

October 20, 2026

*Via electronic submission (rule-comments@sec.gov)*

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

**Re: Regulation Crypto Assets (Release Nos. 33-11434; 34-106150; File No. S7-2026-27)**

Dear Secretary Countryman:

I write on behalf of the Public Investors Advocate Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors in securities arbitration and litigation. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the SEC and the Financial Industry Regulatory Authority as they relate to investor protection.

PIABA opposes Regulation Crypto Assets (“Reg Crypto”) to the extent the proposal reduces investor protections. PIABA believes generally that Reg Crypto will create more potential for fraud and abuse while simultaneously diminishing investor protections. We outline our general concerns below.

**I. The Proposed Startup Exemption Sacrifices Investor Protection by Eliminating Essential Disclosure and Accountability Safeguards**

The proposed startup exemption creates a public offering pathway that removes several of the protections traditionally used to address information asymmetry, deter misconduct, and preserve meaningful accountability when issuers solicit capital from retail investors. Under the proposal, an issuer could offer and sell up to \$5 million of covered investment contracts during a four-year period without registering the offering under Section 5 of the Securities Act.

An issuer relying on the startup exemption would not be required to provide financial statements, audited or otherwise. The offering would not require Commission qualification or the participation of a broker, funding portal, or other regulated intermediary. General solicitation would be permitted, and the issuer could solicit capital directly from retail investors. The issuer also could be an individual or a group of individuals or entities, rather

than an established legal entity with assets, financial controls, insurance, and a clear governance structure.

This combination would create a public offering regime with substantially reduced preventive oversight and reduced practical accountability for investments that are likely to be highly speculative, difficult to value, and dependent on the future efforts of promoters and developers.

#### **A. The \$5 Million Offering Limit Is Not Adequate for Investor Protection**

The Commission relies heavily on the \$5 million aggregate offering limit as a safeguard. Proposed Rule 200(b)(4) provides that the aggregate offering price and gross proceeds from covered transactions may not exceed \$5 million during the exemption period. The Commission expressly acknowledges that issuers relying on the exemption would not provide financial disclosures at the same level or frequency as issuers in registered offerings, but concludes that the \$5 million limit is an appropriate response.<sup>1</sup>

An aggregate offering cap simply does not protect any investor. It merely limits how much a single issuer may take from the public. It says nothing about how many retirees, families, or inexperienced investors may be financially devastated in the process. An exemption does not become protective simply because the aggregate harm caused by each issuer is capped at \$5 million. That amount may represent the retirement savings, college funds, emergency reserves, and financial security of dozens or even hundreds of households. The cap does not verify the issuer's representations, establish whether the issuer has the resources to complete the promised project, prevent misuse of proceeds, or limit the amount any particular investor may lose. In practical terms, the proposal treats the financial destruction of individual investors as tolerable so long as any one issuer does not collect more than \$5 million. That premise is fundamentally incompatible with the Commission's investor protection mandate. PIABA is concerned that bad actors will take advantage of these reduced investor protections at the expense of retirees and retail investors.

Five million dollars also is a substantial amount of public capital. The Commission estimates that 99 offerings per year could be conducted under the startup exemption, based on the number of crypto asset offerings in the Regulation D and Regulation Crowdfunding markets that raised \$5 million or less in 2024.<sup>2</sup> If numerous issuers use the exemption, hundreds of millions of dollars could be raised from the public each year without financial statements, intermediary review, Commission qualification, or individual investment limits.

The offering cap therefore does not cure the exemption's underlying weakness. It merely places a limit on the amount that can be raised in each offering while leaving

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<sup>1</sup> See Regulation Crypto Assets, Securities Act Release No. 33-11434, Exchange Act Release No. 34-106150, File No. S7-2026-27 (Aug. 18, 2026), 91 Fed. Reg. 54510 (Aug. 21, 2026) (proposed rule), at 82 [hereinafter Release]; proposed 17 C.F.R. § 228.200(b)(4). Page citations to the Release, in the text and in these notes, are to the Commission's conformed release.

<sup>2</sup> Release at 282.

individual investors exposed to concentrated losses and leaving the broader market exposed to repeated offerings conducted under a substantially reduced disclosure regime.

## **B. Financial Information Is Most Important When the Enterprise Is Least Developed**

The absence of any financial statement requirement is the exemption's most serious defect. The Commission expressly states that the proposed startup disclosure requirements do not require a discussion of the issuer's financial condition or any financial statements or financial information.<sup>3</sup>

Financial statements provide information that narrative descriptions cannot replace. They allow investors to evaluate the issuer's assets, liabilities, revenue, operating expenses, outstanding debt, related party obligations, prior capital contributions, available resources, and financial runway. They help investors determine whether the issuer can continue operating, whether proceeds will be used for development or to repay insiders and existing obligations, whether the enterprise already is insolvent, and how management has used previously raised funds.

This information is particularly important for early-stage crypto projects. Such projects may have no meaningful operating history, no completed product, no established revenue, no readily valued assets, and significant dependence on management's ability to use investor funds as promised. In that setting, the issuer's financial condition and use of prior funds will be highly important to an investor.

The proposal reverses the normal logic of disclosure. The less developed and more uncertain the enterprise, the more important basic financial information becomes. Yet the proposed startup exemption provides the least financial transparency at the point when information asymmetry is likely to be greatest.

The disparity with Regulation Crowdfunding illustrates the absence of a sound policy justification. The Commission acknowledges that an issuer raising \$5 million under Regulation Crowdfunding would be required to provide financial statements and use an intermediary, while an issuer raising the same amount under the startup exemption would not be required to do either.<sup>4</sup> The fact that an investment is recorded on a distributed ledger does not make the issuer's assets, liabilities, operating expenses, cash position, related party obligations, or use of proceeds less material. Crypto asset issuers should not receive more favorable treatment than other early stage issuers merely because of the technological form of the investment.

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<sup>3</sup> *Id.* at 290.

<sup>4</sup> *See* Release at 222–23.

### **C. Principles Based Narrative Disclosure Cannot Replace Financial Statements**

Proposed Rule 103 would require principles-based narrative disclosure concerning ten general subjects: the covered investment contract; the offering; the subject crypto asset; management, related persons, and conflicts of interest; the associated crypto network or application and development plan; security and source code; crypto asset economics and allocations; governance; the crypto asset ecosystem; and risk factors.

These topics are relevant, but they are not *substitutes* for financial disclosure statements. An issuer can describe an ambitious development plan without disclosing that it lacks the resources to execute that plan. It can describe an intended use of proceeds without showing how it spent previously raised funds. It can generally identify related persons and conflicts without quantifying payments, loans, transfers, or obligations involving those persons. It can disclose token allocations without providing meaningful information about the financial condition of the persons responsible for completing the project.

The principles-based structure also gives issuers substantial discretion over what to disclose, how much detail to provide, and how to characterize negative information. Proposed Rule 103 generally requires issuers to describe the “material aspects” of each listed topic rather than provide standardized, line-item information.<sup>5</sup> These disclosure requirements should not force investors to infer an issuer’s financial condition from promotional narratives about future technology, network growth, token economics, or decentralization. Financial statements provide a disciplined and comparatively standardized account of the issuer’s actual condition. Narrative disclosure does not.

### **D. Eliminating an Intermediary Removes an Important Layer of Protection**

The startup exemption would not require the use of a registered broker, funding portal, or other regulated intermediary.<sup>6</sup> The Commission identifies this absence as a source of cost savings when comparing the startup exemption with Regulation Crowdfunding.<sup>7</sup>

Those cost savings come at the expense of investor protection. A regulated intermediary can provide an important layer of verification and accountability through issuer identification, bad actor and disqualification inquiries, disclosure procedures, investor education, transaction records, and regulated procedures for the protection of investor funds.

The need for an intermediary is particularly strong because proposed Rule 200(b)(2) would permit an issuer to be an individual or a group of individuals or entities.<sup>8</sup> Individual issuers likely have no conventional corporate structure, no established accounting controls,

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<sup>5</sup> See Release at 54.

<sup>6</sup> See Release at 215.

<sup>7</sup> *Id.* at 222–23.

<sup>8</sup> See Release at 80, 244.

no insurance, no meaningful assets available to satisfy a judgment, and no clearly identifiable person responsible for compliance.

