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DIVISION OF ECONOMIC JUSTICE
INVESTOR PROTECTION BUREAU

October 20, 2026

VIA ELECTRONIC SUBMISSION

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

Re: Regulation Crypto Assets
File Number S7-2026-27

Dear Secretary Countryman:

We respectfully submit this comment letter in opposition to the Commission's proposed Regulation Crypto Assets, 161 Fed. Reg. 54,510 (Aug. 21, 2026) (the "Proposal"), issued August 18, 2026. The Commission should withdraw the Proposal in its entirety. As set forth below, the Proposal exceeds the Commission's exemptive authority under Section 28 of the Securities Act of 1933 (the "Securities Act") and Section 36 of the Securities Exchange Act of 1934 (the "Exchange Act") by creating rules that are neither necessary nor appropriate in the public interest and that are not consistent with investor protection as required by statute.

The issuance of crypto assets to fundraise from the public must be accompanied by appropriate guardrails to ensure investors understand the unique risks of investing and that they are sufficiently protected to the same degree that they would be in the traditional securities markets. The benefits of innovation, whether through crypto assets or otherwise, should not include the evasion of regulatory structures built to protect investors. Entities producing novel services and software should have room to build, develop and experiment. But they must do so in a manner that: (1) does not deprive investors of the most basic and fundamental level of regulatory protection to which they are accustomed; and (2) does not render our markets unduly susceptible to fraud, manipulation, criminality and instability. Rather than prioritize investor protection, the Proposal provides an unprecedented technology-based fundraising exemption that removes traditional investor protection guardrails. The Proposal, by combining broad retail access, general solicitation, and immediately transferable securities while excluding commonplace

protections such as registered intermediaries that act as gatekeepers, market surveillance, individual investment limits, and the disclosure of financial statements, is entirely inconsistent with both the Commission's mission and federal law.[1]

This comment letter will demonstrate (1) how the Proposal exceeds the Commission's exemptive authority; (2) the deficiencies of the Proposal's startup exemption; (3) the risks associated with its allowance for the immediate sales by insiders; (4) the unworkable framework it establishes for investment contracts; and (5) the need to preserve state registration authority.

I. The Proposal Falls Outside the Exemptive Authority Granted to the Commission in Section 28 of the Securities Act and Section 36 of the Exchange Act

A. The Proposal Exceeds the Commission's Authority as it is Not in the Public Interest or Consistent with Investor Protection as it Relaxes Regulatory Guardrails for an Asset Class that Poses Significant Risks to Investors

The Commission undoubtedly has the right to regulate. But this responsibility is tempered by the statutory obligations set forth in Section 28 of the Securities Act and Section 36 of the Exchange Act, which both provide that the Commission may "conditionally or unconditionally exempt any person, security, or transaction…to the extent that such exemption is *necessary or appropriate in the public interest, and is consistent with the protection of investors*." (emphasis added). The Proposal does not satisfy the mandates of operating in the public interest and for the protection of investors.

As discussed further below, the Commission seeks to create special rules for the crypto asset class, which has routinely been a vehicle for money laundering,[2] human trafficking,[3] facilitating illicit transactions,[4] avoiding U.S.-imposed sanctions,[5] and fraud resulting in significant investor

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[1] Lee Reiners, *Regulation Crypto Assets: Policymaking by Crypto, for Crypto*, THE FINREG BLOG, DUKE FIN. ECON. CTR. (Aug. 20, 2026), https://sites.duke.edu/thefinregblog/2026/08/20/regulation-crypto-assets-policymaking-by-crypto-for-crypto/.

[2] *See, e.g.*, CHAINALYSIS, *The 2026 Crypto Crime Report* (Mar. 17, 2026), https://www.chainalysis.com/wp-content/uploads/2026/03/the-2026-crypto-crime-report-3-17-release.pdf (noting that cryptocurrency money laundering ecosystems had grown from $10 billion in 2020 to over $82 billion in 2025); TRM LABS, *2026 Crypto Crime Report* (Jan. 28, 2026), https://www.trmlabs.com/reports-and-whitepapers/2026-crypto-crime-report (Documenting $158 billion in illicit crypto flows in 2025—a 145% increase over 2024).

[3] *See* CHAINALYSIS, *Cryptocurrency Flows to Suspected Human Trafficking Services Surge 85% Year-over-year* (Feb. 12, 2026), https://www.chainalysis.com/blog/crypto-human-trafficking-2026/.

[4] *See, e.g.*, CHAINALYSIS, *The 2026 Crypto Crime Report*, https://www.chainalysis.com/wp-content/uploads/2026/03/the-2026-crypto-crime-report-3-17-release.pdf (noting that dark net markets crypto inflows for fentanyl were over $2.5 billion in 2025 and ransomware payments in 2025 amounted to over $820 million).

