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COMMENTARY

Rules Without a Referee: What the SEC's New Crypto Proposal Gets Right, and Where It Still Falls Short

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For nearly a decade, a company that wanted to raise money by selling a crypto token faced a version of the same question: is this a security, and if so, under what rules? The Securities and Exchange Commission's (SEC) answer for most of that decade was to litigate first and legislate rarely, policing an industry built on a seventy-nine-year-old test through enforcement actions instead of rules.¹ However, that began to change this year. In March, the SEC and Commodities Futures Trading Commission (CFTC) jointly clarified how existing securities laws apply to crypto assets.² On August 18, 2026, after abruptly pulling the same proposal from an August 14 vote and bringing it back four days later, the SEC went further, proposing "Regulation Crypto Assets," its first comprehensive rulemaking for crypto capital raising.³ The announcement itself calls the package a new pathway for "capital formation."⁴ While the proposal is a genuine improvement over the enforcement-by-ambush era it replaces, its central innovation, a safe harbor that lets issuers decide for themselves when they have exited securities regulation, risks moving the uncertainty it is meant to solve a few years down the road instead of resolving it.

Under *Howey*, an investment contract exists when someone invests money in a common enterprise while expecting profits from the efforts of others.⁵ That decades-old test is awkward to apply to a blockchain token, because a token does not necessarily stay an investment contract forever. A network that starts out dependent on a founding team's promises to build infrastructure can, in principle, decentralize to the point that profits no longer depend on anyone's managerial efforts. The SEC's March interpretive release gave that idea a name, the "separation" doctrine, and sorted crypto assets into five categories, from digital commodities like Bitcoin to digital securities, based on where each sits on that spectrum.⁶ Commissioner

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¹ *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946).

² *Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets*, Securities Act Release No. 33-11412, Exchange Act Release No. 34-105020 (Mar. 23, 2026), <https://www.sec.gov/files/rules/interp/2026/33-11412.pdf>.

³ Jesse Hamilton, *U.S. SEC Proposes First Major Crypto Rule in Surprise Announcement*, COINDESK (Aug. 18, 2026, 3:09 PM EDT), <https://www.coindesk.com/policy/2026/08/18/r>.

⁴ Press Release, SEC, SEC Proposes New Regulation Crypto Assets (Aug. 18, 2026), <https://www.sec.gov/newsroom/press-releases/2026-76-sec-proposes-new-regulation-crypto-assets>.

⁵ See *Howey*, 328 U.S. at 298–99.

⁶ *Application of the Federal Securities Laws*, *supra* note 2

Uyeda has been blunt about what the old, enforcement-only approach cost the market: years of “bureaucratic runaround” in which issuers had no clear path to compliance and no chance to shape the rules before being sued over them.⁷

Regulation Crypto Assets tries to turn that interpretive framework into something issuers can build a business plan around. It creates two exemptions from ordinary Securities Act registration.⁸ The first is a “startup” track allowing up to \$5 million raised over four years with only principles-based disclosure. The second is a two-tier “fundraising” track modeled loosely on Regulation A, permitting up to \$75 million annually with audited financials and ongoing reporting.⁹ Both tracks preempt conflicting state blue-sky registration requirements for covered offerings by defining participating purchasers as qualified purchasers under the Securities Act.¹⁰ And both remain subject to the antifraud and antimanipulation rules that apply to every securities offering.¹¹ Yet, the safe harbor is the most consequential piece because it frees a crypto asset from securities regulation once the issuer completes or abandons the essential managerial efforts it promised investors.¹²

The proposal’s real virtue is that it writes rules “so that well-intentioned people can follow them,” rather than leaving them to be discovered after the fact in a settlement.¹³ Fixed dollar thresholds and defined disclosure obligations give founders and their counsel something to measure against before they raise a dime, which is precisely what a decade of enforcement actions never offered. For lawyers advising a token issuer, “here is the exemption, here is what you must disclose, and here is when you can exit the regime” is an enormous improvement over “we will tell you if you got it wrong, after the fact, in court.”

However, that clarity does not reach the exit. The safe harbor does not require the SEC to confirm that an issuer’s managerial efforts have actually ended.¹⁴ Instead, it lets the issuer certify that fact itself. This is an odd place to relax scrutiny. The entire justification for the safe harbor is that a sufficiently decentralized asset no longer poses the information asymmetry *Howey* was designed to police. But self-certification asks the market, and the SEC’s Division of Enforcement, to take an issuer’s word on its own decentralization. An issuer with every incentive to exit securities regulation as quickly as possible is hardly a neutral judge of whether it has finished the efforts it promised. Suppose the SEC challenges that self-

⁷ Mark T. Uyeda, Comm’r, SEC, *Statement on Regulation Crypto Assets* (Aug. 18, 2026), <https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-regulation-crypto-assets-081826>.

⁸ *Regulation Crypto Assets*, Securities Act Release No. 33-11434, Exchange Act Release No. 34-106150 (proposed Aug. 18, 2026), <https://www.sec.gov/files/rules/proposed/2026/33-11434.pdf>.

⁹ *Id.*

¹⁰ Daniel Engoren, *The Wait Is Over: SEC Proposes “Regulation Crypto Assets”, A Bespoke Offering Regime for Crypto Investment Contracts*, SIDLEY AUSTIN INSIGHTS (Aug. 20, 2026), <https://www.sidley.com/en/insights/newsupdates/2026/08/the-wait-is-over-sec-proposes-regulation-crypto-assets-a-bespoke-offering-regime-for-crypto>.

¹¹ *Id.*

¹² *Regulation Crypto Assets*, *supra* note 8

¹³ Hester M. Peirce, Comm’r, SEC, *Filling the Regulatory Tank: Regulation Crypto Assets Proposing Release* (Aug. 18, 2026), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-regulation-crypto-assets-081826>.

¹⁴ Ryan J. Adams, Val Dahiya, Trevor Levine & Tyler Miller, *SEC Proposes New “Regulation Crypto Assets”*, MORRISON FOERSTER CLIENT ALERT (Aug. 19, 2026), <https://www.mofo.com/resources/insights/260819-sec-proposes-new-regulation-crypto-assets>.

assessment years after tokens have traded on it. The resulting enforcement action would revive the very guess-and-litigate dynamic the rule was meant to end.

The proposal also arrives inside a moving legislative target. Congress is simultaneously considering market structure legislation that could assign jurisdiction over digital commodities to the CFTC and resolve by statute many of the questions this rule addresses by regulation.¹⁵ A rule resting on SEC exemptive authority is far easier to amend or withdraw than a statute. It also leaves open whether the platforms where these tokens trade must register as broker-dealers or exchanges.¹⁶

Even so, none of this is an argument for scrapping the proposal. Rather, it is a reason to use the sixty-day comment period to fix its weakest joint. A middle path exists between the old regime, where every offering risked enforcement, and the current draft, where issuers grade their own homework. The SEC could require a staff no-action letter, or lighter-touch written confirmation, before an issuer relies on the safe harbor. That step would preserve predictability while adding an independent check where it matters most. Lawyers advising token issuers should treat the gap, not the exemption thresholds, as the provision most worth commenting on before the window closes.

¹⁵ Jay B. Sykes, CONG. RSCH. SERV., LSB11415, SEC ISSUES CRYPTO GUIDANCE AS CONGRESS CONSIDERS MARKET STRUCTURE LEGISLATION (2026), <https://www.congress.gov/crs-product/LSB11415>.

¹⁶ Adams, *supra* note 12.