A public offering exemption designed for early-stage projects and broad retail investor participation should require more verification and accountability, not less. Startup exemption offerings should be conducted through a regulated intermediary with defined responsibilities for issuer identification, disqualification inquiries, disclosure procedures, investor education, transaction records, and the handling of investor funds.

## **E. Crypto Asset Offerings Do Not Warrant Preferential Treatment**

Crypto asset technology justifies supplemental disclosure concerning token economics, network development, governance, source code, cybersecurity, custody, and insider allocations. It does not justify eliminating basic financial disclosure and accountability protections. Crypto asset offerings simply do not deserve some special most favored asset treatment from the Commission.

Existing exemptions already provide pathways that can accommodate issuers at different stages of development. Regulation Crowdfunding permits broad retail participation but requires financial disclosure, individual investment limits, and use of a regulated intermediary. Regulation A provides a framework for larger public offerings with Commission qualification and ongoing reporting. Regulation D provides alternatives for offerings directed principally to accredited investors.

Crypto asset issuers should use these existing pathways, supplemented where appropriate with additional disclosures tailored to the technological and economic characteristics of the investment. The fact that an investment is represented by a token or recorded on a distributed ledger does not make the issuer's financial condition less important. It does not reduce the risk of fraud, conflicts of interest, related party transactions, misuse of proceeds, or promoter misconduct. It does not make retail investors better able to evaluate an early-stage enterprise without reliable financial information.

Crypto assets do not make retail investors better able to evaluate an early-stage enterprise without reliable financial information. To the contrary, crypto asset fraud is among the fastest growing and most financially destructive forms of investment fraud. The most recent FBI data confirm that the danger is neither hypothetical nor isolated. In 2025, complaints involving cryptocurrency produced more than \$11 billion in reported losses, and cryptocurrency investment fraud alone caused \$7.2 billion in losses, making it the largest source of financial losses to Americans reported to the FBI's Internet Crime Complaint Center that year.<sup>9</sup> Against that record, reducing disclosure and accountability requirements for crypto asset offerings is especially difficult to justify. The proposed exemption would remove preventive protections from the very market in which fraud is expanding rapidly and producing extraordinary investor losses. Rather than standing up to fight for the investor

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<sup>9</sup> See Federal Bureau of Investigation, 2025 Internet Crime Report at 8, 11.

protection mission, the Commission's proposed Reg Crypto invites additional avenues and tools for fraud while providing no real investor protections.

Section 28 of the Securities Act permits the Commission to create an exemption only to the extent it is necessary or appropriate in the public interest and consistent with investor protection. The Commission recites that standard in discussing the authority for the proposed exemptions.<sup>10</sup> The startup exemption does not satisfy that standard in its present form because it would permit public solicitation of up to \$5 million unrestricted from retail investors without financial statements, Commission qualification, a regulated intermediary, individual investment limits, meaningful resale restrictions, or prompt current reporting.

#### **F. Website Disclosure and Annual Updating Further Weaken Accountability**

Proposed Rule 200(d) would not require the substantive information mandated by Rule 103 to be filed on EDGAR. Instead, the issuer could publish the information on a website of its choosing and determine the manner in which it is presented.<sup>11</sup> This approach would leave investors dependent on an issuer-controlled source for the principal information concerning the offering.

Website disclosure is not equivalent to a standardized Commission filing. A website can be modified, reorganized, or removed, and prior versions may not be preserved. Investors attempting to establish what was represented when they purchased may have difficulty identifying when language changed, determining what information was deleted, or locating the version available on the date of sale. The Commission itself asks whether permitting disclosure on a separate website could impair the ability of investors and the Commission to pursue claims for material misstatements or omissions.<sup>12</sup> The answer is unquestionably yes.

The proposed updating requirement is also inadequate. Rule 200(d)(3) generally would require an issuer to amend its disclosure within thirty calendar days after the end of each calendar year if material changes occurred.<sup>13</sup> A material event occurring near the beginning of a calendar year therefore could remain undisclosed for more than a year while the issuer continues soliciting and accepting investor funds.

The final rule should require all offering disclosures, financial statements, and amendments to be filed on EDGAR in a standardized format, with prior versions preserved. It also should require prompt disclosure after a material change rather than relying principally on an annual updating cycle.

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<sup>10</sup> See Release at 97 n.222.

<sup>11</sup> See Release at 89.

<sup>12</sup> See Release at 91–92.

<sup>13</sup> See Release at 90.

## **II. Reg Crypto Imposes No Lock-Up on Insider Sales, Inviting Insider Profiteering at the Retail Public's Expense**

Proposed Reg Crypto places no lock-up, vesting, holding period, or other restriction on founders, promoters, employees, affiliates, or other related persons who often hold the largest allocations of a project's cryptocurrency assets. PIABA believes that this—in combination with Reg Crypto's resale provisions—breeds conflicts of interest that hurt retail investors.

This danger is not theoretical. One of cryptocurrency's defining harms over the past several years has been insiders who acquire tokens cheaply, promote them to the public, and sell out, leaving retail investors holding the proverbial bag. As proposed, Reg Crypto codifies a safe harbor for such conduct that is not available for any comparable securities offerings. Traditional securities laws have long restricted insiders' sales of securities and how quickly newly issued securities may flow into public hands. PIABA urges the Commission to incorporate both into Reg Crypto before adopting a final rule to ensure that the investing public is not left holding the bag as promoters profit at the expense of the investing public while being shielded from accountability by the Commission's own regulations and actions.

### **A. Failing to restrict insider sales creates structural conflicts of interest**

Reg Crypto defines "related person" to include "founders, promoters, employees, affiliates, and any person that is a director, officer, trustee, consultant, contractor, or advisor to the issuer" and expressly states this is "intended to include any person that may be viewed as an 'insider' of the issuer."<sup>14</sup> Although Reg Crypto requires disclosure of conflicts and asset allocations, the proposal stops short of restrictions. For example, unlike other securities offerings, the proposal does not require that allocations be locked up, vested over time, or only sold in limited amounts.

In a conventional securities offering, the interests of insiders and public investors are aligned, at least for a time, because insiders cannot immediately cash out their positions. In other words, lock-ups and holding periods force those who built and promoted an enterprise to share in its outcome. Reg Crypto does not impose this incentive structure, instead creating *harmful incentives* to the detriment of the investing public. There is simply no reasoning justifying eliminating these protections for the types of offerings Reg Crypto would cover.

When founders can sell immediately, their economic incentive is to ensure a crypto asset's price is highest at the moment of sale. Thus, insiders' strategy will be to maximize near-term price through promotion, then exit. This is a recipe for disaster given insiders hold an overwhelming informational advantage over the investing public, yet are not subject to the reporting, short swing disgorgement, or blackout periods associated with traditional public offerings.

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<sup>14</sup> Release at 39; Proposed 17 C.F.R. § 228.100.

This is not a conflict that disclosure alone can cure. Retail investors cannot, and should not have to, price the risk that insiders may sell at unknown times in unknown amounts based on undisclosed information. This issue is exacerbated by the difficulty in monitoring insider sales across wallets on offshore and/or decentralized exchanges, often under pseudonym wallets. Thus, the only effective protection is to restrict insider selling and limit the speed at which newly-issued cryptocurrency assets flow into the public market.

## **B. The market already has a track record of exploitation**

It is not necessary to speculate about how insiders may behave without lock-ups and resale restrictions. The SEC already knows:

In *SEC v. Ripple Labs, Inc.*, the Commission alleged that senior Ripple executives sold hundreds of millions of XRP into the market while the company was promoting the asset to the public.<sup>15</sup>

In *SEC v. Telegram Grp. Inc.*, the Commission alleged that Telegram intended to flood the market via sales to sophisticated “initial purchasers” who intended to quickly resell to the investing public.<sup>16</sup>

In *SEC v. SafeMoon LLC*, the Commission alleged that insiders touted that their token’s liquidity was “locked” while they withdrew and misappropriated millions of dollars of it.<sup>17</sup>

Without lock-ups and resale restrictions, Reg Crypto does not prevent these scenarios. Worse, an issuer that follows Reg Crypto’s requirements as proposed could point to compliance as a badge of legitimacy whilst insiders sell freely.