[5] *See id.*(noting that 2025 saw a 162% surge in state-driven sanctions volume year-over-year as state-driven sanctions volumes increased from $59 billion in 2024 to $154 billion in 2025); *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106178, REPORT TO THE SELECT COMMITTEE ON INTELLIGENCE, U.S. SENATE

losses.[6] The need for greater (rather than fewer) investor protections in this space is all the more acute because crypto assets themselves have no intrinsic value. Crypto assets are unlike stock or debt: they do not provide a right to income or interest, and do not provide investors with an ownership interest in a company. Their value is primarily driven by speculation conditioned on another buyer willing to pay a higher price, which results in significant price volatility and potential crashes without warning.[7] Between 2021 and 2025, over half of all crypto assets offered to the public failed.[8] In 2022, several of the largest and most famous projects at the time collapsed due to fraud,[9] and estimates of the total losses suffered from the 2022 crypto crash due to failed crypto asset tokens, meme coins, NFTs, and platforms are as high as $2 trillion.[10] The Federal Bureau of Investigation reports that fraud involving crypto assets reached a new all-time high in 2025,[11] the same year that saw the largest number of token failures on record.[12] And crypto assets have become a popular channel of fraud for international criminal organizations.[13] All too frequently, retail investors suffer the most significant harm from these frauds and failures. This data highlights the need for substantial investor protections to the extent issuers of crypto assets seek to solicit investments directly from the public. The Proposal does not justify its

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(Dec. 13, 2023), https://www.gao.gov/assets/d24106178.pdf (finding "[i]ncreased use and acceptance of digital assets in the future could contribute to the reduced dominance of the U.S. dollar in international financial markets, potentially eroding the strength of U.S. sanctions and limit their effectiveness in supporting U.S. policy goals.")

[6] COMSURE, *Crypto Exchange Collapses Have Led to $30-50 Billion in Investor Losses* (Sep. 24, 2025), https://www.comsuregroup.com/news/crypto-exchange-collapses-have-led-to-30-50-billion-in-investor-losses/.

[7] U.S. GOV'T PUBL'G OFF., EXEC. OFF. OF THE PRESIDENT, *Economic Report of the President together with the Annual Report of the Council of Economic Advisers* (Mar. 2023), at 246.

[8] Shaun Paul Lee, *Dead Coins: Over 50% of Cryptocurrencies Have Failed*, COINGECKO (Apr. 17, 2026), https://www.coingecko.com/research/publications/how-many-cryptocurrencies-failed (13.4 million of 25.2 million listed tokens no longer trading); COMSURE, *Crypto Exchange Collapses Have Led to $30-50 Billion in Investor Losses* (Sep. 24, 2025), https://www.comsuregroup.com/news/crypto-exchange-collapses-have-led-to-30-50-billion-in-investor-losses/.

[9] *See, e.g.*, Press Release, U.S. Dep't of Just., Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes (Mar. 28, 2024), www.justice.gov/opa/pr/samuel-bankman-fried-sentenced-25-years-his-orchestration-multiple-fraudulent-schemes; Press Release, N.Y. Att'y Gen., Attorney General James Sues Former CEO of Celsius Cryptocurrency Platform for Defrauding Investors, (Jan. 5, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-sues-former-ceo-celsius-cryptocurrency-platform-defrauding; Press Release, Dep't of Just., Crypto-Enabled Fraudster Sentenced For Orchestrating $40 Billion Fraud (Dec. 11, 2025), https://www.justice.gov/usao-sdny/pr/crypto-enabled-fraudster-sentenced-orchestrating-40-billion-fraud.

[10] COMSURE *supra* note 6; Mandeep Walia & Dante Disparte, *2022 Was a Hard Year for Crypto — But it May Have Been Just What the Industry Needed*, WORLD ECON. F. (Apr. 14, 2023), https://www.weforum.org/stories/emerging-technologies/2022-was-a-hard-year-for-cryptocurrencies-but-it-may-have-been-just-what-the-industry-needed/ (noting the digital asset market lost nearly $2 trillion in 2022).

[11] *See* FED. BUREAU OF INVESTIGATION *Internet Crime Report 2025* at 52, https://www.ic3.gov/AnnualReport/Reports/2025_IC3Report.pdf.

[12] Lee, *Dead Coins*, https://www.coingecko.com/research/publications/how-many-cryptocurrencies-failed (Finding that 11.6 million out of 20.2 million token projects launched failed).

[13] U.S. SECRET SERV., *Investment Fraud and Pig Butchering*, https://www.secretservice.gov/investigations/investmentfraud-pigbutchering (last visited Oct. 20, 2026).

necessity or appropriateness in the face of these serious investor risks and public interest concerns. As a result, the Commission should withdraw this Proposal on this basis alone.

B. The Proposal Does Not Provide a Mechanism for the Commission to Conduct Market Surveillance, Which Erodes Investor Protection

The Proposal does not respect the expressed intention of Congress that "securities markets are an important national asset" and should operate in a manner that promotes fair competition, investor protection, and market integrity.[14] Effective market surveillance is a foundational component of those objectives. In traditional securities markets, regulators rely on intermediaries such as registered broker-dealers who are required to collect customer identification and other information and implement systems for capturing transaction data that detect market manipulation, insider trading, wash trading, and other abusive conduct. These mechanisms allow regulators to attach electronic activity in securities markets to the people directing those trades.

