



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

October 20, 2026

***RE: Notice of Proposed Rulemaking on Regulation Crypto Assets - File Number S7-202627;  
RIN 3235-AN38***

Dear Secretary Countryman:

Americans for Financial Reform Education Fund (AFREF) has grave concerns about the U.S. Securities and Exchange Commission's (SEC) proposed Regulation Crypto Assets (RIN 3235-AN38; File Number S7-2026-27) rule's dangerous shortcomings for investor protection and the integrity of the securities regulatory framework.<sup>1</sup> Americans for Financial Reform Education Fund (AFREF) is a nonpartisan and nonprofit organization founded by a coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups and is dedicated to advocating for policies that shape a financial sector that serves workers, communities and the real economy, and provides a foundation for advancing economic and racial justice.

The proposed rule would amplify, not reduce, the investor risk and harm associated with crypto asset offerings as well as undermine the existing financial regulatory frameworks that are designed to promote market integrity and financial stability. The proposed rule establishes, with thin legal precedent, a new class of assets known as "covered investment contracts." Using this construction, the rule allows crypto firms to raise money from investors from sales of crypto tokens, but with carveouts from traditional securities rules and oversight, granting special privileges for crypto firms while posing risks to investors and the economy:

- **Creates tiered paths for registration exemptions from disclosure and reporting:** The proposed rule allows crypto start-ups to raise up to \$5 million over a year from selling crypto tokens to retail, institutional, and accredited investors alike without more formal SEC registration and effectively with minimal investor disclosures or reporting requirements. It creates an even larger exemption for bigger projects to raise up to \$75 million over 4 years without formal SEC registration and with similar streamlined and minimal disclosure and reporting requirements.
- **Establishes a safe harbor provision that allows issuers to unilaterally dissolve covered investment contracts and the associated investor protections:** The proposed rule lets both new and existing crypto token issuers dissolve the investment contracts if they claim

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<sup>1</sup> Securities and Exchange Commission. [Notice of Proposed Rulemaking, Regulation Crypto Assets](#). 91 Fed. Reg. 161. August 21, 2026, at 54510 et seq.

they no longer exercise “essential” control over the token—effectively erasing the associated investor protections, regulatory obligations, and oversight tied to those contracts.

- **Exempts crypto investment contracts from state securities laws:** The proposed rule exempts firms issuing tokens under this rule from complying with state securities registration and disclosure requirements, pre-empting large swaths of state securities law and oversight.

The proposed rule’s exemptions, carve outs, and safe harbors expose investors to unnecessary risk, undermine market integrity, and threaten financial stability. Section I discusses how the proposed rule would likely incentivize and perpetuate extractive capital-raising activity by early investors and founders at the expense of retail investors. Section II discusses how the proposed rule’s weak disclosure framework fails to adequately protect or inform investors purchasing tokens. It also addresses how the rule’s analysis fails to account for the full cost or risk of historic and widespread fraud and investors losses stemming from crypto token offerings. Section III discusses how the agency’s definition and proposed structure of covered investment contracts and crypto assets is based on a poor legal foundation and undermines the Howey test and other longstanding securities judicial precedents. Section IV discusses how the proposed rule’s pre-emption of state registration requirements for qualified purchasers would undermine state securities regulators’ authority and jurisdiction, potentially reducing investor protection and increasing investor harm. Finally, Section V discusses how the proposed rule may exceed the agency’s statutory authority and invite legal challenges. The broad scope of the proposed rule raises many significant additional concerns, including the rule’s provisions allowing issuers to sell tokens to retail investors under a private offering framework, a range of investor concerns associated with secondary sales of tokens issued under this rule, and additional aspects of the safe harbor provisions that are not discussed at length in this comment but that must be addressed.

## Introduction

The proposed rule creates a new framework under the SEC’s purview for issuers of crypto assets that allows them to sell crypto to investors while exempting these offerings from basic investor protections that are present with more traditional offerings. The exemption framework for these so-called “covered investment contracts” for crypto assets is superficially similar to the exempt offering frameworks found under Regulation A, D and CF. For example, like these other exemptions, the proposed rule sets limits on how much issuers can raise from any offering, requires some minimal disclosures from issuers to investors, and sets some limits on which investors can buy these assets and under what conditions. Yet beneath this veneer, the rule’s assumptions and assertions about the unique nature of these crypto offerings, the function of these assets, the obligations of the issuers beyond initial issuance of their tokens, the qualities of disclosures investors need, and the limit to which securities and investor protection laws can and should be applied to issuers, result in the de facto establishment of a unique asset class with its own set of rules. These assumptions are ill-founded and a radical departure from the SEC’s existing authority and jurisprudence.

Consequently, the proposed rule grants crypto issuers and early investors favorable treatment at the expense of retail investors. The rule permits issuers to offer tokens to retail investors without the same level of disclosure retail investors receive from other SEC-regulated investment offerings. This will incentivize firms to offer tokens to investors with less value, less transparency, and more risk, knowing that issuers and their affiliates will have fewer obligations to token purchasers and more

reasons to quickly sell their own token holdings after the initial offering to maximize profits from initial token price increases.

Crucially, the agency's creation of novel covered investment contracts under this rule, coupled with a generous safe harbor provision, may be the greatest and most dangerous departure from existing law. This structure allows token issuers to unilaterally invalidate their obligations to token holders once the terms of the associated investment contract have been met or no longer apply. Token issuers themselves can determine the terms of the contracts and when they have been met, creating a self-certification regime that allow the issuers to largely determine for themselves what obligations they have to investors and when to terminate those obligations to their investors. It is inappropriate and dangerous for the SEC to give issuers the power to unilaterally dissolve their obligations to their investors and choose when key investor protections no longer apply to them or their tokens. Doing so increases the chance that token issuers and other larger market players will take advantage of retail investors, extracting profits from those investors' losses.

Both new and existing issuers can use this escape hatch from investor protections. Start-up token offerings could abdicate their investor protection obligations by filling out an SEC form that is not reviewed before the contract dissolution goes into effect. Existing token issuers, who have not issued tokens under this framework, can also rely on the investment contract clause in this rule to unilaterally declare any previous "investment contracts" tied to their token as no longer effective, which allows issuers to withdraw token sales or trading from the SEC's jurisdiction. Given that many tokens already on the market could be eligible for this safe harbor, this provision may be the loophole that swallows the rule that undermines the SEC's broader oversight of crypto markets and the full application of securities investor protection laws.

The Commission claims it has authority to offer this exemptive framework to issuers under existing law, in particular the general exemptive authority under Section 28 of the Securities Act.<sup>2</sup> Yet, an even cursory look at legislative history shows that the other major exemptive frameworks for private marketing securities offerings have been authorized directly by congressional legislation. Congress has so far failed to advance legislation, such as the CLARITY Act, which gives the SEC express authority to enact an exemption framework similar to the one under this proposed rule.

Crypto firms already have viable paths to issue tokens under existing SEC offering frameworks—private and public—to raise capital for crypto related businesses and have used these paths to generate capital for existing crypto projects. The crypto industry objects to the costs and structural changes required for compliance under the current framework, but these issues are not currently creating an insurmountable barrier to raising capital. More importantly, concerns over compliance costs do not justify the wholesale erosion of the SEC's statutory directive to protect investors. The proposed rule would authorize an entirely new exemptive framework that weakens investor protections and disclosures; erodes the jurisdiction of the SEC; precludes the full application of securities investor protections to crypto assets, actors, and activities; and legitimizes or incentivizes riskier, more extractive token offerings that benefit insiders at the expense of retail investors.