## **C. Lock-up style safeguards already exist in comparable offering frameworks**

Existing paths by which issuers raise capital from the public, on a registered or exempt basis, contain some combination of insider selling restrictions and resale limits. Reg D, Reg A, Reg Crowdfunding, and registered IPOs are all subject to insider sale restrictions. Reg Crypto, as proposed, would be the exception. These existing safeguards are all the more important for the type of issuances Reg Crypto envisions. The Commission should adopt clear restrictions or explain clearly why they would not advance important investor protection objectives.

Measures such as mandatory insider lock-ups, volume limits, requiring advance notice and prompt reporting of insider sales, blackout periods, and limits on resale will impose limited burden on legitimate projects. These proposed additions to Reg Crypto would, however, impose meaningful safeguards against bad actors whose only goal is

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<sup>15</sup> Complaint, *SEC v. Ripple Labs, Inc.*, No. 1:20-cv-10832 (S.D.N.Y. Dec. 22, 2020).

<sup>16</sup> Complaint, *SEC v. Telegram Grp. Inc.*, No. 1:19-cv-09439 (S.D.N.Y. Oct. 11, 2019).

<sup>17</sup> Complaint, *SEC v. SafeMoon LLC*, No. 1:23-cv-08138 (E.D.N.Y. Nov. 1, 2023).

promote and promptly exit. Adopting these safeguards would facilitate meaningful capital formation in the crypto market and protect retail investors.

### **III. Rule 400 inappropriately codifies a contested reading of *Howey* and, as proposed, does not identify the right exit point (RFC 124–135)**

The Release is also technically problematic down to the nitty gritty. The Release reasons that a crypto asset should not remain subject to an investment contract indefinitely once purchasers no longer depend on the issuer’s managerial efforts, and that a clear exit path serves investors as well as issuers. As proposed, however, Rule 400 does not identify the right exit point. More fundamentally, the theory on which it rests has not been accepted by the courts.

Under proposed Rule 400, a covered investment contract is deemed to cease to exist, and the crypto asset is deemed not subject to it for purposes of Securities Act §2(a)(1) and Exchange Act §3(a)(10), when two conditions are met.<sup>18</sup> First, the issuer has “completed or otherwise permanently ceased” the essential managerial efforts it promised and is not making new promises. Second, the issuer files Form TR with a certification and supporting analysis. Neither the Commission nor its staff needs to review or act on Form TR, which takes effect on filing.<sup>19</sup> The Commission’s position is that federal securities law requirements stop applying from that point.<sup>20</sup>

The Commission states that it does not intend to supersede *Howey*, which it describes as binding precedent.<sup>21</sup> But Rule 400 is consistent with *Howey* only if three propositions hold:

1. an investment contract, once formed, can cease to exist because the promoter has finished, or stopped, the work it promised;
2. that cessation can be determined for an asset as a whole, across all later transactions; and
3. the issuer’s own unreviewed certification is an adequate way to make that determination.

The first proposition has no holding behind it (Part III.A). The second runs against the transaction-specific analysis the Commission itself invokes, and the third has no analogue in *Howey* case law (Part III.C). Because the Commission’s reading of “investment contract” receives no deference, these are questions about what the statute means, and the record must answer them on the merits (Part III.D). Parts III.B and III.E through III.H identify the changes Rule 400 needs if the Commission proceeds. If the Commission rejects these proposals, it should explain the reasons why.

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<sup>18</sup> Proposed 17 C.F.R. § 228.400; Securities Act § 2(a)(1), 15 U.S.C. § 77b(a)(1); Exchange Act § 3(a)(10), 15 U.S.C. § 78c(a)(10).

<sup>19</sup> See Release at 160–62, 165; Proposed 17 C.F.R. §§ 228.305(c)–(d), 228.400(b).

<sup>20</sup> Release at 167.

<sup>21</sup> SEC v. W.J. Howey Co., 328 U.S. 293 (1946); *Application of the Federal Securities Laws to Certain Types of Crypto Assets and Certain Transactions Involving Crypto Assets*, Securities Act Release No. 33-11412 (Mar. 17, 2026), 91 Fed. Reg. 13714, 13716 (Mar. 23, 2026) (“2026 Interpretation”).

### **A. Courts have not accepted the theory that an investment contract ceases to exist when promised efforts end**

The 2026 Interpretation identifies two routes to cessation: the issuer fulfills its promised efforts, or purchasers lose any reasonable expectation that it will continue them, including through abandonment.<sup>22</sup>

First, there is doctrinal reason to believe that fulfillment is not a basis for an investment contract ceasing to exist. In *Telegram*, the court observed in dicta that a token administered by a decentralized community is unlikely to be a security. But it rejected the issuer's argument that its tokens should be evaluated at network launch, when the issuer said it would no longer supply essential efforts. The court held that *Howey* examines the undertakings at the time they were made.<sup>23</sup> A promoter's stated plan to stop working did not defeat security status. In *LBRY*, the court declined to reach a maturation argument raised in the alternative.<sup>24</sup> We are aware of no decision holding that an asset originally sold in an investment contract became a non-security because the promoter completed its work, and the release identifies none.

Second, the reasonable expectations route is subject of an unresolved split in authority. *Ripple* held that blind programmatic sales did not satisfy *Howey*'s third element, and *Binance* was inclined to follow that approach for secondary sales by third parties.<sup>25</sup> But *Ripple* expressly declined to decide whether secondary-market sales are investment contracts.<sup>26</sup> Two later decisions in the U.S. District Court for the Southern District of New York rejected *Ripple*'s reasoning: *Coinbase* found the efforts element satisfied in part because issuers kept promoting development efforts long after their tokens began secondary trading.<sup>27</sup> The *Coinbase* court certified the question for interlocutory appeal; the Commission then dismissed the action, and it later abandoned its appeal in *Ripple*.<sup>28</sup> The Commission is thus proposing to codify one side of an intra-district split that it prevented the courts from resolving.

The D.C. Circuit's decision in *SEC v. Life Partners, Inc.*, says that if the value of the promoter's efforts has been impounded into the price, and neither the promoter nor anyone else is expected to make further efforts, the need for securities regulation is greatly diminished.<sup>29</sup>

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<sup>22</sup> 2026 Interpretation, 91 Fed. Reg. at 13722–23.

<sup>23</sup> SEC v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 358 (S.D.N.Y. 2020) (dicta regarding decentralized community); *id.* at 365, 367–76 (repeatedly rejecting evaluation at network launch).

<sup>24</sup> SEC v. LBRY, Inc., 639 F. Supp. 3d 211, 221 n.4 (D.N.H. 2022).

<sup>25</sup> SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308, 331 (S.D.N.Y. 2023) (*Ripple*); SEC v. Binance Holdings Ltd., 738 F. Supp. 3d 20, 53–57 (D.D.C. 2024).

<sup>26</sup> *Ripple*, 682 F. Supp. 3d at 329 n.16.

<sup>27</sup> SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170, 197 (S.D.N.Y. 2023) (“[T]he Court rejects the approach recently adopted . . . in . . . *Ripple* . . .”); SEC v. Coinbase, Inc., 726 F. Supp. 3d 260, 288–290 (S.D.N.Y. 2024).

<sup>28</sup> SEC v. Coinbase, Inc., 761 F. Supp. 3d 702 (S.D.N.Y. 2025) (certifying interlocutory appeal); SEC Press Release 2025-47 (Feb. 27, 2025), <https://www.sec.gov/newsroom/press-releases/2025-47> (announcing dismissal).

<sup>29</sup> SEC v. Life Partners, Inc., 87 F.3d 536, 547 (D.C. Cir. 1996).