By contrast, the Proposal allows for covered investment contracts to trade on markets that the Commission does not supervise, including decentralized finance ("DeFi") protocols, centralized foreign platforms and centralized U.S. platforms. Trading of covered investment contracts conducted through DeFi protocols occurs without regulated intermediaries that surveil their markets, maintain customer records, submit to regulatory examinations, or provide the Commission or any other regulator with reliable means of identifying market participants. The Proposal contains nothing restricting covered investment contracts from trading on popular DeFi protocols that do not require customer identification for participants in their markets. The Proposal also allows covered investment contracts to trade on centralized foreign platforms that may dispute that they are subject to U.S. laws, and which fail to identify customers and refuse to share information with the Commission or any other regulator. Even where covered investment contracts trade on centralized U.S. platforms that are regulated by state or federal financial services regulators inside the United States, the Proposal does not require such platforms to provide the Commission customer identification or trade information, even where such information exists. As a result, the Commission and other regulators will be unable to conduct the type of cross-market and participant-level surveillance that occurs in securities markets today and is necessary to detect and deter market manipulation. Indeed, exempting crypto asset transactions here serves little purpose where these transactions should be particularly amenable to market surveillance given their electronic nature.

The Proposal is incompatible with Congress's objectives of investor protection and fair, orderly, and efficient markets, as it permits electronic securities trading on venues where even basic market surveillance mechanisms are unavailable. This is a matter of particular importance in the crypto asset markets, as many trading platforms do not know who is submitting orders and the extent to which prices are the product of wash trading[15] or other manipulation. Currently, for

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[14] Securities Exchange Act of 1934, § 11A(a)(1), 15 U.S.C. § 78k-1(a)(1)(A).

[15] Lin William Cong, Xi Li, Ke Tang & Yang Yang, *Crypto Wash Trading*, (Nat'l Bureau of Econ. Rsch., Working

equities and options securities, extensive market surveillance is conducted by FINRA, NYSE, Nasdaq, CBOE, and other self-regulatory organizations that are required by law to surveil for market manipulation and other violations of exchange rules.[16] Further, those self-regulatory organizations' members—registered broker-dealers—have their own know-your-customer obligations and obligations to supervise their own and their customers' trading for compliance with federal securities laws.[17] In the derivatives space, similar functions are conducted by the Intercontinental Exchange, CME, CBOE, and the NFA, among others. Here, the Proposal does nothing to establish a market surveillance process or imbue any self-regulatory bodies with the duty and authority to do so.

C. The Commission Does Not Have Specific Congressional Authorization to Enact the Proposal as Required Under Section 28 of the Securities Act and Section 36 of the Exchange Act

This Proposal cannot replace the CLARITY Act, which failed to pass in Congress. For nearly three years, Congress negotiated, considered, and debated market structure legislation for crypto assets, but failed to pass it. The Commission now seeks to bypass the duly elected legislative branch and usurp Congress's authority. In doing so, it exceeds its Congressionally mandated authority.

The Commission has exercised specific authority granted through Congress in creating exemptions under Regulation A, Regulation Crowdfunding, and Regulation D, but has no such authorization here. Regulation A implemented Section 3(b) of the Securities Act, which explicitly granted authority to the Commission to exempt specific offerings. Similarly, Title IV of the JOBS Act directed the Commission to issue Regulation A+, the 2015 amendments to Regulation A, and clearly specified the initial terms of the Rule. Regulation Crowdfunding was also outlined in a statutory framework established in Title III of the JOBS Act, which called for specific congressionally mandated offering caps, per-investor limits scaled to income, a requirement that covered offerings would occur through registered intermediaries, and established disclosure requirements. Finally, Regulation D defines transactions not involving a public offering pursuant to clearly delegated authority set forth in Section 4(a)(2) of the Securities Act.

No such Congressional authorization exists here. The Commission cannot take the place of Congress and craft an entirely new regulatory framework without the statutory authority to do so.

Paper No. 30783, 2022), https://www.nber.org/system/files/working_papers/w30783/w30783.pdf.

[16] Exchange Act § (6)(b)(5), 15 U.S.C. § 78f(b)(5).

[17] *See, e.g.*, FINRA Rule 3110 (requiring FINRA members to supervise their businesses and the activities of associated persons to achieve compliance with applicable securities laws and regulations).

II. The Commission Has Not Met Its Burden in Establishing that the Startup Exemption is Consistent with the Goals of Investor Protection

The Commission's attempt to create a new regulatory regime for crypto asset issuers seeking to raise capital directly from the investing public fails to satisfy its statutory requirement that the exemptions be consistent with investor protection. The Proposal's startup exemption would allow issuers to raise up to $5 million through covered issuances of crypto assets over a period of four years and requires that the issuer make principles-based narrative disclosures available only on a website listed in their Form NOR and requires that the issuer amend such disclosures as any material changes occur. Unlike other exemptions that have been created under Section 28 and Section 36, the minimal protections offered by the Proposal are limited to disclosure requirements that largely mirror the industry's common practice of publishing a whitepaper. However, as described above, those limited disclosures have already proven themselves insufficient to protect the public (especially retail investors).

A. The Startup Exemption Does Not Require the Disclosure of Financial Statements to Investors

The Proposal exempts issuers from any form of financial reporting and provides few prescriptive periodic disclosures for covered investment contracts qualifying under the startup exemption. Financial reporting provides investors with crucial information regarding the issuer's financial health and the deployment of capital raised pursuant to its offerings. These are critical and material aspects of the enterprise and provide investors with metrics that allow them to assess the performance of issuers. There is no reason that issuers of crypto assets should not be held to account to the public for the funds raised from the public.