The SEC should withdraw the proposed rule because it poses significant risk to investors, market integrity, and financial stability. Instead, the SEC should work with prospective crypto asset issuers

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<sup>2</sup> 15 USC § 77z-3.

to seek capital formation under existing regulatory frameworks and offering structures that do not unduly undermine investor protections.

## **I. Proposal would incentivize issuers and early investors to seek short-term gains at the expense of retail investors**

The proposed rule locks in special privileges for insiders and early investors who typically get special access to discounted tokens before initial token offerings and reap hefty profits by unloading tokens on retail investors as prices decline. The crypto industry is deeply rooted in the tech industry's start up business model. That model has been highly dependent on early investments from venture capital firms (VC), that are able to absorb the risk of backing many risky experimental ventures that might fail in exchange for outsized early returns from one highly successful investment.

That conventional wisdom belies a different truth and crypto's unique role in it. VC and crypto firms aim to lock in early returns when newly launched tokens soar in value, whereupon they can dump their early stakes on retail investors who face steep losses when token values subside or collapse. American University Professor Hilary Allen, reviewing literature on the subject, wrote that, "despite their reputation for taking moon shots, VC firms are seeking 'investments with high upside, relatively short time frames and less risk.'"<sup>3</sup> Allen points out that internet-based businesses like crypto firms are appealing to VC funds because their lower capital costs make them quicker to set up, leaving more time for VC to exit early. Of these, crypto ventures have been especially popular because of the "unique exit strategies that are available as the securities laws are not enforced against crypto ventures."<sup>4</sup>

Since crypto tokens have not consistently been treated as or considered securities, VC firms can invest in crypto start-ups by purchasing heavily discounted tokens,<sup>5</sup> wait until the initial public sales of the tokens boost token prices, then sell immediately, with little restrictions on who they can sell to. Early investors in more conventional non-public offerings are barred from selling their shares for between six months and one year, and afterwards the sales of such securities are subject to SEC reporting requirements,<sup>6</sup> but there have been no such required holding periods for early investors in crypto tokens, and the proposed rule would effectively permanently extend this exemption from holding periods, allowing early investors to continue to seek early cash outs.

Many of these token offerings have historically either failed or were outright scams (see Section II). While VC investors have sometimes lost money in failed or fraudulent tokens along with other investors, many still profited. This short-sighted model has contributed to the crypto market's heady atmosphere of investors taking huge risks hoping for lottery-ticket style returns. This dynamic incentivizes issuers to offer tokens that either fail or are vehicles for scams—so long as insiders and early investors profit.

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<sup>3</sup> Allen, Hilary J. "[Interest Rates, Venture Capital and Financial Stability](#)." *University of Illinois Law Review*. Vol. 2025 No. 5. October 24, 2025 at 1699.

<sup>4</sup> *Ibid.* at 1720.

<sup>5</sup> Sometimes VC early investments act as equity stakes in the crypto venture or tokens are granted to the VC investors explicitly as equity. Functionally, both models grant VC early investors a way to capitalize and profit from the token offering itself.

<sup>6</sup> If the security has been subject to reporting requirements for 90 days, the holding period is six months; if the security has not been subject to reporting requirements for 90 days, the holding period is one year. 17 CFR §230.144(d)(1).

Historically, crypto token offerings that raise capital for start-up ventures have been known as Initial Coin Offerings, or ICOs. The history of crypto ICOs provides ample illustrations of how these token offerings have been attractive to VC funds because of their early exit profit potential. A 2021 study published in the journal *Financial Markets and Portfolio Management* examined the VC role in ICO fundraising and concluded that “For at least half of all primary market investors, the goal of participating in the ICO appears not to be the prepurchase of a product *that they intend to use* but rather speculation, as they sell the tokens before the product is developed.”<sup>7</sup> The paper found that early investors bought tokens at an average 34 percent discount and that “large investors indeed sell quickly after the ICO.”<sup>8</sup>

These quick sales flood the market with newly available coins, causing the price to decline. Retail investors who buy coins during the initial offers (after the pre-sales to early investors) are likely to see their investments decline in value. For example, a 2020 Technical University of Munich study looking at a sample of ICOs issued in 2019 found that 30 days after issuance, only 30 percent of the tokens were trading above their initial price. After six months, only 17 percent of tokens traded above their initial price and two-thirds (65 percent) of the newly issued tokens lost substantially all their value.<sup>9</sup> During the 2020–2021 crypto boom years, the early investor exit from initial token offerings was a well-known feature attracting a broader array of VC firms. A *Fortune* investigative report found:

The huge potential returns from tokens spurred the rise of crypto-focused funds... [and] also attracted the attention of generalist venture firms, including Sequoia Capital and Bessemer Venture Partners. In an era of zero interest rates and tons of cash in the private markets, many VCs latched onto crypto—and tokens in particular—as the next hot thing. Lilita Infante, a former Department of Justice special agent who founded the crypto crime-fighting startup CAT Labs, told *Fortune* that she had trouble raising money in the heady days before FTX’s collapse. She felt a major roadblock when she approached VCs was that the project didn’t offer tokens—only old-fashioned equity. “I didn’t have the pump-and-dump element, so they weren’t interested,” she said.<sup>10</sup>

The strategy generated record fundraising for VC firms during the boom, which one industry analyst partially attributed to the fact that these firms, “had very good metrics by getting liquidity super early and juicing up those numbers.”<sup>11</sup> Some of these same VC firms suffered significant losses from exposure to the downside of these tokens during the 2022 crypto crash, but most have managed to avoid lasting financial harm and have continued to be profitable from their early investment-early exit strategy.

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<sup>7</sup> Fahlenbrach, Rudiger and Marc Frattaroli. “[ICO Investors](#).” *Financial Markets and Portfolio Management*. Vol. 35. November 6, 2021.

<sup>8</sup> *Ibid.*

<sup>9</sup> Haffke, Lars and Mathias Fromberger. “[ICO Market Report 2019/2020 – Performance Analysis of 2019’s Initial Coin Offerings](#).” TUM School of Management, Technical University of Munich. December 30, 2020.

<sup>10</sup> Schwartz, Leo and Anne Sraders. “[“Token projects have to eat that sh\\*t every day”: Crypto VCs face a harsh reality in the bear market](#).” *Fortune*. June 1, 2023.

<sup>11</sup> *Ibid.* quoting Robert Le, a Pitchbook analyst.

The proposed rule uncritically parrots industry claims that the token offerings are not securities themselves but are actually different kinds of tokens with different functions for the investors (such as utility or security tokens) and that investors purchase these tokens for their functionality, not because they are profit seeking investments in tokens as a financial instrument. However, the *Financial Markets and Portfolio Management* study mentioned above undercuts the notion that early investors are buying tokens for their non-financial use; most are seeking quick returns, not access to governance tokens.

The proposed rule establishes an exemptive relief framework that codifies and legitimizes special privileges for early investors, a condition which poses significant risks to unsuspecting retail investors in initial token offerings. The proposal creates ample latitude for token issuances without lock-ups, minimal obligations to token purchasers from issuers, streamlined disclosure rules, more opportunities for quick resales and a wider array of potential customers to provide liquidity from initial token sales. The offerings issued under the proposed rule would likely be tremendously lucrative for insiders and venture capital firms but extremely risky and costly for retail investors.

Under traditional securities rules, such as under Rule 144, venture capital firms investing in start-up venture must submit to lock-up period requirements that prohibit them from dumping their early shares onto the market for six months to a year, and potentially longer under other conditions.<sup>12</sup> A VC selling its holdings might trigger additional registration requirements, and even those sales might be restricted to only certain buyers.<sup>13</sup> These requirements help prevent or at least mitigate misalignment between the incentives of founders, early investors and retail investors and deter insiders from pumping an offering for quick profits at the expense of subsequent retail buyers.