That passage has three limits. First, it is dicta. The holding was that pre-purchase services alone cannot suffice, and Judge Wald dissented on that point.<sup>30</sup> Second, it is a point of sale test: it asks what a buyer expects at the time of a given purchase. It does not describe an instrument that begins as a security and later becomes a non-security. On that temporal question it is consistent with *Telegram*.<sup>31</sup> Third, its operative rule is contested. The Eleventh Circuit declined to adopt the *Life Partners* line between pre- and post-purchase efforts,<sup>32</sup> and *Coinbase* left the question open.<sup>33</sup> The Commission itself argued in *Life Partners* that the distinction was “hypertechnical.” It was the prevailing plaintiff in *Mutual Benefits*, and state regulators have rejected the line as well.<sup>34</sup>

A safe harbor that applies to purchasers after Form TR treats the issuer’s completed work as “pre-purchase” effort relative to those purchasers, and treats it as insufficient. That is the *Life Partners* rule, and adopting it is a change in the Commission’s position (Part III.H).

The Commission should (i) identify any holding that an investment contract ceased to exist because the promoter completed or abandoned its efforts; (ii) explain how Rule 400 is consistent with *Telegram*, *Mutual Benefits*, *Terraform*, and *Coinbase*; (iii) state whether it relies on *Life Partners*, and if so, acknowledge that the relevant passage is dicta stated as a point-of-sale test; and (iv) explain why codifying a contested reading by rule is appropriate while the question remains open in the courts that will decide it.

## **B. “Permanently ceased” turns an exit for completed projects into an exit for abandoned ones**

The Commission’s reliance rationale supports, **at most**, exit when the issuer has delivered everything it promised. That is the scenario the *Life Partners* dictum describes: once promised efforts are complete and their value is reflected in the price, the information asymmetry the securities laws address narrows.<sup>35</sup>

That rationale does not extend to a project that has been abandoned rather than completed. When an issuer stops work it promised to perform, purchasers relied on those efforts, paid for them, and did not receive them. What the price reflects is the failure, not the delivered value. Abandonment is the point at which purchasers’ claims mature, not the point at which they should disappear. The Proposal nonetheless treats abandonment as covered.<sup>36</sup>

Consider an ordinary case. An issuer raises \$5 million under the startup exemption, promising to build a protocol within four years. Eighteen months later, having spent part of the proceeds, it files Form TR certifying that it has permanently ceased its efforts, and it keeps the remaining treasury. On filing, the Commission’s position is that the federal securities laws no longer apply to the asset. The Proposal’s answer for purchasers is to seek

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<sup>30</sup> *Id.* at 546–48; *id.* at 551–56 (Wald, J., dissenting).

<sup>31</sup> *Cf. Telegram*, 448 F. Supp. 3d at 365.

<sup>32</sup> *SEC v. Mutual Benefits Corp.*, 408 F.3d 737, 743–44 (11th Cir. 2005).

<sup>33</sup> *Coinbase*, 726 F. Supp. 3d at 303 n.18.

<sup>34</sup> *Life Partners*, 87 F.3d at 547; *Mutual Benefits*, 408 F.3d at 745.

<sup>35</sup> 29.

<sup>36</sup> Proposed Rule 400(a); 2026 Interpretation, 91 Fed. Reg. at 13723 & n.98 (§ IV.B.2).

contractual recourse against counterparties.<sup>37</sup> In a regime that also eliminates resale restrictions, financial statements, and express private remedies for startup offerings, that is not an adequate substitute. The filing also ends continuing disclosure just when purchasers most need to know what failed, how the treasury will be handled, and whether insiders are selling or stealing. Later buyers of the abandoned token would purchase outside the federal securities laws altogether. The cost of failure shifts from those who controlled the project to the holders who did not.

The Release notes that private plaintiffs and states may still contend that a security exists.<sup>38</sup> That preserves a litigation path for purchasers with the resources to pursue it, and the Commission should confirm it in the rule text (Part III.G). As an organization whose members represent claimants in securities arbitration, we are particularly concerned with ensuring that a litigation path for purchasers remains as there must be clear paths for accountability and justice for aggrieved investors. It does not, however, preserve the Commission's oversight, the ongoing reporting obligations, or the information on which a later claim would depend.

RFC 133 asks whether the safe harbor should be limited to fulfilled promises. It should. The Commission should delete "or otherwise permanently ceased" from Rule 400(a) and withdraw the abandonment route. It should also state that an abandoned project remains subject to its covered investment contract.

If the Commission concludes that some abandonment route is necessary, it should require a separate abandonment filing disclosing proceeds raised, proceeds spent and on what, treasury remaining, and related-person holdings and sales. It should also condition the safe harbor on disposition of the remaining proceeds for the benefit of purchasers, and make a separate investor-protection finding for that route.

If the Commission declines these recommendations, it should explain why. Limiting Rule 400 to completion would remove the most acute misalignment of incentives, but it would *not* cure the problems in Parts III.A, III.C, and III.D.

### **C. Howey is applied transaction by transaction; Rule 400 substitutes an issuer-defined, self-certified election**

The Commission's cessation theory starts from the premise that *Howey* evaluates each transaction on its own facts.<sup>39</sup> We agree that a particular later sale might hypothetically fall outside *Howey*. That premise does not establish that an issuer may declare, by a single filing, that *every* later transaction in an asset falls outside it. These are separable questions. Rule 400 answers a transaction-specific question with an issuer-level determination, made by the party with the strongest interest in the outcome.

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<sup>37</sup> Release at 167.

<sup>38</sup> *Id.*

<sup>39</sup> See *Marine Bank v. Weaver*, 455 U.S. 551, 560 n.11 (1982) ("Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole."); *Ripple*, 682 F. Supp. 3d at 329 & n.16.

Rule 400 measures exit against the efforts the issuer represented or promised. Where those efforts include decentralization, whether it has been achieved turns on how the issuer itself defined it, “not a general market conception.”<sup>40</sup> The certification also requires that the issuer “does not intend” to make new promises, which is a statement of present intent no one can verify at filing.<sup>41</sup> The certification is unreviewed, unattested, and technically unverified.

The mechanism is straightforward. Because the exit is measured against the issuer’s own written promises, an issuer drafting its disclosure has an incentive to promise narrowly and vaguely, which makes the exit easier to reach. It can then continue substantial, value-driving work relabeled as maintenance or ecosystem support, which the Commission has separately excluded from essential efforts. Purchasers, however, form expectations from the whole of the issuer’s promotional activity, including social media and community channels, not only the formal disclosure. *Howey* asks about purchasers’ reasonable expectations from the promoter’s conduct as a whole, judged by economic reality rather than labels.<sup>42</sup> A safe harbor triggered by a certification, rather than by any change in the economic relationship among the token, the enterprise, and its purchasers, makes form dispositive where *Howey* requires substance.

The Commission considered objective functionality and decentralization criteria and declined them, citing cost and difficulty.<sup>43</sup> That comparison counts only the costs objective criteria would impose on issuers. It omits the costs an issuer-defined standard imposes on purchasers. We do not ask for a mechanical test. We ask that the Form TR analysis address objective control indicia alongside the issuer’s promises, including:

- (i) the share of supply held or controlled by the issuer and related persons;
- (ii) who holds administrative, upgrade, or pause keys and multisig signing authority;
- (iii) control over the treasury; and
- (iv) whether the asset’s value continues to depend on development performed by the issuer *or any other person*, including development the Commission’s post-functionality carve-out would exclude.

These facts are knowable to the issuer at low cost and are central to whether reliance has ended. The Commission should also remove the carve-out or explain how it is consistent with *Coinbase*.

In addition, verification should match the consequence. The Commission should add verification proportionate to the consequence of the filing:

- a staff no-objection period of [60] days before Form TR becomes effective;
- certification by the principal executive officer in a personal capacity; and
- an independent technical attestation of the control indicia.

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<sup>40</sup> Release at 74.

<sup>41</sup> Proposed Rule 400(a)(1).

<sup>42</sup> *Howey*, 328 U.S. at 298–99; *SEC v. Edwards*, 540 U.S. 389, 393–97 (2004); *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 848–49 (1975); 2026 Interpretation, 91 Fed. Reg. at 13716–17.

<sup>43</sup> Release at 276.

It should also state in the rule text that the safe harbor addresses only the issuer's and its affiliates' own subsequent offers and sales, and does not determine the status of any other person's transaction.