While the Commission notes its concerns about the ability of startup issuers to comply with reporting requirements, financial statements reviewed or audited by independent accountants are currently required of issuers raising as little as $618,000, and unaudited financial statements are required of issuers raising as little as $124,000.01under Regulation CF. [18] Issuers of crypto assets raising as much as $5 million should not be given a technology-based carveout from similar reporting at the expense of investors.

Any notion that the financials of a crypto asset issuer are immaterial to investors is undermined by the Proposal's financial statements requirement for offerings qualifying under the fundraising exemption. It is a basic tenet of regulation to require issuers who raise money from the public to demonstrate how that money is spent so that regulators and investors alike can ensure the efficient and lawful deployment of capital. To do otherwise is an open invitation for bad actors to pilfer from the public (so long as it is less than $5 million). Investments in crypto assets are not donations.

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[18] 17 C.F.R. § 227.201(t).

B. The Startup Exemption Creates Opportunities for Fraud by Foreign Issuers

The adopting release also suggests that the exemption will be available to non-US issuers. In doing so, the Proposal turns a blind eye to the prevalence of foreign fraud and the difficulty of enforcing U.S. law against foreign actors. Many scams involving crypto assets involve parties overseas that use coordinated channels to defraud American investors. It is not hard to imagine a scenario in which a foreign-based issuer registers with the Commission from abroad, relies on this registration to make an exempt offering (whereby they would point to registration with the Commission as a legitimizing factor in promotional materials), executes a pump-and-dump, and absconds with their earnings to a jurisdiction outside of the U.S. Such schemes involving the securities of Nasdaq-listed Chinese companies have occurred with increasing frequency, defrauding thousands of U.S. investors of hundreds of millions of dollars.[19] And the international nature of crypto asset markets makes this all too easy and facilitates what has already been a multibillion-dollar wealth transfer outside of the United States.[20]

While any such frauds would – in theory – be subject to enforcement actions, such actions could only be filed after the fraud has already taken place (after investors have lost some, if not all, of their life savings). At that point, the likelihood of recovery against a party abroad in jurisdictions like China, Cambodia, Vietnam, Russia, and other hotbeds for scams is minimal at best. Even if the criminals can be identified (more often than not they cannot), often federal law enforcement can only prosecute a matter if it reaches a large monetary threshold and foreign actors are often beyond the jurisdiction of state and local law enforcement. The Proposal creates additional dangers to retail investors by allowing foreign issuers to solicit funds from the American public, even when those foreign issuers are out of the reach of law enforcement.

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[19] Dave Michaels, *Obscure Chinese Stock Scams Dupe Americans by the Thousands*, WALL ST. J. (June 16, 2025), https://www.wsj.com/finance/regulation/obscure-chinese-stock-scams-dupe-american-investors-by-the-thousands-8416f795

[20] FINCEN, *Financial Trend Analysis Digital Asset Investment Scams: 2023-2025 Threat Patter and Trend Information* (Sep. 2026), https://www.fincen.gov/system/files/2026-08/FinCEN-FTA-Digital-Asset-Investment-Scams.pdf (finding that roughly $12.7 billion have been lost according to 33,904 BSA reports involving digital asset investment scam related activity between September 8, 2023 and December 31, 2025.)

C. The Startup Exemption Should Not Allow Individuals and Unincorporated Groups to Take Advantage of its Exemption

The Proposal allows issuers under the startup exemption to take the form of individuals, entities, and groups of individuals and entities, who will be required to file a Form NOR that includes the name of the issuer, the jurisdiction of incorporation or formation (if the issuer is or includes an entity), telephone and email address, and does not require disclosures pertaining to the beneficial owners of the issuer. The Proposal also seeks comment as to whether that should be extended to allow decentralized unincorporated nonprofit associations and other such organizational structures. The Commission should not permit the registration of individuals, a group of individuals or entities, or decentralized unincorporated nonprofit associations, because, as the Commission notes, doing so creates difficulties in obtaining and providing financial information regarding the project. It also may create difficulties in enforcing judgments and recovering assets in the event of fraud. The Proposal to exempt offerings to the public without requiring disclosure of the identities of the beneficial owners of the entity is a nonstarter for investor protection. *See below* at II.E.

D. Issuers Should be Required to File Disclosure Information on EDGAR

The Proposal allows issuers under the startup exemption to post their disclosures on a website and does not require them to upload the information to EDGAR. This portion of the Proposal unnecessarily subjects disclosure information to hidden website placement, website outages, or hacks without meaningful justification. The Proposal states that it "is intended to ... to limit issuers' compliance costs (especially in view of the fact that many of these issuers are smaller and may not be familiar with EDGAR)."[21] In that regard, the Proposal suggests that digital asset issuers — capable of coding and creating a digital asset for international trading using blockchain technology and creating and maintaining their very own websites — are somehow burdened by the now ordinary process of uploading documents. It also belies the existence of the SEC's EDGAR "Quick Guide," "designed for the novice filer" to upload documents to the SEC's website.[22]

Furthermore, there is no requirement that the disclosures be written in plain English, or in the English language at all.[23] Removing EDGAR filings as a requirement also removes a central verification source where investors can check whether the issuance is at least facially real. As

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[21] Proposal at 88.