Yet, the proposed rule does not currently consider requiring specific lock-up or vesting periods for early investors. Proposed Rule 103(b)(4), dealing with related person holdings, does not address the potential risks of this extractive capital acquisition model.<sup>14</sup> The SEC chose not to impose any lock-up period for insiders even though it notes that such an alternative could strengthen investor protection, avoid insider sales that raise concerns regarding asymmetry of information and misaligned incentives, and cites “prior economic studies” which “find that ICOs are more successful...when the insiders have a lockup/vesting period for the sale of their tokens.”<sup>15</sup>

The proposed rule lacks lock-up requirements for insiders because foregoing these protections purportedly promotes innovation and business formation. Further, the SEC claims that the proposal’s requirement that insiders merely disclose any resale permissions or restrictions will suffice to address these risks, since retail investors could purportedly weigh for themselves the risk of such arrangements (despite acknowledging risky informational asymmetries).

This is not only insufficient but demonstrates that this rule is largely tailored to meet the needs of issuers (and their early backers) not retail investors. The SEC should impose lock-up periods comparable to those found in Rule 144 and similar regulatory measures for insiders, early investors, and related parties of crypto initial token offerings (e.g., from 6 to 12 months and limitations on

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<sup>12</sup> 17 CFR §230.144(d)(1).

<sup>13</sup> Securities and Exchange Commission. “Rule 144: Selling Restricted and Control Securities.” Investor Publications. January 15, 2013.

<sup>14</sup> 91 Fed Reg. 161 at 54588

<sup>15</sup> 91 Fed. Reg. 161 at 54588

buyers). Disclosure of insider resale allowances or limitations are necessary but insufficient to address the potential investor risk associated with these arrangements, especially given the track record of token offerings rewarding insiders and harming retail investors. But even the addition of lock-up periods for insiders would not mitigate the broader investor harms stemming from other aspects of the proposed rule.

## **II. Proposal exposes retail investors to more risk without providing adequate safeguards or disclosures**

*The proposed rule's economic analysis does not adequately acknowledge or address the costs to investors that are exposed to widespread crypto-related fraud*

The proposed rule establishes considerably weaker investor protections and disclosures than are guaranteed in public equities markets or some of those found in other private exempt offerings. These shortcomings leave investors vulnerable to the fraud and predatory practices that are endemic in crypto markets. Investor protection is the first mission of the SEC, but the proposed rule references investor protection as an aim and desired outcome of the proposal in mostly vague or oblique ways. For example, the proposed rule aims to mitigate, but not prevent, investor harm from fraudulent crypto enterprises by disqualifying issuers and investors from the proposed exemptions who had been convicted or disciplined for prior fraudulent activity.<sup>16</sup> It states the disqualification provision “could help reduce potential fraud.” The proposal’s requirement that issuers be primarily located within the United States purportedly will help foster more oversight and presumably enforcement. Lastly, the rule suggests that disclosures required by issuers using the start-up and fundraising exemptions are “designed to provide appropriate investor protections.”<sup>17</sup>

These measures, and the proposed rule’s general approach to mitigating investor harm, provide only a modicum of protection and are wholly inadequate given the well-documented record of widespread fraud, failure, and investor risk found throughout crypto markets. The rule must both account for the economic costs of such fraud on investors and other stakeholders and offer a thorough assessment of how and to what extent the proposed rule might reduce or address those costs. Yet, the rule’s economic analysis does little to acknowledge, evaluate, or account for the historic costs to investors from crypto-related securities fraud and token failure, let alone attempt to demonstrate in real economic terms how this rule would concretely mitigate such losses. The rule does not meaningfully attempt to assess what sort of increase in token-related fraud might occur should there be an increase in token offerings under the proposed rule. It appears primarily focused on whether the rule reduces the costs for crypto issuers, including compliance costs (which have a direct relationship to the potential costs of fraud).

This is a glaring oversight. Crypto is at the center of a burgeoning epidemic of financial crime. The FBI’s Internet Crime Complaint Center (IC3) reported \$11.3 billion in consumer losses from financial crime with a cryptocurrency nexus in 2025, up 22 percent from 2024. Well over half those reported losses were specifically from crypto investment fraud (\$7.22 billion), and out of all reported investment fraud, crypto-related scams were the most prevalent.<sup>18</sup> And, the average reported loss via

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<sup>16</sup> 91 Fed. Reg. 161 at 54576

<sup>17</sup> 91 Fed. Reg. 161 at 54576

<sup>18</sup> [FBI 2025 Internet Crime Report](#). April 6, 2026 at Page 52.

these crypto investment scams was \$62,604—a significant sum given U.S. household investment patterns and net wealth.<sup>19</sup>

Survivors of financial fraud, especially crypto frauds, rarely recoup their stolen funds and typically incur other costs. A 2015 FINRA Foundation study of 600 self-reported fraud victims—conducted well before the onset of crypto-related investment scams which have contributed to a large increase in financial fraud—found that about 9 percent ended up declaring bankruptcy, while half incurred additional direct and indirect financial costs.<sup>20</sup> Many respondents reported costs associated with physical and mental health concerns rising from their experience as well.

New crypto token offerings—like those that could be governed by the proposed rule—have historically been a source of investor losses due to scams or hacks. A 2018 Ernst & Young study analyzing more than 372 initial coin offerings (ICOs) issued during 2017–2018 crypto boom found that more than 10 percent of the invested funds were lost or stolen through hacks. The study identified \$400 million lost out of \$3.7 billion raised.<sup>21</sup> Another 2018 study found that over 80 percent of the individual ICOs the study evaluated were identified as scams.<sup>22</sup> And, a 2022 study that evaluated 1,014 ICOs launched between 2014 and 2019 found that 56.8 percent of these ICOs, equaling 65.8 percent of the market capitalization, were credibly associated with scams, amounting to \$15.38 billion.<sup>23</sup>

The proposed rule acknowledges that its exemptions could impose costs on investors by allowing “issuers [to] lessen the vigor with which they develop and implement systems and controls to achieve compliance with the requirements of the proposed exemption.”<sup>24</sup> Yet the agency does not attempt to quantify the potential investors losses that could occur should issuers “lessen the vigor” of compliance and the tokens issued under this rule fail, become vehicles for fraud, or are subject to hacks or theft.

The proposed rule fails to acknowledge or address the impacts of crypto fraud on investors, despite the SEC’s statutory mission to protect investors. It fails to acknowledge the prevalence or predominance of crypto related fraud within the broader category of investment fraud. The proposed rule effectively condones and potentially exacerbates the widespread crypto fraud by enshrining weak protections while promoting the increased issuance of crypto tokens. The widespread fraud in token issuance demands *stronger* investor protections and disclosure, not the

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<sup>19</sup> The median figure for U.S. household wealth was \$176,500 in 2022. About \$76,000 of that net worth was in retirement accounts, stocks, and bonds; see Sullivan, Briana and Shomik Ghosh. U.S. Census Bureau. “[The Wealth of Households: 2022](#).” Current Population Reports No. P70BR-202. 2024. Accordingly, the ICE3’s average reported crypto investment scam loss would represent more than one-third of median household net worth and over 80 percent of investor’s investment account holdings.

<sup>20</sup> Applied Research and Consulting LLC. Prepared for FINRA Investor Education Foundation. “[Non-Traditional Costs of Financial Fraud: Report of Survey Findings](#).” March 2015.

<sup>21</sup> Irrea, Anna. “[More than 10 percent of \\$3.7 billion raised in ICOs has been stolen - Ernst & Young](#).” *Reuters*. January 22, 2018.