**D. The Commission's reading of "investment contract" receives no deference, and the Release does not establish authority for the deeming provision**

Whatever it is called, a rule providing that a covered investment contract "will be deemed" to have terminated interprets a statutory term. After *Loper Bright Enterprises v. Raimondo*,<sup>44</sup> courts will construe "investment contract" independently. The term is especially unsuited to agency adjustment because the Supreme Court has authoritatively construed it, and the Commission concedes that construction is binding.<sup>45</sup> To the extent a court gives the Commission's view any weight, it will be weight proportioned to the view's reasoning and its consistency with the agency's earlier pronouncements.<sup>46</sup> Here the reading reverses the Commission's litigating positions in *Life Partners*, *Mutual Benefits*, *Telegram*, *Terraform*, and *Coinbase*, and it rests on dicta the Commission previously opposed.

The Release cites, among other provisions, Securities Act §§19(a) and 28 and Exchange Act §§3(b) and 36. Neither line of authority fits the deeming provision comfortably.

First, definitional authority under §19(a) and Exchange Act §3(b) reaches accounting, technical, and trade terms and must be exercised consistently with the statute.<sup>47</sup> "Investment contract" is a term of art whose content the Supreme Court has supplied, not a technical or trade term in any ordinary sense. A definition that turns on an issuer's certification of its own intent is difficult to reconcile with a term the Court has said turns on economic reality.

Second, exemptive authority under §§28 and 36 permits the Commission to exempt persons and transactions from statutory provisions. It does so only where the exemption is necessary or appropriate in the public interest and consistent with the protection of investors.<sup>48</sup> Both provisions contemplate that the Commission will make findings, supported by substantial evidence and consistent with the APA's reasoned decision-making requirements, that the exemption meets those standards. What's more, an exemption is not a redefinition. If Rule 400 is an exemption, the Commission should say so, identify the

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<sup>44</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

<sup>45</sup> 2026 Interpretation, 91 Fed. Reg. at 13716.

<sup>46</sup> *Loper Bright*, 603 U.S. at 388, 402 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>47</sup> See, e.g., Exchange Act § 3(b), 15 U.S.C. § 78c(b) ("The Commission . . . shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter.").

<sup>48</sup> See, e.g., Securities Act § 28, 15 U.S.C. § 77z-3 ("The Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this subchapter or of any rule or regulation issued under this subchapter, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."); Exchange Act § 36(a), 15 U.S.C. § 78mm(a) ("[T]he Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.").

provisions from which it exempts, and make the required findings separately for completion and for abandonment.

This leaves a choice the Commission should make on the record. If Rule 400 only describes how the Commission will exercise enforcement discretion, it binds no court and provides less certainty than it appears to, and it should not be codified as a definitional rule. If it purports to remove an instrument from the statutory definition of “security,” the Commission must identify where Congress authorized an issuer’s certification to settle a judicially construed term.<sup>49</sup> Prior definitional safe harbors such as Rule 151 do not answer the question, because they turn on objective, verifiable features of the instrument rather than the issuer’s characterization of its own promises and intent.<sup>50</sup>

The further Rule 400 departs from *Howey*’s objective, purchaser-focused test, the more likely courts and states are to reach different conclusions. Issuers would receive less certainty than the rule appears to promise, while investors lose the Commission’s oversight. The Commission should identify the specific authority for the deeming provision, explain how an issuer-defined standard is consistent with it without reliance on deference, and, if it relies on exemptive authority, recast Rule 400 as an exemption with the required findings.

#### **E. The safe harbor should not let insiders trade on the timing of their own exit filing**

The safe harbor creates substantial risk of abuse and investor harm. The issuer and its insiders decide when Form TR is filed, and it takes effect on filing. No public body evaluates the certification before the protections it ends are gone. The Commission may challenge a false certification later,<sup>51</sup> but by then purchasers have traded, and insiders may have sold, on the strength of it.

After Form TR becomes effective, the Commission’s position is that the asset is outside the definition of “security.” Three sets of protections would then no longer reach trading in it: Exchange Act §10(b) and Rule 10b-5, the insider-trading prohibitions, and the anti-touting rule in Securities Act §17(b).

The Proposal imposes no holding period on related persons (Part II). Insiders can therefore position their holdings in advance and sell into a market that has just been told the securities laws no longer apply. The Release acknowledges that insiders may delay decentralization to preserve leverage,<sup>52</sup> which confirms that their timing incentives are real. The Commission should condition Rule 400 on related persons not selling during a defined period after Form TR becomes effective (for example, six to twelve months). It should also require Form TR to disclose related-person holdings and any sales in the preceding 12 months.

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<sup>49</sup> See Lee Reiners, *Regulation Crypto Assets: Policymaking by Crypto, for Crypto*, Duke FinReg Blog (Aug. 20, 2026).

<sup>50</sup> See Securities Act Rule 151, 17 C.F.R. § 230.151; see also Adoption of Rule, *Definition of Annuity Contract or Optional Annuity Contract*, Securities Act Release No. 6645, 51 Fed. Reg. 20254 (June 4, 1986).

<sup>51</sup> Release at 167.

<sup>52</sup> *Id.* at 61 & n.169.

#### **F. Rule 400 should identify every person whose promises it extinguishes**

Crypto projects commonly involve a development company, a foundation, a DAO or DUNA, and affiliates, any of which may sell assets or make promises (RFC 60, 72). Rule 400 addresses only “the issuer.” The Commission should define the persons whose promised efforts are relevant under Rule 400 to include affiliates and any other person that made promises of essential managerial efforts, and should require each to join the Form TR certification. The Commission already takes a similar approach for startup “groups,” whose members sign Form NOR and Form TR and are responsible individually and collectively.<sup>53</sup>

#### **G. The rule text should state that Rule 400 does not affect past liability or private claims**

The Release states that requirements stop applying “from the point in time” the safe harbor is satisfied.<sup>54</sup> We read this as prospective. The market will understand Form TR as an announcement that federal securities protections no longer apply,<sup>55</sup> so the point should not be left to the preamble.

The Commission should add rule text stating that:

- Rule 400 does not affect any liability for conduct before Form TR becomes effective, including under Securities Act §5 and the antifraud provisions, and the filing is not a defense to such liability;
- the filing does not preclude private or state claims that the asset is or was a security; and
- a Form TR creates no presumption and is not evidence that any transaction was outside the definition of “security” in any proceeding other than one brought by the Commission.

#### **H. Rule 400 reaches assets sold before the Proposal, under a different understanding of the law**

Rule 400 is available to any issuer, whether or not it used a Reg Crypto exemption.<sup>56</sup> It therefore applies to crypto assets already outstanding, many of them sold when the Commission’s stated view was that many token offerings involved securities.<sup>57</sup> Purchasers in those offerings bought against that background, including the oversight and remedies it implied. Rule 400 codifies the Commission’s 2026 Interpretation.<sup>58</sup> That interpretation departs from earlier positions in two ways: in its treatment of token offerings generally, and in its embrace of the line between pre- and post-purchase efforts that the Commission litigated against (Part III.A). To the extent it departs from earlier positions, the Commission must acknowledge the change and give good reasons for it. It must also address the facts

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<sup>53</sup> *Id.* at 80.

<sup>54</sup> *Id.* at 167.

<sup>55</sup> *Id.* at 166–67 & nn.369, 371.

<sup>56</sup> Release at 167 n.371.

<sup>57</sup> *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017).*

<sup>58</sup> Release at 164–65.

underlying its prior view and take account of serious reliance interests.<sup>59</sup> The Commission should do so, address its prior findings about investor harm in token offerings, and explain how Rule 400 accounts for the reliance interests of existing holders.

The beneficiaries of that reach also deserve attention. Issuers whose assets already trade, with insider and early-investor allocations already in place, could use Rule 400 to exit the securities laws without ever having provided Reg Crypto disclosure or satisfied its conditions. That benefit would flow to established projects and their investors rather than to the startups the Proposal is designed to help. The Commission should estimate how many outstanding assets would be immediately eligible for Rule 400, and the share of their supply held by issuers, insiders, and early investors.

#### **IV. Preservation of State Regulatory Authority is Vital to Advancing Investor Protection.**

For decades, the cooperative federal–state securities regulatory framework has played a central role in protecting retail investors, particularly seniors who may be living on fixed incomes and cannot recover from significant financial losses. State regulators bring local knowledge, faster response times, and enforcement resources that federal agencies simply cannot replicate at the community level. For seniors living on fixed incomes, for whom a significant financial loss is not a setback but a catastrophe, this framework is often the last line of defense. The Commission must reinforce every line of defense possible for fraudsters who would utilize any loopholes to commit fraud utilizing Crypto schemes and exemptions. Reg Crypto instead substantially erodes a key line of defense.