[22] U.S. SEC. & EXCH. COMM'N, EDGAR Filer Manual (Volume II) (Sep. 14, 2026) at 2.1, https://www.sec.gov/files/edgar/filermanual/edgarfm-vol2-v78.pdf.

[23] While the proposed rules articulate that information "*should* be presented in clear, concise, and understandable language" (emphasis added), the Proposal substantially departs from other laws and rules using mandatory language. *See* 17 C.F.R. § 230.421(b) ("[y]ou must present the information in a prospectus in a clear, concise and understandable manner."); 17 C.F.R. §§ 240.13a-20, 15d-20 information "must be presented in a clear, concise and understandable manner."

the proposal stands, the SEC puts the public in the hands of the issuer with no place to verify information.

E. The Startup Exemption Lacks the Investor Protections Found in Other Rules Issued Pursuant to Section 28 and Section 36

Previous regulations promulgated under the authority of Section 28 of the Securities Act and Section 36 of the Exchange Act were authorized by Congress and contained critical provisions specifically designed to ensure the protection of retail investors. For instance, Regulation A caps the amount of investment that a non-accredited natural person may make based on their annual income or net worth pursuant to Tier 2 offerings and only removes the cap for qualified investors with $5 million or more in investments, thereby limiting potential retail exposure to such offerings.

Similarly, Regulation Crowdfunding imposes statutory caps and income-scaled limits for investments that prevent investors from being too exposed to a risky start-up investment. The regulation also requires that issuers provide financial reporting to investors and the rigor of the financial reporting requirements scales depending on the amount of the offering. It further mandates that offerings must take place through registered intermediaries and places specific diligence requirements on such intermediaries that process transactions pursuant to the exempt offerings. Specifically, the intermediaries are required to deny issuers access to their platform if they have a reasonable basis to believe that the issuer does not comply with the requirements of the regulation or if the intermediary has a reasonable basis for believing that the issuer or the offering presents the potential for fraud or otherwise raises concerns about investor protection.

Likewise, Rule 506 of Regulation D limits the sales of securities to investors that meet the stated wealth-related criteria (e.g., individuals with $200,000 in annual income or $1,000,000 in net worth) or otherwise to a limited number of sophisticated non-accredited investors.[24]

Each of these Congressionally mandated exemptions offers several clear[25] protections specifically focused on reducing the potential harm to the most vulnerable investors. The Proposal does not and should be stricken.

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[24] Notably, non-accredited investors or their representative must be sophisticated (i.e. must have knowledge or experience in business or financial matters to evaluate the merits and risks of the investment) and even then, the issuer must provide specific substantive disclosures required by Regulation D, including financial statements.

[25] OAG continues to believe that the Accredited Investor standard should be amended to increase these thresholds. *See* N.Y. Att'y Gen., Comment Letter on Proposed Rule Amending the "Accredited Investor" Definition (Mar. 16, 2020), https://www.sec.gov/files/rules/proposed/2019/33-10734.pdf.

III. The Proposal's Allowance for Immediate Sales Benefits Insiders and Venture Capitalists at the Expense of Retail Investors

The Proposal allows covered investment contracts sold pursuant to any of the proposed exemptions to be sold immediately upon acquisition, without any holding period whatsoever. This creates a misaligned incentive that allows insiders and early venture capital investors, who typically receive crypto assets at a significant discount prior to public offerings, to sell their assets just as the assets become broadly available to the public. Insiders will be able to buy low and sell high, while retail investors will buy high and be subjected to unregulated markets to try to find a seller to exit.

The Commission seeks comments regarding whether the startup exemption should allow for insider sales during the four-year exemption period. OAG agrees with certain comments already received by the Commission, including some from market participants, indicating that lockups for insiders would best align the interests of issuers and investors and prohibit insiders from taking advantage of new investors in that way.

Similar restrictions should also apply to early-stage venture capital investors to ensure they do not immediately offload their assets (obtained at a steep discount) into the marketplace just as the price increases as retail investors rush in. As crypto asset projects often tout their early investors and vice versa, immediate anonymous sales by those same investors could work a fraud upon the public.[26] Investors in crypto assets are no less entitled to holding period protections set forth in rules such as Rule 144, and the Commission has not demonstrated otherwise.

IV. The Proposal's Investment Contract Safe Harbor Upends the *Howey* Test and Creates an Unworkable Framework that Does Not Protect Investors

The Proposal is improper as it upends *SEC v. W.J. Howey Co*.[27] and 80 years of jurisprudence on the application of the investment contract test. Courts have consistently applied the *Howey* test and determined that crypto assets sold as investments are securities subject to the federal securities laws.[28] Under *Howey*, an investment contract exists where the underlying economic substance of a transaction consists of an investment of money in a common enterprise with the

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[26] *See* In the Matter of Galaxy Digital Holdings Ltd., Assurance of Discontinuance, N.Y. Att'y Gen. Inv. Prot. Bureau, Assurance No. 25-011 (Mar. 27, 2025), https://ag.ny.gov/sites/default/files/settlements-agreements/galaxy-digital-holding-ltd-et-al-assurance-f-discontinuance-2025.pdf.