<sup>22</sup> Dowlat, Sherwin and Michael Hodapp. Statis Group Crypto Research. “[Cryptoasset Market Coverage Initiation: Network Creation](#).” July 11, 2018.

<sup>23</sup> Grobys, Klaus, Timothy King, and Niranjan Sapkota. “[A fractal view on losses attributable to scams in the market for initial coin offerings](#).” *Journal of Risk and Financial Management*. Vol. 15, No. 12. 2022.

<sup>24</sup> 91 Fed. Reg. 161 at 54575

weaker protections afforded under the exemptions, loopholes, and safe harbors of the proposed rule.

***The proposed rule relies on tailored, principle-based disclosure standards instead of proscriptive and fulsome disclosures, despite the significant flaws in this approach***

The proposed rule's disclosure requirements will not provide investors with the necessary or sufficient details to make informed investment decisions. The proposal offers only high-level guidance on the categories and quality of the issuers' disclosure content rather than providing proscriptive guidance on consistent, comparable, and uniform sets of information or data that all investors deserve to be able to understand and compare the opportunities and risks across token offerings.

Instead of a clear set of easily comparable data and information that would be valuable to prospective investors, the proposed rule's disclosure requirements are "principles-based" and tailored to the issuer. Issuers would be required only to describe the material aspects of applicable disclosure topics, but the rule does not specify what degree of detail or scope may be sufficient to meet the disclosure requirements or provide investors with adequate information.<sup>25</sup> Moreover, it states that "disclosure is not required to be provided where a particular disclosure requirement is not applicable."<sup>26</sup> The proposed rule justifies this by saying it will give issuers flexibility to tailor their disclosure information to their specific facts and circumstances and avoid disclosure of irrelevant information.

The proposed rule delineates general categories of content that issuers must cover in their disclosures: (1) covered investment contract; (2) offering; (3) subject crypto asset; (4) management, related persons, and conflicts of interest; (5) associated crypto network/application; plan of development; (6) security; source code; (7) subject crypto asset economics and allocation; (8) governance; (9) subject crypto asset ecosystem; and (10) risk factors.<sup>27</sup> The proposed rule directs issuers to provide information in clear, concise, understandable language that addresses the issuer's stage of development and forward looking plans for development. And issuers are told the information provided must be consistent with its public statements.<sup>28</sup>

These elements may be a starting point for disclosure, but without more specific parameters, this undefined approach effectively obscures or withholds useful, comparable, and adequate information from investors. It would also be difficult for the SEC to pursue issuers for deceptive or problematic token offerings under the proposed rule's qualitative, principles-based disclosure obligations which lack specific, proscriptive, and more comprehensively standardized disclosures requirements. Issuers will have an incentive to game the system and abuse the lack of specific reporting requirements to obscure or omit information that investors deserve, but it will be difficult for the SEC to police issuers' compliance with disclosure requirements under a principles-based disclosure regime. The result is that investors would receive less reliable and less useful information upon which to make their investment decisions.

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<sup>25</sup> 91 Fed. Reg. 161 at 54524

<sup>26</sup> 91 Fed. Reg. 161 at 54608

<sup>27</sup> 91 Fed. Reg. 161 at 54608

<sup>28</sup> 91 Fed. Reg. 161 at 54608

For example, the proposed rule gives little detail on how it would require issuers to disclose material terms of the investment contracts that constitute offerings under the rule. The initial description of what issuers must disclose appears straightforward. But then, the Commission goes on to delineate how an issuer may pre-emptively make representations that would not constitute managerial efforts. In particular, an issuer could include in their disclosure representations about how an issuer's administrative efforts to service the network or infrastructure underlying the token after an investment contract has ended, would not be sufficient to meet the Howey Test.<sup>29</sup>

This type of construction allowable under the proposed rule's disclosure framework may grant issuers further leeway with regard to the Howey Test. Regulators and courts typically apply facts and circumstances tests to investment offerings. These tests look at the totality of circumstances, and economic realities of an offering (regardless of underlying technology or statements made by issuers). A disclosure regime that allows an issuer to pre-emptively name the conditions where and when their managerial activities may or may not fall within the bounds of Howey, and then have those conditions tacitly approved through this exempt offering framework, could blunt the ability of regulators or the courts to apply the Howey test to these offerings, if future questions or investor concerns arise.

All told, the proposed rule's lack of more proscriptive disclosure standards gives issuers far too much latitude. Issuers may write their own terms for the relevant investment contract and its dissolution, paint an overly optimistic picture of a token's prospects (but still steer clear of material misstatements), or provide whatever information they deem fit to share with or conceal from investors. It is not difficult to imagine scenarios where token issuers offer selective and favorable principles-based disclosures in ways that meet the standard of the rule but still put investors at a disadvantage.

The proposed rule's disclosure approach sacrifices the legitimate interests of investors to have access to fulsome and comparable information and data to the interests of issuers to have flexibility in choosing what and what not to reveal to prospective investors. The proposed rule repeatedly notes that there are significant information asymmetries between issuers and investors, but the proposal's weak, principles-based disclosure regime would likely worsen these informational asymmetries, create incentives and opportunities for issuers to conceal material risks, and exacerbate the widespread opacity in crypto markets that exposes crypto investors to risks and harms.

***Current crypto industry's disclosure practices have not demonstrated reliable efficacy as tools for meaningfully mitigating investor risk***

The proposed rule aligns token issuer disclosure requirements with current industry information sharing practices that have often obscured meaningful information from investors and exposed them to harm. The proposal repeatedly argues that the tailored disclosure requirements should include the disclosure of crypto-specific information that is more relevant and useful to crypto investors than more standard information disclosed under conventional investment offerings. These types of information include whitepapers, explanation of the "tokenomics" of a particular offering, the disclosure of technical information, such as the source code, network protocols or security features of the underlying software or platform supporting the token issuance.<sup>30</sup>

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<sup>29</sup> 91 Fed. Reg. 161 at 54525

<sup>30</sup> 91 Fed. Reg. 16 at 54523

Some of this information no doubt has nominal value for crypto investors. But academic and industry studies have often shown that the quality and clarity of such crypto-specific information is inconsistent, non-standardized, and can sometimes be used to obfuscate, not clarify, details of crypto-related investments. Unlike corporate SEC filings that contain specific data and narrative elements that are consistent across all reporting companies, whitepapers are unique, bespoke, and often promotional publications that vary considerably in detail and content between issuers.

For example, a 2025 study examined hundreds of crypto whitepapers (out of a larger pool of crypto offerings), exploring how different facets of whitepapers might correlate to the corresponding assets' performance. While the study found that coins that simply had whitepapers demonstrated higher average returns, at least in the short-term, it was less clear which features mattered. For example, the study found that longer white papers had a negative correlation with returns and the "readability" of the whitepapers had no consistent effect on returns.<sup>31</sup>

A 2019 study found that token issuers systematically exaggerate information disclosed in whitepapers, raising more funds in less time from investors. Investors covered in the study were unable to differentiate accurate from exaggerated information, in part because of a lack of institutional guidance to evaluate the quality of those papers. Investors in exaggerated token offerings ultimately sold their products at a loss, and such products were more likely to fail. The study concluded that this dynamic created moral hazard in ICO markets, where token issuers had incentives to exaggerate claims in ways that generated early financial benefit at the expense of token purchasers.<sup>32</sup>

If whitepapers are included in the required disclosures for issuers, the SEC should establish consistent data elements, narrative requirements, and technical standards for these whitepapers. The European Union's MiCA regulatory framework for crypto assets is developing draft technical standards to regulate the format of white papers in a more standardized manner.<sup>33</sup> But, the proposed rule does not even consider adopting whitepaper technical standards. The proposed rule does describe the types of content often found in ICO whitepapers, but primarily to estimate compliance costs. The proposed rule makes no real assessment of the quality, consistency, or usefulness of whitepapers, beyond mentioning that some issuers say they find the information useful—which is relevant, but not sufficient to establish a foundation for a disclosure regime.<sup>34</sup>

Nor does security information necessarily present a reliable and meaningful source of alternative information for crypto investors. The proposed rule suggests disclosure of information regarding the security and underlying source code of the token and associated networks or protocols would be useful for investors. In the rule, the SEC cites a letter from a firm called OpenZeppelin, which in previous communications with the SEC recommended disclosure of information regarding third-party security audits of crypto platforms or protocols and the methodology used in those audits as a

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<sup>31</sup> Moser, Stefanie. "[Do whitepapers matter? Investigating the long-term effects of cryptocurrency whitepapers.](#)" *Finance Research Letters*. Vol. 85. 2025.

