managerial efforts that it represented or promised it would engage in under the contract and is not making and does not intend to make any new representations or promises to engage in essential managerial efforts with respect to the crypto asset; and
- files a transition report on Form TR, which would contain (among other things) a certification that the issuer has satisfied the above condition and analysis supporting that certification.

The investment contract safe harbor—which codifies aspects of the SEC's March 2026 guidance—would be available to issuers relying on the startup exemption or the fundraising exemption, in addition to issuers that do not utilize those exemptions. If the conditions of the safe harbor are satisfied, secondary-market transactions in a covered crypto asset would not constitute securities transactions and issuers that relied on a Reg CA exemption would no longer be subject to the regulation's disclosure requirements.

Preemption of State Law

Proposed Reg CA would amend the SEC's definition of "qualified purchaser" in regulations implementing Section 18(b)(3) of the Securities Act to include purchasers of covered investment contracts. As a result, under the proposed rule, federal law would preempt state law registration and qualification requirements with respect to offers and sales of covered investment contracts sold pursuant to a Reg CA exemption. The proposed rule would also result in federal law preempting state law registration and qualification requirements as applied to secondary-market transactions in a covered investment contract initially sold pursuant to a Reg CA exemption, provided the issuer satisfies applicable requirements and the transactions do not involve an issuer, underwriter, or dealer of such a contract.

Considerations for Congress

While proposed Reg CA aims to mitigate certain legal impediments to capital raising by crypto issuers, it is unclear whether it would eliminate those obstacles. The proposal reinforces the SEC's view that a crypto asset remains "subject to" an investment contract until the completion or permanent cessation of promised essential managerial efforts. Accordingly, even if the SEC finalizes proposed Reg CA, intermediaries such as exchanges, brokers, and dealers would potentially subject themselves to the securities laws (including registration requirements) by listing or trading covered crypto assets before those efforts end. If this possibility deters intermediaries from listing or trading certain crypto assets, the securities laws may continue to restrict the crypto industry along the lines the SEC identifies in its release. The absence of robust intermediation, like the investor eligibility limitations and resale restrictions that accompany certain existing registration exemptions, may impede efforts to promote widespread adoption of new crypto assets and achieve the resulting network effects.

Similar concerns may persist even after an issuer filed a transition report pursuant to proposed Reg CA. Under the proposal, the filing of a transition report would not by itself remove a covered crypto asset from SEC jurisdiction; the SEC would have the right to challenge an issuer's certification that it completed or permanently ceased promised essential managerial efforts. The possibility of such a challenge may present intermediaries with legal uncertainty in evaluating whether to list or trade specific crypto assets, which may deter them from doing so.

Congress is considering comprehensive crypto market-structure legislation that is similar to proposed Reg CA in some respects, while also containing certain differences. In July 2025, the House of Representatives passed H.R. 3633, the Digital Asset Market Clarity Act (the CLARITY Act). In July 2026, Senator Cynthia Lummis released updated text of related draft legislation that she described as reflecting the merged work products of the Senate Banking and Agriculture Committees (the July 2026 Senate draft).

Like proposed Reg CA, both H.R. 3633 and the July 2026 Senate draft would permit issuers of certain crypto assets to engage in primary-market sales (subject to certain conditions and size limits) without registering underlying investment contracts as securities. (H.R. 3633 would amend the Securities Act to this effect, while the July 2026 Senate draft would direct the SEC to create the exemption via regulation.) Issuers that utilize the new exemption would face tailored disclosure requirements for their initial offerings and ongoing reporting requirements, which would be administered by the SEC. The ongoing reporting requirements would continue until a defined period after an issuer makes certain certifications to the SEC. Under H.R. 3633, the certifications would involve the "maturity" of a blockchain system associated with a crypto asset. After making such a certification, issuers engaged in "material ongoing efforts" related to a mature blockchain system would face narrower disclosure requirements related to their role within such a system. Under the July 2026 Senate draft, the certifications would involve an issuer's ongoing efforts related to a crypto asset.

Both H.R. 3633 and the July 2026 Senate draft would go further than proposed Reg CA in providing that secondary-market transactions in a covered crypto asset are not securities transactions, even if an issuer is engaged in essential managerial efforts related to the crypto asset. The bills thus aim to address the concerns involving intermediaries discussed above.

The premise of proposed Reg CA and the market-structure legislation discussed above—that the securities laws should include crypto-specific exemptions from regulatory requirements—is the subject of debate. The minority staff of the Senate Banking Committee, for example, has characterized the July 2026 Senate draft as attempting to create a "two-tiered system in which assets offered on the blockchain can escape the SEC's authority," undermining "basic protections for investors, pensions, and retirement accounts."

The level of investor protection offered by crypto-specific securities law exemptions would depend in part on the adequacy of their disclosure requirements and the ease with which they would allow issuers to transition out of such requirements. Proposed Reg CA and the market-structure bills discussed above reflect different approaches to the termination of disclosure requirements. As discussed, proposed Reg CA would provide that disclosure requirements terminate after issuers file a transition report and complete or permanently cease the essential managerial efforts they promised or represented they would undertake. Because the transition inquiry under proposed Reg CA would focus on an issuer's representations and promises, it may incentivize issuers to limit the scope of their representations and promises to ease the path out of SEC jurisdiction.

Under the July 2026 Senate draft, in contrast, the transition inquiry would turn on the nature of an issuer's continuing efforts related to a crypto asset. Specifically, disclosure requirements would terminate within a defined period after an issuer certifies that certain covered parties had not within the previous 180 days engaged in "more than a nominal level of entrepreneurial or managerial efforts" related to a crypto asset (as defined by SEC rule) and that any efforts by such parties were not a "primary factor" in determining the relevant crypto asset's value.

Similarly, H.R. 3633 would provide for reduced disclosure requirements after a blockchain system associated with a covered crypto asset reaches "maturity." If a blockchain system is certified as mature, issuers would face ongoing disclosure requirements only if they engage in "material ongoing efforts" related to the system. Like the July 2026 Senate draft, then, H.R. 3633 would not look to an issuer's representations and promises to determine whether the issuer remains subject to disclosure requirements. Instead, that inquiry would turn on independent features of the associated blockchain system and an issuer's efforts related to that system. The market-structure bills may thus prescribe more demanding standards for assessing whether a crypto asset issuer remains subject to disclosure requirements than proposed Reg CA.

In announcing proposed Reg CA, Chairman Atkins remarked that "legislation remains indispensable to enacting 'future-proofed' rules of the road" concerning crypto, adding that the SEC "has and will continue to support Congress in delivering the CLARITY Act to President Trump's desk." A Senate vote on the cloture motion on whether to proceed with H.R. 3633 is scheduled for September 15, 2026.

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