[27] *S.E.C. v. W.J. Howey Co*., 328 U.S. 293 (1946).

[28] *See, e.g.*, *S.E.C. v. Kik Interactive Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2020); *S.E.C. v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020); *S.E.C. v. Grybniak*, No. 1:20-cv-327 (EK) (MMH), 2024 WL 4287222 (E.D.N.Y. Sep. 24, 2024); *S.E.C. v. Rivetz Corp.*, No. 3:21-cv-30092-MGM, 2024 WL 4892590 (D. Mass. Sep. 30, 2024); *S.E.C. v. LBRY, Inc.*, 639 F. Supp. 3d 211 (D.N.H. 2022); *S.E.C. v. Binance Holdings Ltd.*, 738 F. Supp. 3d 20(D.D.C. 2024); *S.E.C. v. Coinbase, Inc.*, 726 F. Supp. 3d 260 (S.D.N.Y. 2024); *S.E.C. v. Payward, Inc.*, No. 3:23-cv-06003-WHO, 2024 WL 4511499 (N.D. Cal. Aug. 23, 2024), *motion to certify appeal denied*, No. 3:23-cv-06003-WHO, 2024 WL 4819259 (N.D. Cal. Nov. 18, 2024); *S.E.C. v. Terraform Labs Pte. Ltd.*, 708 F. Supp. 3d 450 (S.D.N.Y. 2023)

expectation of profits due to the efforts of others. The *Howey* test is an objective test[29] that looks to the substance of the transaction and is not defined by the issuer itself. In fact, courts applying *Howey* routinely look past the self-serving statements of an issuer disclaiming that the transactions at issue are securities.[30]

The Supreme Court has ruled that *Howey* requires an examination of the economic realities of a given transaction. The *Howey* test "embodies a flexible, rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[31] It has been applied to a variety of schemes involving a promise of profits from a wide range of assets and arrangements including orange grove plots,[32] payphone sale leaseback agreements,[33] whiskey,[34] cosmetics,[35] self-improvement courses,[36] earthworms,[37] beavers,[38] chinchillas,[39] and cattle embryos.[40] It does not require privity between the issuer and the investor.[41] *Howey* fundamentally looks to whether the issuer led investors to believe that it would create opportunities for profit through its efforts.

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[29] *S.E.C. v. Ripple Labs, Inc.,* 682 F. Supp. 3d 308, 332 (S.D.N.Y. 2023) ("*Howey* is an objective test that provides the flexibility necessary for the assessment of a wide range of contracts, transactions, and schemes.").

[30] *See, e.g.*, *LBRY*, 639 F. Supp. 3d at 219 ("a disclaimer cannot undo the objective economic realities of a transaction"); *Telegram Grp.*, 448 F.Supp.3d at 365 ("Disclaimers, if contrary to the apparent economic reality of a transaction, may be considered by the Court but are not dispositive.").

[31] *Howey*, 328 U.S. at 299.

[32] *Id.*

[33] *S.E.C. v. Edwards*, 540 U.S. 389, 391, 397 (2004) (payphone sale-and-leaseback agreements).

[34] *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1035 (2d Cir. 1974) (casks of Scotch whiskey).

[35] *S.E.C. v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 485–86 (5th Cir. 1974) (cosmetics distributorships).

[36] *S.E.C. v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482–83 (9th Cir. 1973) (self-improvement courses).

[37] *Smith v. Gross*, 604 F.2d 639, 641–43 (9th Cir. 1979) (earthworms).

[38] *Cont'l Mktg. Corp. v. S.E.C.*, 387 F.2d 466, 468, 471 (10th Cir. 1967) (beavers).

[39] *Miller v. Cent. Chinchilla Grp., Inc.*, 494 F.2d 414, 415–16 (8th Cir. 1974) (chinchillas).

[40] *Eberhardt v. Waters*, 901 F.2d 1578, 1579, 1582 (11th Cir. 1990) (cattle embryos).

[41] *Payward*, 2024 WL 4511499 at *13) ("The Court in Howey said nothing about an investment of money requiring privity between the issuer and the investor, nor has Congress ever drawn such boundaries around what constitutes an investment contract. It defies common sense to suggest that when someone purchases crypto assets from a reseller or another investor, that person or entity does not understand themselves to be investing money in the asset.").

A. The Vagueness of What the Commission Considers to be "Essential Managerial Efforts" Creates an Unworkable Standard that is Inconsistent with *Howey*

The managerial efforts prong of the Howey test has always been a fundamental part of the analysis of crypto assets. However, the Proposal declares that the issuer may provide "services to secure, maintain, improve or enhance a network application or its functionality, facilitate network effects, whether through sponsoring or funding development projects or other similar activities" and that such actions "would not constitute essential managerial efforts" under *Howey*, so long as the issuer states that it has satisfied its self-defined obligations. The Commission's claim that managerial efforts, such as securing, maintaining, improving, or enhancing the network application, cannot serve as essential managerial efforts is inconsistent with 80 years of *Howey* precedent. In fact, the essential managerial efforts in *Howey* primarily consisted of basic maintenance of an orange grove.