<sup>32</sup> Momtaz, Paul P. "[Entrepreneurial Finance and Moral Hazard: Evidence from Token Offerings.](#)" *Journal of Business Venturing*. Vol 36, Issue 5. September 2021 at 106001.

<sup>33</sup> Cobos, MT.O. "[Crypto-Asset White Papers and Marketing Communications Post the MiCA Regulation.](#)" In: Pastor Sempere, C. (eds). *Governance and Control of Data and Digital Economy in the European Single Market*. Law. Governance and Technology Series. Vol 71. Springer Nature Switzerland AG: Cham, Switzerland. 2025.

<sup>34</sup> 91 Fed. Reg. 161 at 54572-54573

key type of information crypto investors might want more information on. It is worth noting that OpenZeppelin is a third-party auditor of blockchain protocols,<sup>35</sup> so this proposed requirement would seem to directly benefit the firm.

While no doubt such information would be material and potentially meaningful to a prospective crypto investor, the SEC errs in assuming this particular type of information is qualitatively equivalent to the more proscriptive, standardized disclosures required of conventional asset issuers, or represents meaningful security information at all. As an illustration, a 2026 State of Crypto Security Report published by the crypto trade news outlet *CoinGecko*, which evaluated 245 recorded crypto hacking exploits between January 2025 and July 2026, found that 60 percent of the platforms that fell victim to these exploits had secured independent security audits prior to the hacking event. According to *CoinGecko*, the losses attributed to audited firms account for 88.44 percent of the overall losses captured in their report, which totaled \$3.63 billion. Furthermore, the report goes on to say that the most common security exploits fell beyond the scope of traditional crypto security audits, suggesting that even quality audits that represent the industry standard are of limited value.<sup>36</sup>

This example presents two problems for the SEC. One, if information on security audits is a meaningful example of the type of disclosure information that should be offered in this alternative disclosure regime, then the SEC should identify what constitutes a good audit, how investors might determine the extent to which such audits provide accurate information for risk assessment, and other technical guidance. This would be in line with the SEC's recognition of other types of standardized technical guidance, such as the Financial Accounting Standards Board's Generally Accepted Accounting Principles.<sup>37</sup> Failing that, the Commission should at least point to existing technical standards as reference points. But nowhere in the rule does the agency offer any guidance or suggestions on the standards or quality of such audits or the information that must be provided about them by issuers.

As such, under the proposed rule, issuers may offer investors information about third-party security audits, which presumably investors must evaluate from a risk management perspective. But investors are given no context or point of reference to conduct such a risk assessment, independent of the issuer or the industry. Subsequently, investors will struggle to determine what is "good" quality or "poor" quality information about such security measures. Second, if the industry's own analysis finds that traditional third-party security audits fail to assess platform vulnerability to a wide range of security risks, then the value of providing audit information is limited. Instead, the proposed inclusion of information regarding third-party security audits of tokens, protocols or platforms could provide a misleading sense of security to potential investors since the SEC has given its imprimatur to audits as meaningful information to include in issuer disclosures, irrespective of their quality or effectiveness.

These are but two examples that demonstrate that the information the crypto industry promotes as useful and relevant, and that the proposed rule accepts as suitable information to be shared in issuers' disclosures, is inconsistent and unreliable.

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<sup>35</sup> OpenZeppelin. Services. Security Audits. Available at <https://www.openzeppelin.com/security-audits>. Accessed October 2026.

<sup>36</sup> "2026 State of Crypto Security Report." *CoinGecko*. August 7, 2026.

<sup>37</sup> SEC. Policy Statement. "Reaffirming the status of the FASB as a designated private-sector standard setter." Release Nos. 33-8221, 34-47743, IC-26028, FR-70. August 25, 2003.

Moreover, many retail and even institutional investors struggle to meaningfully evaluate such crypto-specific information to assess and manage risk and are susceptible to promotional materials that encourage investment in highly risky crypto issuances. For example, one study evaluating accredited investors active in cryptocurrency markets noted that “numerous accredited investors participated in ICOs that later collapse or were revealed to be outright scams” and that “accredited investors held significant stakes in Terraform Labs through private placements exempted under Regulation D. However, their presumed sophistication did not translate into accurate risk assessment” of Terraform Lab’s manifold failures and malfeasance.<sup>38</sup> The study author also notes that major accredited investors such as Sequoia Capital, Temasek, and SoftBank invested hundreds of millions of dollars in FTX without uncovering the extent of FTX’s problems: “These institutions, presumed to embody the pinnacle of sophistication, failed in due diligence.”

The offerings the author refers to were made under a more restrictive regime than that found under the proposed rule, to a pool of more sophisticated institutional investors, including some who professed high degrees of expertise or technical proficiency in crypto markets theoretically sufficient to evaluate the technological aspects of these platforms and their offerings. The backing from these well-heeled financial firms encouraged a large pool of less sophisticated investors to also invest in these assets and platforms that ultimately collapsed. That their investments failed spectacularly suggests that even technically proficient investors may struggle to use the kinds of technical disclosures enshrined or endorsed by the proposed rule to accurately evaluate risks, resulting in investor harm or hazard. Alternatively, it also suggests that a crypto asset investment culture focused on high-risk, high-reward, high-speed returns may devalue technical information, regardless of its quality or consistency, allowing short-term profit seeking to trump disclosure content that would otherwise raise flags.

The SEC should strengthen the disclosure requirements to provide needed, comparable, uniform information including specific narrative and data elements, at a similar level of detail to the disclosures required by publicly traded equities. The rule should prioritize the interests of investors in accessing reliable, comparable information to make investment decisions and meaningfully assess the novel risks posed by investing in these crypto asset offerings.

### **III. Proposal’s legal treatment of crypto investment contracts threatens to undermine judicial precedent in ways that harm investors**

The proposed rule establishes a novel class of crypto-linked “covered investment contracts,” an offering framework for these assets, and a safe harbor to dissolve these contracts. In the rule, the SEC says that “it can be difficult to apply the Howey test to crypto assets” and that its existing rules are not fully “fit-for-purpose” with respect to these assets, and that these issues “stem from the unique attributes of crypto assets.” Specifically, the SEC says that “although crypto assets maybe subject to investment contracts...when first offered or sold, the crypto assets may subsequently cease to be subject to investment contracts (at which point the Federal securities laws no longer would apply.”<sup>39</sup>

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<sup>38</sup> Stern, Lana. “[Understanding accredited investors in cryptocurrency markets: A comprehensive analysis.](#)” *Journal of Economic Criminology*. Vol 9. September 2025.