According to the FBI’s Internet Crime Complaint Center, Americans lost more than \$5.6 billion to cryptocurrency-related fraud in 2023 alone, a 45 percent increase from the prior year, with Americans over 60 accounting for the largest share of losses of any age group.<sup>60</sup> These are not abstract statistics. They represent retirement savings wiped out, mortgages taken out against paid-off homes, and life savings handed to criminals, many of whom are overseas and actively working against the best interests of the United States, and who exploit regulatory uncertainty and technological complexity to evade accountability. These figures only continue to grow every year.

Across the country, older Americans and hardworking families are increasingly targeted by sophisticated online scams, many involving digital assets. Fraudsters thrive in regulatory uncertainty, and any rule that weakens or displaces investor protections, however well-intentioned, hands them a significant advantage. The Commission should ensure that its new offering regime closes gaps rather than creates them.

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<sup>59</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016).

<sup>60</sup> Fed. Bureau of Investigation, Internet Crime Complaint Center, 2023 Cryptocurrency Fraud Report (Sept. 9, 2024) (reporting losses of over \$5.6 billion in 2023, a 45 percent increase over 2022, and losses of over \$1.24 billion reported by complainants over age 60, the highest of any age group); see also Fed. Bureau of Investigation, *2023 Cryptocurrency Fraud Report Released* (Sept. 10, 2024), <https://www.fbi.gov/news/stories/2023-cryptocurrency-fraud-report-released>.

### **A. The Commission Should Reject Preemption of State Registration and Qualification Authority**

Rule 500 would treat covered investment contracts sold under either exemption as “covered securities,” stripping state regulators of authority to require registration or qualification before these instruments are sold to the public. States would retain their antifraud authority and their notice-filing and fee authority. Those retained powers are not a substitute. Antifraud enforcement is, by definition, after the fact: it begins once investors have already been harmed, often against promoters who are thinly capitalized, anonymous, or beyond the reach of U.S. courts. State registration and qualification review is the point at which a regulator can ask hard questions, require corrections, and keep a deficient offering from reaching retail investors in the first place. For the older Americans whom PIABA members represent, who rarely recover their losses after the fact, that front-end review is often the only meaningful protection.

### **B. The Commission Should Not Preempt State Review of the Startup Exemption**

The startup exemption would permit an issuer to raise up to \$5 million over four years after filing a notice of reliance. The Commission would not review or qualify the issuer’s disclosure, which the issuer would publish on its own website. No financial statements of any kind would be required. There would be no investor eligibility conditions and no limit on how much any one retail investor may invest, and general solicitation would be permitted. Covered investment contracts sold under the exemption would not be restricted securities, and the issuer need not be a U.S. entity and may be an individual or an unincorporated group.<sup>61</sup> Preempting state review of such offerings would leave retail investors with no independent pre-sale review at either the federal or the state level. If the Commission adopts the startup exemption, it should exclude that exemption entirely from Rule 500.

### **C. The Commission Should Not Extend Preemption to Secondary-Market Transactions**

Rule 500 would also preempt state registration and qualification requirements for secondary-market transactions by persons other than issuers, underwriters, or dealers, but only for as long as the issuer remains current in its Reg Crypto filings. Preemption would lapse when an issuer falls delinquent, resume upon cure, and, for a startup-exemption issuer, end when the issuer files its transition report while the covered investment contract remains outstanding. An ordinary retail purchaser has no practical way to determine at the point of sale whether those conditions are met. The Commission’s own requests for comment ask whether market participants can identify the provenance of a fungible token, determine whether the issuer satisfied an exemption, and monitor the issuer’s ongoing compliance.<sup>62</sup>

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<sup>61</sup> Release at 60, 80, 82, 85, 89; Proposed 17 C.F.R. § 228.200.

<sup>62</sup> Release at 181–82 (Request Nos. 140–143).

The Commission should not preempt state law on the strength of conditions that the people it purports to protect cannot readily observe.

Moreover, the Release itself acknowledges commenters' observation that federal law does not preempt state law for secondary-market transactions in Regulation A securities, and the Proposal does not resolve whether the platforms that would host these trades must register as exchanges, broker-dealers, or alternative trading systems.<sup>63</sup> Preempting state oversight of the trades before federal oversight of the venues exists risks creating a secondary market with no regulator watching.

#### **D. The Commission Should Respect the Limits of its Authority Under Section 18(b)(3)**

Congress, not the Commission, decides when federal law displaces state securities regulation. In the National Securities Markets Improvement Act, Congress identified by statute the categories of "covered securities" and preserved state authority over the rest, delegating to the Commission only the narrow task of defining "qualified purchasers" by rule.<sup>64</sup> The Commission's principal precedent for using that delegation is the Regulation A Tier 2 definition sustained in *Lindeen v. SEC*.<sup>65</sup> That decision does not carry the weight Rule 500 places on it. Tier 2 offerings are reviewed and qualified by the Commission, require audited financial statements, and cap purchases by non-accredited investors at ten percent of income or net worth. The startup exemption has none of those features, and, as the Release acknowledges, the Regulation A definition does not reach secondary-market transactions.<sup>66</sup>

*Lindeen* was also decided under a deference doctrine the Supreme Court has since abandoned. After *Loper Bright Enterprises v. Raimondo*, a court will decide for itself whether section 18(b)(3) permits this definition.<sup>67</sup> A rule later vacated would leave issuers, intermediaries, and investors holding years of transactions of uncertain legal status. Where Congress has not clearly spoken, the Commission should not claim sweeping new preemptive authority over state regulators, and certainly not without the robust notice-and-comment process that comes with rulemaking. Foundational securities policy decisions that affect millions of Americans and the protections they enjoy — including retirees and small investors — should remain within Congress's purview, and Congress continues to consider market structure legislation.

#### **E. State Enforcement Authority is Vital and Must Be Preserved**

State securities regulators are frontline enforcers and are often the first to identify emerging fraud trends affecting investors, especially frauds targeting older Americans. For example, states have invested significant resources designed specifically to help identify and

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<sup>63</sup> Release at 28 & n.95, 213 n.456.

<sup>64</sup> National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102, 110 Stat. 3416; Securities Act § 18(b)(3), 15 U.S.C. § 77r(b)(3).

<sup>65</sup> *Lindeen v. SEC*, 825 F.3d 646 (D.C. Cir. 2016).

<sup>66</sup> Release at 28 & n.95; 17 C.F.R. §§ 230.251(d)(2)(i)(C), 230.256.

<sup>67</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

stop cases of suspected financial exploitation. Many states have also enacted dedicated elder financial exploitation statutes, established specialized fraud units targeting senior investors, and developed protocols that allow regulators to pause suspicious transactions before investors lose everything. These are not duplicative functions. They are irreplaceable ones.

Any final rule should include clear, robust, and unambiguous language confirming that nothing in Reg Crypto limits the antifraud, investigative, or enforcement authority of state securities regulators, consistent with section 18(c) of the Securities Act.<sup>68</sup> It should also confirm that an issuer's Form TR filing, which is a self-certification that the issuer's promised managerial efforts have ended, does not bind state regulators, who may conclude under their own laws that an asset remains a security. The investors who depend on state enforcement, particularly older Americans who are disproportionately targeted by digital asset fraud, cannot afford to find out after the fact that their protections were quietly displaced.

#### **F. State Licensing and Registration Authority Should be Protected**

The Proposal contains no exemption from broker-dealer registration for the launchpads, platforms, and promoters that would facilitate these offerings, and state registration of broker-dealers, agents, and investment advisers rests on separate statutory requirements. The Commission should expressly confirm that Reg Crypto does not limit state authority to license and register securities firms and professionals operating within their jurisdictions. State registration requirements are a meaningful gatekeeping function that keeps unqualified, dishonest, and previously disciplined individuals from accessing investors in the first place. Removing or preempting state registration authority would eliminate one of the most practical and effective tools for keeping bad actors away from vulnerable investors before harm occurs, rather than pursuing them after the damage is done.