Efforts to improve, enhance, and maintain software systems are not trivial or mere administrative functions when it comes to crypto assets because the assets themselves are software – in addition to being investment vehicles. These functions are essential aspects of the software life cycle of crypto assets and are required to ensure that the software system is functional. There is good reason that software companies do not fire their software engineers after deploying a system. As the Institute of Electrical and Electronics Engineers explains:

> Software maintenance is an integral part of the software life cycle that involves modifying and updating software after it has been deployed. The goal of maintenance is to correct faults, improve performance or other attributes, and adapt the software to a changing environment throughout its lifetime. *Maintenance begins after system deployment and commonly occupies over half of the total lifecycle costs. Maintenance is required to keep software operational and meet user needs over time.* As requirements evolve and the software ages, maintenance activities become necessary to sustain a satisfactory operation. . . .
>
> The maintenance phase may persist for years at significant expense. The majority of costs arise from evolutionary enhancements rather than defect repairs. Managing maintenance well and designing software for maintainability can help control lifetime costs.[42]

[42] IEEE COMPUTER SOCIETY, *What is Software Maintenance?*, IEEE, (emphasis added) https://www.computer.org/resources/software-maintenance#issues (last visited Oct. 20, 2026).

Developing, securing, maintaining, improving, and enhancing a crypto asset network or its assets are the exact types of efforts that courts applying *Howey* to crypto assets consider as part of the essential managerial efforts.[43]

Similarly, the notion that efforts to "facilitate network effects" do not constitute essential managerial efforts is unfounded and contradicts the case law. Facilitating network effects, while undefined in the Proposal, ordinarily includes the promotion of the crypto assets, including encouraging adoption of crypto assets,[44] efforts to ensure that assets are traded on popular platforms or negotiating private placements with investors, all of which have been determined to be managerial efforts under *Howey*.[45]

B. The Self-Certification Process Invites Abuse

1. The Issuer Decides When a Security Stops Being a Security

Under the Proposal, crypto assets may cease to be securities through the fulfillment of certain conditions established by the issuer through a certified Transition Report ("Form TR"). This proposed self-certification process consists of the issuer both determining what obligations constitute the essential managerial efforts it must fulfill and determining whether it has in fact fulfilled those obligations. In creating this framework, the Proposal takes the objective *Howey* test and shifts it to a subjective standard to be defined by the issuer regardless of the economic substance of the transaction, in direct conflict with the foundational requirements of *Howey*. This means not only that bad actors who intend to deceive the system will have an easy time doing so, but even good actors with proper intentions may miscalculate their own actions.

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[43] *See, e.g.*, *LBRY*, 639 F. Supp. 3d at 216–21 (citing to LBRY's efforts to develop, debug, and build the network as considerations in the *Howey* analysis); *Terraform Labs*, 708 F. Supp. 3d at 471–74 (citing to Terraform's development efforts, building of websites, code audits, and publishing updates to protocols as considerations in the *Howey* analysis); *Kik Interactive*, 492 F. Supp. 3d at 179–80 (citing to Kik's promises to provide startup resources and technology as factors in the *Howey* analysis); *Coinbase*, 726 F.Supp.3d at 290-292 (citing to Solana's efforts to develop the token ecosystems as evidence of a common enterprise).

[44] *See, e.g., Terraform Labs*, 708 F. Supp. 3d at 471–74 (citing to Terraform's efforts to manage user adoption, grow the network, and marketing campaigns as factors in the *Howey* analysis); *Kik Interactive*, 492 F. Supp. 3d at 179–80 (citing to Kik's promises to attract developers and foster an ecosystem as relevant factors in the *Howey* analysis); *Coinbase*, 726 F.Supp.3d at 292 (citing to promoters' efforts to market the assets and scale the platforms in the *Howey* analysis).

[45] *LBRY*, 639 F. Supp. 3d at 217 (citing representations regarding efforts to ensure the asset would trade on centralized exchanges and communications regarding private placements of the assets as relevant factors in the *Howey* analysis).

2. Self-Certification is Effective Upon Filing and Does Not Require Commission Review

Under the Proposal, the self-certification process is driven entirely by the issuer and becomes effective immediately upon filing. Any accompanying reporting obligations are deemed to end immediately upon the filing of Form TR. The Commission notes that it may subsequently determine that the issuer misrepresented its satisfaction of relevant conditions pursuant to the Form TR and may challenge whether the issuer did in fact satisfy those conditions. But the Proposal creates no requirement that the Commission (or anyone else, for that matter) ever review the Form TR to ensure that the conditions were met. Indeed, Form TR does not require any form of third-party assurance whatsoever.

3. The Self-Certifying Transition Report Allows Failed Projects to Terminate without Further Disclosure

Even where an issuer has not fulfilled the obligations of the investment contract, the Proposal allows issuers to file a Form TR and qualify under the investment contract safe harbor. In effect, this means that a project may raise as much as $75 million dollars and file a Form TR declaring that the project has ended because it was unworkable, without the issuer being required to make any additional public reports. Reporting obligations should not end without a proper wind-down because a project was abandoned or failed. The failure or abandonment of a project is among the times investors need information the most. Financial information regarding the remaining assets held by the issuer is particularly important so that investors can determine whether they have any recourse against the issuer or the project's assets.