<sup>39</sup> 91 Fed. Reg. 161 at 54512

Through this rationale, the proposed rule would allow token issuers several ways to avoid or evade application of securities-based investor protection rules. Such evasion means token investors would have fewer rights and protections as investors when buying token in a first offering, and especially when buying tokens offered under this framework in secondary sales. Investors would be subject to more risk and volatility, and token issuers and their associated platforms would have power and leverage to exploit these investors without the oversight or investors obligations they would otherwise be subject to if these assets were treated the same way as other securities offerings. And the SEC's assertion that this asset class needs a tailored set of offering rules because Howey is difficult to apply to them invites further regulatory arbitrage by crypto and other financial market players, potentially undermining Howey's reach with respect to investor protection.

The SEC proposes this new exempt framework after considering existing exemptions for private offerings as an alternative. The proposed rule notes crypto issuers could raise money from investors by selling a securities offering that relies on existing exemptions from the Securities Act of 1933 Section 5,<sup>40</sup> but then says the SEC believes Regulation A is unlikely to be a viable option for issuers that are considering offering covered investment contracts because such assets are not "eligible securities" under Regulation A.<sup>41</sup> As support, the SEC points to previous discussion of this notion in its proposed rule,<sup>42</sup> which in turn relies on, in part, the agency's own interpretive guidance from March 2026 (itself not formally legally binding) which mirrors longstanding crypto industry arguments that crypto assets are distinct from the investment contracts that encompass their offer or sale.<sup>43</sup>

The SEC's interpretive guidance suggesting that crypto offerings are not investment contracts and the proposed rule's novel new crypto investment contracts completely contravenes existing securities law and jurisprudence. This notion, which Duke Fellow Lee Reiners says is sometimes referred to as the "separation theory," derives its legal subsistence from Southern District of New York Judge Analisa Torres's 2023 ruling on a set of motions filed by the SEC and crypto firm Ripple (SEC v. Ripple Labs, Inc.). Judge Torres ruled partially favor of a motion by Ripple, including by stating that "XRP, as a digital token, is not in and of itself a "contract, transaction[,] or scheme."<sup>44</sup>

Torres' ruling, as Reiners notes, is a stark outlier in the judicial record: "Until Judge Torres' ruling in Ripple, no court had adopted separation theory in a crypto related case." Indeed, Reiners and others analyzed numerous federal cases where courts consistently ruled that the economic reality of a crypto assets offering, including the facts and circumstances surrounding that offering, were the ultimate test of whether an offering amounted to a security under existing securities laws – and that in most cases the court rules that such offerings amounts to securities via the Howey Test.<sup>45</sup>

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<sup>40</sup> 15 U.S.C. § 77e

<sup>41</sup> 91 Fed. Reg. 161 at 54561.

<sup>42</sup> 91 Fed. Reg. 161 at note 249 at 54537.

<sup>43</sup> SEC. Interpretive Rule. "[Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets](#)." RIN 3235-AN56. March 23, 2026.

<sup>44</sup> *Securities and Exchange Commission v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308 (S.D.N.Y. 2023) at 13.

<sup>45</sup> Reiners, Lee. Duke University. "[Prepared Statement for SEC's Crypto Task Force](#)." March 21, 2025 at Page 6, Section III. "Howey Has Been Consistently Applied to Cryptocurrency Cases."

The SEC has willfully disregarded this record of judicial rulings. Following the crypto industry's lead, it has selected a single legal ruling that agrees with the industry's characterization of these assets out of the many other rulings that do not. It has buttressed that toothpick's worth of legal precedent with selective information collection from its Crypto Task Force findings and its own non-binding, largely self-referential interpretive guidance on crypto assets and their taxonomy, to erect a whole new pathway for exempt offerings that it proposes in this rule.

The Howey Test, first established by the 1946 Supreme Court decision in *SEC v. W.J. Howe Co.*, is the primary legal standard used by the SEC, federal courts, and others to determine whether an investment or financial offering should be considered an investment contract, and therefore fall under the jurisdiction of federal securities law. An investment meets the Howey Test if the facts and circumstances of the offering show that it is an investment of money in a common enterprise where the investors expect profits from their investment due primarily to efforts of those running that common enterprise.<sup>46</sup> Crucially, the Howey Test is intended to be a way to evaluate investment offerings based on their economic realities, rather than any name or label assigned to them by their investors or the entities offering the investment.

The case law supporting the application of the Howey Test to investment offerings involving purportedly novel underlying assets is robust. A 2024 Better Markets report outlines how a number of exotic ventures involving investment contracts—where the underlying assets included barrels of scotch, live beavers, chinchillas, earthworms and cattle embryos—have all been found by the courts to meet the definition of the Howey Test and constitute securities. In each of those cases, the courts were not focused on whether the underlying asset was or was not a security, but rather why and how investors chose to enter into the investment arrangements with the offering party. The answer is that the investors consistently had the expectation that their investment in these ventures were investments in a common enterprise that would create profits for them due to the efforts of others, and that the offerings they received fostered those expectations.<sup>47</sup>

If the Commission were serious about maintaining consistent regulatory standards for crypto relative to other investment offerings, the proposed rule would either more robustly reflect this judicial history or would take an altogether different approach. For example, the SEC could have created small, tailored amendments under Regulation A to include crypto-related investment contract offerings as eligible securities that would have been a more targeted and surgical change to existing securities regulations than the proposed rule. That would have given crypto investors a level of oversight more consistent with existing exempt offerings and would not require, or pursue, a wholesale revision of the application or scope of the Howey Test.

The question of whether this erosion of Howey stands to harm investors is not abstract. In a separate analysis by Reiners of World Liberty Financial's offering of \$WLFI (described by the firm as a governance token), Reiners shows that WLFI's features strongly suggest that as an offering it meets the Howey Test:

Imagine a non-Trump-affiliated crypto project that sold hundreds of millions of dollars of governance tokens to fund a not-yet-complete DeFi ecosystem; told

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<sup>46</sup> “[Howey Test](#),” Legal Information Institute, Cornell Law School. Accessed October 2026.

<sup>47</sup> Schiffrin, Benjamin. “[Crypto Should Be Regulated by the SEC under the Howey Test to Protect Investors and Enforce the Securities Laws](#),” Better Markets. July 25, 2024.

purchasers the token's only utility was governance; reserved sweeping control over proposals and implementation; later made the token tradable; unilaterally added blacklist and reallocation powers; froze its largest investor's tokens; allegedly blocked that investor from voting; and allegedly threatened to burn those tokens. It is difficult to believe the SEC would treat that as a routine commercial dispute. Under both traditional *Howey* analysis and the SEC's own new interpretation, those facts scream securities-law relevance. Now add a related-party lending transaction in which the issuer pledges billions of its own governance tokens to borrow tens of millions of dollars in its own stablecoin from a protocol tied to one of its own advisers, draining a user-funded liquidity pool and liquidation risk for ordinary depositors. That would be impossible for a sane SEC to ignore.<sup>48</sup>

Moreover, Reiners explains that, under CLARITY Act provisions that mirror the proposed rule, "The Senate market structure legislation shows why this matters. Under the text of that bill, \$WLFI would likely be treated as an 'network token' or 'ancillary asset,' and therefore largely removed from securities-law protection."<sup>49</sup> Assuming the similarities between the proposed rule and this legislation hold, under the proposed rule investors in \$WLFI would have less protection under this framework than under a Regulation D offering or a public offering. If the \$WLFI offering is a template for how crypto token offerings would proceed under the proposed rule, that should be cause for great concern, and underscores how this novel treatment of investment contracts and application of *Howey* would sidestep decades of securities law precedent in ways that benefit issuers but expose investors to more risk and less disclosure.