#### **G. Quantify Investor Harm and Ensure Sustainable Funding**

The Commission's economic analysis should weigh the investor losses that state review would have prevented, not only the issuer cost of complying with multistate review. It should also account for the litigation and compliance costs of determining which transactions fall within a preemption that switches on and off with an issuer's filing status. A durable framework must include sustainable funding for oversight, enforcement, capital formation review, and investor education at both the federal and state levels. Investor education initiatives, in particular, are essential to helping seniors and hardworking Americans recognize and avoid increasingly sophisticated online scams.

#### **H. Recommended Alternatives**

If the Commission proceeds despite these concerns, PIABA urges, at a minimum, that it: (1) withdraw Rule 500 or defer the question to Congress; (2) exclude the startup exemption from any preemption; (3) limit any preemption to fundraising-exemption

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<sup>68</sup> Securities Act § 18(c), 15 U.S.C. § 77r(c).

offerings that the Commission has qualified and, mirroring Regulation A, to Tier 2 offerings only, leaving Tier 1 offerings subject to state review; (4) decline to extend preemption to secondary-market transactions unless and until the Commission has finalized rules governing the intermediaries and venues for these assets and provides a public, machine-readable indicator of each issuer's current status; (5) establish a coordinated state-federal review process so that issuers can obtain single-track review without displacing state review; and (6) expressly preserve state antifraud, investigative, enforcement, licensing, and registration authority.

By reinforcing state authority and preventing unintended regulatory gaps, the Commission can promote responsible innovation while preserving the investor protections that safeguard older Americans, hardworking families, and the integrity of our markets. Strong, coordinated oversight is not an obstacle to innovation — it is a prerequisite for public trust.

#### **V. The Commission Relies on Antifraud Enforcement While Discarding the Evidence That Enforcement Requires, Inappropriately Providing no Recordkeeping Requirements**

The Commission assures the public that issuers relying on Reg Crypto "would remain subject to the antifraud and antimanipulation provisions of the Federal securities laws."<sup>69</sup> That assurance is hollow without evidence of what was promised, to whom, and when. Yet the Release concedes, without qualification, that "[i]ssuers would not be subject to recordkeeping requirements under Regulation Crypto Assets."<sup>70</sup>

This is no mere technical oversight. Under proposed Rule 400, whether a crypto asset remains subject to an investment contract depends entirely on what the issuer promised about its essential managerial efforts and whether it kept those promises. Proposed Rule 103 directs issuers to disclose those promises and keep them consistent with their websites, social media, and whitepapers.<sup>71</sup> The Proposal makes the issuer's own words the test of whether the securities laws apply, and then permits the issuer to destroy them.

#### **A. Crypto Market Practices Guarantee That Evidence Will Be Lost**

Crypto projects often raise capital through Discord, Telegram, X, and constantly revised whitepapers, on channels that let promoters edit, delete, and auto-delete messages. A blockchain ledger shows tokens moving between wallets, not who controls them or what founders told investors.

Under proposed Rule 200(d), startup-exemption issuers do not file disclosures on EDGAR at all. They post them on a website they control, revise them at will, and need not

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<sup>69</sup> See Release at 2.

<sup>70</sup> Release at 307.

<sup>71</sup> Release at 53.

preserve what they replaced.<sup>72</sup> An investor who bought in reliance on one version of a roadmap may find, when the project fails, that only a later and more cautious version exists.

The Commission knows this. Request for Comment No. 65 asks how investors and the Commission would determine what the issuer told investors at the time of sale if disclosures appear only on the issuer's website.<sup>73</sup> The Commission has identified the problem but proposed no solution. That cannot be squared with its own sustained enforcement against broker-dealers and investment advisers for failing to preserve off-channel communications.

## **B. Every Comparable Securities Framework Requires Record Preservation**

Broker-dealers, investment advisers, FINRA members, crowdfunding portals, and even registered-offering issuers must all preserve records.<sup>74</sup> Regulation Crowdfunding, the closest analogue, requires portals to preserve every platform communication for five years. Reg Crypto would allow offerings of up to \$75 million per year in freely tradable covered investment contracts, with state registration preempted. A framework that strips away registration, state review, and resale restrictions cannot also strip away the records needed to detect and prove fraud.

## **C. Without Record Preservation, Any Antifraud Remedies Are Largely Illusory**

Securities fraud is often discovered years after the investment. That is why private fraud claims may be brought up to five years after the violation, Commission disgorgement claims for scienter-based violations within ten years, and a myriad of other claims with extended time periods for asserting claims.<sup>75</sup> None of these protections means anything if the evidence is gone.

The investment contract safe harbor turns this problem into a structural defect. The Commission projects that 475 issuers per year will rely on Rule 400.<sup>76</sup> Its only conditions are the issuer's own determination that it "has completed or otherwise permanently ceased" its promised managerial efforts and the filing of Form TR.<sup>77</sup> Yet the issuer need not preserve a single record showing what it promised or whether it delivered.

The Commission rejected objective functionality and decentralization conditions in part because issuers "would incur the additional costs of documenting their satisfaction of these other conditions."<sup>78</sup> Having spared issuers the burden of documenting objective criteria, the Proposal excuses them from preserving any documentation at all. The result is a self-certification that no investor, arbitrator, court, or regulator can meaningfully test.

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<sup>72</sup> Release at 89–90.

<sup>73</sup> Release at 91–92.

<sup>74</sup> 17 C.F.R. §§ 240.17a-4(b)(4), 275.204-2(a)(7), (e)(1), 227.404(a), 230.433(g); FINRA Rule 4511(b).

<sup>75</sup> 28 U.S.C. § 1658(b); Securities Exchange Act of 1934 § 21(d)(8)(A)(ii), 15 U.S.C. § 78u(d)(8)(A)(ii).

<sup>76</sup> Release at 283.

<sup>77</sup> Proposed 17 C.F.R. § 228.400(a)–(b); Release at 354–55.

<sup>78</sup> Release at 276.

## **D. Recommendations**

PIABA responds to Requests for Comment Nos. 14, 65, 66, and 69.<sup>79</sup> PIABA urges the Commission to:

1. Require EDGAR filing of all Rule 103 disclosures and amendments, creating a permanent, dated record of what investors were told.
2. Make record preservation a condition of every exemption and safe harbor in Part 228, exclude recordkeeping failures from Rule 101(d), require prompt production to the Commission, and require certification of compliance in Form NOR, ongoing reports, and Form TR.
3. Require issuers to preserve, for at least six years after the later of the last sale or the Form TR filing, and longer for any pending investigation or proceeding:
  - every dated version of offering materials and disclosures;
  - all purchaser and project communications on any channel the issuer or related persons use;
  - testing-the-waters materials;
  - records of related-person token allocations, transfers, and wallet control;
  - material changes to smart contracts and administrative keys;
  - all records supporting any Form TR filing. This obligation should survive the safe harbor and bar auto-deleting communications for project business.
4. Impose equivalent preservation obligations on compensated platforms and promoters.

These requirements cost honest issuers little. Their absence benefits only those who would prefer the evidence disappear. The Commission cannot rely on antifraud enforcement in place of upfront protections while declining to preserve the evidence that enforcement depends on.

## **VI. Reg Crypto and the Inconsistency with Historical Limited-Offerings Bargain**

For more than forty years, the Commission has followed a simple rule when it lets companies raise money without registering: if the issuer gets relief from registration, investors get something in return.<sup>80</sup> Under Rule 506 of Regulation D, that something is a limit on who can invest. Unlimited offerings are confined largely to accredited investors, whom the Commission presumes able to fend for themselves.<sup>81</sup> Under Regulation A, retail investors can invest, but the offering must be qualified by the Commission, the issuer must provide financial statements and answer for them under the securities laws, and non-accredited Tier 2 investors are subject to investment limits.<sup>82</sup> Under Regulation Crowdfunding, anyone can

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<sup>79</sup> Release at 46, 91–92.

<sup>80</sup> Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a et seq.) [hereinafter Securities Act].

<sup>81</sup> 17 C.F.R. §§ 230.501(a), 230.506.