V. The Proposal Fails to Preserve State Registration Regimes

The primary protection for investors in the offer and sale of securities is registration. The Proposal adds a new definition to "qualified purchasers" under Section 18(b)(3) of the Securities Act that would broadly define "qualified purchasers" to include any purchasers of crypto assets issued pursuant to the exemptions both in the initial offering and in the secondary markets, thereby exempting all such transactions from State securities law registration and qualification requirements. However, state licensing and registration regimes remain important frontline investor protection tools that support examinations, investigations, and enforcement.[46] This circular provision of the Proposal displaces these foundational tools in combatting investment fraud. Between 2017 and 2025, the states brought hundreds of cases, including registration claims against a variety of bad actors such as trading platforms, investment advisers, and Ponzi scheme perpetrators. Our office was the first law enforcement agency to successfully pursue

[46] Abraham Nelson, *State Attorneys General Cryptocurrency Fraud Enforcement in the Second Trump Term*, N.Y.U. J. OF LEGIS. & PUB. POL'Y (Mar. 29, 2026), https://nyujlpp.org/quorum/nelson-state-attorneys-general-cryptocurrency-enforcement/.

Tether[47] and the first to bring a case against Alexander Mashinsky for his role in the collapse of Celsius.[48]

State registration authority is critical because often the failure to register can be the first indicator of fraud. For instance, our office filed a failure-to-register claim against Coinseed, a crypto asset mobile app. After doing so, we received over 200 complaints from the public and uncovered massive fraud involving the wholesale theft of customer assets. We ultimately shut Coinseed down, secured a receiver and obtained a multimillion-dollar judgment.[49] Similarly, in 2021 New York joined with the SEC and settled a registration case against GTV Media (for nearly $500 million) for promoting and selling crypto assets in New York state without registering.[50] Thereafter, federal criminal authorities indicted and secured convictions against several principals in GTV for engaging in fraud related to those sales. [51]

Again, in March 2023, our office alleged that KuCoin was operating as an illegal securities broker-dealer and an illegal commodities broker-dealer in New York. [52] That case led to the federal government successfully prosecuting KuCoin with federal criminal charges for money laundering.[53]

The exemptions proposed should not in any way infringe on states' rights to bring claims against issuers who failed to comply with state registration requirements. Given the substantial interest in investor protection, particularly in this especially risky asset class, states need to maintain every tool in their arsenal to protect investors.

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[47] In the Matter of iFinex Inc., Settlement Agreement, N.Y. Att'y Gen. Inv. Prot. Bureau (Feb. 18, 2021), https://ag.ny.gov/sites/default/files/2021.02.17_-_settlement_agreement_-_execution_version.b-t_signed-c2_oag_signed.pdf.

[48] Press Release, N.Y. Att'y Gen., Attorney General James Sues Former CEO of Celsius Cryptocurrency Platform for Defrauding Investors. https://ag.ny.gov/press-release/2023/attorney-general-james-sues-former-ceo-celsius-cryptocurrency-platform-defrauding

[49] Press Release, N.Y. Att'y Gen., Attorney General James Shuts Down Virtual Currency Trading Platform and Stops Cryptocurrency CEO From Continuing Fraudulent Conduct, (Sep. 13, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-shuts-down-virtual-currency-trading-platform-and-stops.

[50] Press Release, N.Y. Att'y Gen., Attorney General James Secures Nearly Half a Billion Dollars to Resolve Illegal Stock and Cryptocurrency Sales, (Sep. 13, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-secures-nearly-half-billion-dollars-resolve-illegal-stock.

[51] Press Release, U.S. Dep't of Just., United States v. Ho Wan Kwok, a/k/a "Miles Guo," Kin Ming Je, a/k/a "William Je," and Yanping Wang, a/k/a "Yvette", (June 30, 2026), https://www.justice.gov/usao-sdny/united-states-v-ho-wan-kwok-aka-miles-guo-and-kin-ming-je-aka-william-je.

[52] Press Release, N.Y. Att'y Gen., Attorney General James Secures More Than $22 Million from Cryptocurrency Platform Operating Illegally, (Dec. 12, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-secures-more-22-million-cryptocurrency-platform-operating.

[53] Press Release, U.S. Dep't of Just., Prominent Global Cryptocurrency Exchange KuCoin and Two Of Its Founders Criminally Charged With Bank Secrecy Act and Unlicensed Money Transmission Offenses, (Mar. 26, 2024), https://www.justice.gov/usao-sdny/pr/prominent-global-cryptocurrency-exchange-kucoin-and-two-its-founders-criminally.

Conclusion

In conclusion, our work enforcing the law against crypto asset market issuers, brokers and dealers has identified the need for stronger, more comprehensive regulations to address the substantial risks identified here. The market has demonstrated that it is ill-suited for the more relaxed, permissive regulation contemplated in the Proposal. The Commission should not prioritize crypto asset issuers over retail investors. Nor should innovation be used as an excuse to jeopardize the financial well-being of everyday Americans. The Proposal fails to provide even a minimal level of investor protection. Nor is it necessary or appropriately in the public interest. It should be withdrawn.

Sincerely,



Letitia James
New York Attorney General