#### **IV. Proposal would impede state securities regulators' authority and jurisdiction, eroding market integrity and harming investors**

The proposed rule would exempt covered crypto investment contracts from key elements of oversight conducted by state securities regulators, who are often the first line of defense for investors. The proposed rule adds a new definition of "qualified purchaser" under section 18(b)(3) of the Securities Act of 1933 that pre-empts state securities law registration and qualification for crypto investment contract offers, sales of covered investment contracts, and secondary market transactions except by the issuer, underwriter, or dealer.<sup>50</sup> The purported rationale for this preemption is to lower compliance costs and to reflect a national—not regional or intrastate—market. Moreover, under the proposed rule state securities regulators would retain jurisdiction with respect to fraud, manipulation, and unlawful conduct by intermediaries.<sup>51</sup>

***The rule does not fully consider investor harms and costs from reduced enforcement against bad actors in crypto markets by state securities regulators due to reduced jurisdiction and authority***

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<sup>48</sup> Reiners, Lee. "[Is \\$WLFI an Unregistered Security?](#)" *The FinReg Blog*. Duke Financial Economics Center. May 8, 2026.

<sup>49</sup> *Ibid.*

<sup>50</sup> 91 Fed. Reg. 161 at 54555 to 54556.

<sup>51</sup> 91 Fed. Reg. 161 at 54555 to 54556.

The proposed rule contemplates the cost savings for issuers for avoiding state registration compliance costs,<sup>52</sup> but makes no effort to evaluate the costs to investors from reduced enforcement by state securities agencies. The proposed rule lacks any analysis of the role state securities regulators have played thus far in policing bad actors associated with crypto asset offerings and provides no quantitative or qualitative accounting of the potential costs incurred by investors and other parties should the proposed rule pre-empt state level registration, qualification, or merit review of crypto assets offered under the rule. The rule merely asserts throughout that state securities regulators will retain their anti-fraud authority. But excluding states securities agencies from broader jurisdiction over crypto investment contracts could significantly impede their ability to protect investors.

State securities regulators are at the forefront of investor protection. A 2021 study found that between 2012 and 2018 state securities regulators brought 1,826 administrative and civil actions each year, 139 percent more than the SEC during the same period.<sup>53</sup> State securities regulators also brought more criminal cases on average during a similar time period than the Department of Justice (DOJ). This same study also found that “state and federal authorities tend not to overlap in their enforcement activity despite overlapping in their enforcement jurisdiction, suggesting that they complement each other as public securities enforcers.”<sup>54</sup> By inference, this raises the concern that whatever new oversight provided by the proposed rule at the federal level would not be a substitute for the resulting potential net loss of oversight by state securities regulators and could expose investors to more harms that would go unaddressed and unremedied.

***The rule’s focus on geographic scope for these offerings as a rationale for pre-emption is superficial and misses key dimensions of crypto-related fraud***

The Commission’s argument that crypto-offerings under rule would likely be national in scope has some surface validity but ignores critical elements of crypto fraud that harm investors. Crypto offerings are often made on or through platforms that operate across states or even international jurisdictions, and the marketing for these products often occurs on social media platforms that have similar footprints. However, crypto-related fraud cases can be and are more targeted in scope. Many crypto related fraud cases are fueled by forms of affinity fraud that target people based specific aspect of their identity—membership in a church, their ethnic identity, their age, or immigration status, among other key determinants.<sup>55</sup> And, while many scam operations have global reach and footprint, just as in legitimate finance, scammers have developed the ability to micro-target their victims.<sup>56</sup> These cases by their very nature may involve smaller dollar amounts that may not trigger larger federal agencies’ intervention, but are often the types of cases state regulators pursue.<sup>57</sup>

The SEC acknowledges that its analysis expects the proposed rule to result in an increase in token issuances that have relatively small fundraising caps. It is reasonable to assume this might increase incidence of fraudulent token offerings of a similar size by encouraging more dubious crypto firms

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<sup>52</sup> 91 Fed. Reg. 161 at 54585.

<sup>53</sup> Jennings, Andrew K. “[State Securities Enforcement](#),” *BYU Law Review*. Vol 47, Issue 1. December 31, 2021.

<sup>54</sup> *Ibid.* at 70.

<sup>55</sup> California Department of Financial Protection and Innovation. “[Watch Out for Crypto Affinity Fraud](#).” Accessed October 2026.

<sup>56</sup> SEC Office of Investor Education and Advocacy. Investor Alert. “[5 Ways Fraudsters May Lure Victims Into Scams Involving Crypto Asset Securities](#).” May 29, 2024.

<sup>57</sup> Berdejo, Carlos. “[Small Investments, Big Losses: The States’ Role in Protecting Investors From Securities Fraud](#).” *Washington Law Review*. Vol 92. 2017.

from manipulating or exploiting the exempt offering framework. Fraudsters observing a burgeoning market might recognize the strategic value of not only putting out their own fraudulent offerings into a larger and more dynamic marketplace filled with more national-scale offerings but also in smaller, more state-specific or sub-national markets. To date, the SEC has not discussed whether its own enforcement strategy and agenda will prioritize investigation of fraud claims related to these small token offerings, on their own, or relative to larger cases.

***The proposal is overly reliant on states' remaining anti-fraud authority under the rule, which is an inadequate substitute for states' current authority and jurisdiction over crypto assets***

The proposed rule presumes that state securities regulators will not be constrained in pursuing fraud cases even when their jurisdiction over crypto investment contracts may be impeded under the proposed rule. The potential erosion of state regulators' jurisdiction under the proposed rule is likely to substantially constrain state fraud investigations and it may prevent other enforcement activities by state regulators. Civil or administrative cases comprise the bulk of enforcement actions or investigations that state securities regulators pursue.<sup>58</sup> And, securities-related matters, including the offer and sale of unregistered securities and/or by unregistered parties, rank at or near the top of the list of investigations or actions taken by state securities regulators.<sup>59</sup> The ability of state securities regulators to review offerings through the registration process and at times, evaluate the merit or suitability of an offering, is a crucial line of defense for investors against not only fraud but also other potential investor harms that could get worse if not caught early on before an offering, legitimate or otherwise, proceeds.

Crypto assets have been a top priority for state regulatory investor protection efforts for many years, given the prevalence of crypto related fraud and malfeasance within the broader subset of financial crimes. In 2024 alone, the North American Securities Administrators Association (NASAA) reported that its members opened more than 460 investigations involving digital assets and initiated more than 120 enforcement actions.<sup>60</sup> From 2017 to 2025, state securities regulators took 334 enforcement actions involving crypto assets, with nearly a third of these just involving crypto security offering fraud.<sup>61</sup> And NASAA has told Congress they believe "states' work in fraud prevention and mitigation will increase in the coming years in part due to scams related to both artificial intelligence ("AI") and DLTs [Distributed Ledger Technology]."<sup>62</sup>

By pre-empting state registration, qualification, or review of crypto asset offerings under this exempt framework, state regulators may be left with much narrower, after-market anti-fraud powers to protect investors in these token offerings and their subsequent resale or trading. This means with respect to the covered investment contracts under this rule, state securities regulators may only be able to step in after alleged fraud has occurred. Or, in other cases their truncated jurisdiction may mean they are unable to pursue bad actors in a timely, effective, and comprehensive way, despite the fact that, as NASAA describes, "Securities frauds can be complex and...include conduct that

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<sup>58</sup> North American Securities Administrators Association (NASAA). "[Enforcement Report](#)," 2025 Edition at 6

<sup>59</sup> *Ibid.* at 6

<sup>60</sup> *Ibid.* at 19.

<sup>61</sup> NASAA. "[NASAA Urges Congress to Champion the States as Fraud Fighters](#)," Letter to Senate Committee on Banking, Housing and Urban Development. July 7, 2025 at 5 and at Appendix A-1: Crypto offering frauds.

<sup>62</sup> *Ibid.* at 3.

touches more than one category of fraud.”<sup>63</sup> The pre-emption of state regulatory oversight of secondary sales of tokens, combined with the problematic use of separation theory, could also further undermine state regulators’ jurisdiction, by placing crypto assets and their sale or offer outside of the securities space and into the commodities space, where state securities regulators’ historically have less jurisdiction.

This is one reason twenty-eight scholars with expertise in financial regulation joined NASAA in 2025 to urge the Senate to reject legislative language similar to the proposed rule that would have undermined state securities regulators’ jurisdiction and authority.<sup>64</sup>

## **V. Proposal exceeds SEC’s authority to offer exemptions that are not necessary and appropriate to the public interest**

The proposed rule creates a novel new crypto offering exemption that exceeds the SEC’s statutory authority to issue exemptions. Key securities law statutes allow the SEC to issue regulatory exemptions only “if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors.”<sup>65</sup> The proposed rule takes an overly broad view of its exemptive authority that fails to consider the impact of its proposed rule on the public interest or investors. Moreover, this expansive exercise of regulatory authority contradicts the crypto industry’s longstanding assertion that the SEC’s regulatory structure was previously unfit or unable to exercise oversight of the crypto industry using the agency’s existing statutory authority.

The SEC inappropriately rationalizes its authority to issue the proposed rule offering exemptive relief to crypto asset issuers by arguing it has done so for other issuers seeking to offer assets for sale in private markets via Regulation A, D, and CF (and the variants of these exemption frameworks). It argues that since the proposed rule’s framework for token issuance is modelled on these exemptive offerings, this new exemption is also within the scope of the SEC’s authority. It also argues it has general authority to offer such exemptions under Section 28 of the Securities Act of 1933.<sup>66</sup>

There are two critical flaws with this argument.

The first is that the SEC’s existing exempt offering categories were all directly authorized by Congress. Regulation A implements Section 3(b) of the Securities Act of 1933, while Regulation D follows from language found in Section 4(a)(2) of that same act (refined further by substantial case law).<sup>67</sup> Recent updates to Regulation A (known as Reg A+) were authorized by Congress under the passage of the JOBS Act of 2012, as was Regulation CF.<sup>68</sup> As former SEC Chief of Internet

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<sup>63</sup> *Ibid.* at note 6 at page 2.

<sup>64</sup> NASAA. “[Twenty-Eight Scholars Call for the Preservation of the State Fraud Fighting Role in Our Securities Markets](#).” Letter to Senate Committee on Banking, Housing and Urban Development. October 7, 2025.

<sup>65</sup> 15 USC §80a-6(c).

<sup>66</sup> 15 USC §77z-3.

<sup>67</sup> 15 USC §77c.

<sup>68</sup> 17 CFR §230.251; 17 CFR §227.

Enforcement John Reed Stark said, with these regulations, “The SEC filled in the details of a map Congress drew.”<sup>69</sup>

Yet, as Stark notes, there is no implementing statute authorizing the SEC to promulgate a proposed rule that creates a new exempt offering framework for a purportedly technologically novel set of assets by relying on outlier legal theory with little support in case law which posits the “separation” of crypto assets and the investment contracts that comprise their offerings.<sup>70</sup>

The second flaw in this argument is that Congress has clearly and recently declined to grant the SEC the authority to promulgate the proposed rule. The crypto industry has spent years and considerable resources making the case that Congressional legislation was needed to provide the Commission with sufficient statutory authority to issue new rules regarding crypto industry market structure, including a structure for exempt crypto token offerings under the SEC.<sup>71</sup> That effort has proved unsuccessful so far.<sup>72</sup> Congress has not established such statutory authority for the agency. The CLARITY Act contained numerous provisions that are structurally similar, if not effectively the same as, the exempt offering framework offered in the proposed rule.<sup>73</sup> While legislation that has failed to be enacted may not necessarily be considered by courts to be explicit affirmation by Congress regarding its intent, it is quite possible that the courts, using the major questions doctrine, would consider active and repeated Congressional engagement as evidence of the significance of the question (that is, whether the SEC has sufficient authority).<sup>74</sup>

Multiple stakeholders, including private action litigants, state regulators, and other regulated entities will likely have multiple paths and multiple credible arguments to offer the court saying that the agency has exceeded its authority with this proposed rule. Subsequent litigation would delay enactment of the rule. While such delay might at least forestall enactment of deeply problematic provisions within the proposed rule, it will nonetheless cause further uncertainty and lack of clarity regarding the application and of scope of existing securities investor protections for crypto assets, actors, and activities.

## Conclusion

Duke Fellow Lee Reiners eloquently sums up how the exemptions proposed under this rule result in a regime with significantly lower investor protection standards than other exempt offerings or public offerings:

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<sup>69</sup> Stark, John Reed. “[Regulatory Annulment by Magic Wand: Why Paul Atkins's Crypto Exemption Charade Will Die in Federal Court \(And Deserves To\)](#).” *LinkedIn*. August 12, 2026. See also Reed Stark, John and Lee Reiners. “[Regulation Crypto Assets Comment Letter Re File No. S7-2026-27](#).” October 16, 2026.

<sup>70</sup> *Ibid*.

<sup>71</sup> Hamilton, Jesse. “[Crypto industry gave \\$8 million to Clarity Act lobbyists who didn't close the deal](#).” *CoinDesk*. September 30, 2026.

<sup>72</sup> Lang, Hannah. “[US Senate fails to advance sweeping cryptocurrency bill in blow for industry](#).” *Reuters*. September 15, 2026.

<sup>73</sup> Reiners, Lee. Duke University Financial Economics Center. “[Why Title I of the CLARITY Act Will Produce Chaos, Not Clarity](#).” *The FinReg Blog*. July 30, 2026.

<sup>74</sup> Stark, John Reed. “[Regulatory Annulment by Magic Wand: Why Paul Atkins's Crypto Exemption Charade Will Die in Federal Court \(And Deserves To\)](#).” *LinkedIn*. August 12, 2026.

No major federal capital-raising exemption currently combines retail access, general solicitation, immediately transferable securities, no registered intermediary, no individual investment limit, and no financial statements. Rule 506(c) permits solicitation but restricts sales to verified accredited investors and produces restricted securities. Regulation Crowdfunding requires an intermediary, financial disclosure, investor limits, and a one-year resale restriction. Regulation A requires SEC qualification and financial statements. The startup exemption discards all those compensating protections at once.<sup>75</sup>

The proposed rule is predominantly focused on how this proposed novel crypto investment contract regime would support crypto asset issuers by reducing their costs and helping them raise capital more quickly with fewer requirements. In doing so, the SEC gives short shrift to its fundamental mission to protect investors. In particular, the proposed rule gives little thought to the potential cost of increased investor harm or fraud that would likely be facilitated by enactment of the rule, the increase in problematic offerings as a result of this rule, and the rule's potential or likely failure to adequately mitigate this harm. And it does all this with little independent justification and shaky legal authority for why such a new exempt framework is necessary and legal under established law and rule.

The proposed rule creates overly permissive exemptions, loopholes, and safe harbors with weak disclosure requirements and few meaningful investor protections. The Commission should withdraw the rule. Any proposed crypto rule must consider not just the costs and benefits to crypto issuers; it must fully consider the costs to investors from any new offering rules, which includes an accounting of the endemic fraud in the crypto industry. The SEC should consider a more modest and tailored application of existing exempt offerings that are more targeted and more consistent with the Commission's existing, statutorily authorized exempt offering framework.

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<sup>75</sup> Reiners, Lee. Duke University Financial Economics Center. "[Regulation Crypto Assets: Policymaking by Crypto, for Crypto.](#)" *The FinReg Blog*. August 20, 2026.