<sup>82</sup> Regulation A, 17 C.F.R. §§ 230.251–230.263.

invest online, but only through a registered intermediary, with caps on what non-accredited investors may invest, a one-year hold on resales, and a private right of action if the disclosures are false.<sup>83</sup>

Reg Crypto breaks that rule.<sup>84</sup> Its Startup Exemption would let an issuer raise \$5 million over four years from anyone and advertise freely, with no investment limits, no financial statements, no Commission review, and no intermediary, while the tokens trade freely from day one. On top of that, the proposal would preempt state registration of secondary trading (Rule 500) and let an issuer take its token out of the securities laws simply by certifying that its promised work is done or has stopped (Rule 400).<sup>85</sup> Nothing in the Commission's exempt-offering rules combines these features. The one piece that does have a precedent, free trading in small public offerings, was tried in 1992 and abandoned in 1999 after it fueled a wave of penny-stock fraud.<sup>86</sup>

So why the change? The Release does not offer an investor-protection reason. Its reasons come from the issuers' business model, chiefly the need for "network effects." PIABA respectfully submits that the business model of a class of issuers is not a good enough reason to give their retail investors less protection than the Commission and Congress have required of every comparable exemption. PIABA asks the Commission to bring the proposal back in line with the existing framework, as described in Part VI.E, and responds in particular to Requests for Comment Nos. 34-35, 55, 81, 124-135, and 136-144.

#### **A. The Proposal and Its Stated Rationale**

Reg Crypto, proposed August 18, 2026, would create two exemptions from section 5 for "covered investment contracts": a Startup Exemption of up to \$5 million over four years (Rule 200) and a two-tier Fundraising Exemption of up to \$20 million or \$75 million in any twelve months (Rule 300).<sup>87</sup> Under either exemption, the tokens sold "would not be restricted securities," so purchasers "would be able to sell those securities immediately upon acquisition" (p. 60). Rule 500 would treat every purchaser in such an offering, and, so long as the issuer remains current in its filings, every purchaser in a later secondary transaction, as a "qualified purchaser" under section 18(b)(3), preempting state registration (p. 355).<sup>88</sup> Rule 400 would deem the investment contract to have "ceased to exist" once the issuer certifies on Form TR that it has "completed or otherwise permanently ceased" its promised managerial efforts (pp. 354-355).<sup>89</sup>

The Release explains that the Commission's existing exemptions are not "fit-for-purpose" for these offerings (pp. 9-10). Its central reason is that the value of a crypto asset

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<sup>83</sup> Regulation Crowdfunding, 17 C.F.R. pt. 227.

<sup>84</sup> Release, *supra* note 1.

<sup>85</sup> Proposed 17 C.F.R. §§ 228.500, 228.400.

<sup>86</sup> 17 C.F.R. § 230.504; Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption, Securities Act Release No. 33-7644 (Feb. 25, 1999), 64 Fed. Reg. 11090 (Mar. 8, 1999).

<sup>87</sup> Securities Act § 5, 15 U.S.C. § 77e; Proposed 17 C.F.R. §§ 228.200, 228.300.

<sup>88</sup> Proposed 17 C.F.R. § 228.500; Securities Act § 18(b)(3), 15 U.S.C. § 77r(b)(3).

<sup>89</sup> Proposed 17 C.F.R. §§ 228.400, 239.604 (Form TR).

depends on its “network effects,” which require that the asset be “widely held and used,” and that existing exemptions “may impede such network effects” because they restrict resale and limit sales to retail investors (p. 10). The economic analysis is more explicit: “Treating covered investment contracts as restricted securities would likely slow down the diffusion of the underlying crypto asset,” and existing exemptions “often rely on accredited investors,” which “could inhibit the development of many networks” requiring “broad distribution of the related crypto asset among users who may be anonymous, global, and retail” (pp. 194-195). The Release also cites the poor fit of existing disclosure items, the burden of state registration on globally distributed tokens, and the risk that issuers will move offshore (pp. 10, 194-195).

## **1. Private offerings and Regulation D**

Since the passage of the Securities Act of 1933, if a company sought to publicly raise capital from investors, there were certain registration and disclosure requirements mandated to ensure some degree of market integrity and investor protection.<sup>90</sup> If a company wanted to raise public money from investors to fund its enterprise, it required certain boxes to be checked. However, exemptions from this registration have also been part of this bargain between capital raisers and the SEC, which has long served as the keeper of the watch. The governing test for private offerings comes from *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953), which held that the private offering exemption, now section 4(a)(2), turns on whether the offerees “are shown to be able to fend for themselves.”<sup>91</sup> Purchasers who cannot do so require the protections offered by registration.

Regulation D, adopted March 8, 1982, codified that premise.<sup>92</sup> Rule 506 permits an unlimited capital raise, but only from accredited investors and, under Rule 506(b), no more than 35 sophisticated non-accredited investors who receive a disclosure document.<sup>93</sup> Under Rule 506(b), general solicitation is prohibited, and the securities are restricted under Rule 502(d) and Rule 144 so that they cannot pass to the public unless they are registered or exempt from registration upon resale.<sup>94</sup> The Commission continues to justify accredited status in these terms: such investors are “presumed to possess sufficient financial sophistication and ability to sustain the risk of loss of their investment or to fend for themselves.”<sup>95</sup> When the Commission relaxed the general-solicitation ban in 2013 by adopting Rule 506(c), it conditioned the relaxation on verified accredited status and, the same day, disqualified felons and other “bad actors.”<sup>96</sup>

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<sup>90</sup> Securities Act §§ 5, 7, 10, 15 U.S.C. §§ 77e, 77g, 77j.

<sup>91</sup> Securities Act § 4(a)(2), 15 U.S.C. § 77d(a)(2).

<sup>92</sup> Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 33-6389 (Mar. 8, 1982), 47 Fed. Reg. 11251 (1982) (adopting Regulation D).

<sup>93</sup> 17 C.F.R. §§ 230.506, 230.502(b).

<sup>94</sup> 17 C.F.R. §§ 230.502(d), 230.144.

<sup>95</sup> Release at 192 n.419 (citing Regulation D Revisions; Exemption for Certain Employee Benefit Plans, Securities Act Release No. 33-6683 (Jan. 16, 1987), 52 Fed. Reg. 3015 (Jan. 30, 1987)).

<sup>96</sup> 17 C.F.R. § 230.506(c); Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Release No. 33-9415 (July 10, 2013), 78 Fed. Reg. 44771 (July 24, 2013); 17 C.F.R. § 230.506(d); Disqualification of Felons and Other “Bad Actors” from Rule 506 Offerings, Securities Act Release No. 33-9414 (July 10, 2013), 78 Fed. Reg. 44729 (July 24, 2013).

PIABA does not agree with the premise that accredited investors can fend for themselves. Accredited-investor status is a test of income or net worth, not of sophistication, and its core dollar thresholds have not been adjusted for inflation since 1982.<sup>97</sup> The past forty plus years have borne this out as the natural reality. PIABA members regularly represent accredited investors, many of them retirees, who suffered serious losses in private placements sold by broker-dealers that failed to investigate the offering or recommended illiquid, high-risk securities that were unsuitable for them. FINRA has repeatedly reminded its members of their due diligence obligations in this market, and its enforcement actions continue to find inadequate investigations and unaddressed red flags.<sup>98</sup> PIABA's point here is narrower. Even on the Commission's own premise, every relaxation of registration has been paired with a substitute protection. The Startup Exemption abandons both the premise and the protection.

## **2. SEC Rule 504 from 1992 to 1999**

The Commission has once before made small offerings to the public freely tradable. In 1992 it removed the resale and general-solicitation restrictions from Rule 504.<sup>99</sup> The result was a wave of microcap and penny-stock fraud in which promoters made prearranged sales to nominees and then had brokers "sell the securities at ever-increasing prices to unknowing investors," a scheme the Commission described as a "pump and dump."<sup>100</sup> In 1999 the Commission returned Rule 504 "largely to its pre-1992 framework" in order to "deter 'microcap' fraud," concluding that "[i]nvestor protection concerns require that this action be taken to curb misuse of this exemption."<sup>101</sup> The Crypto Startup Exemption reproduces the features the Commission abandoned in 1999. The Release does not discuss that history.

## **3. Regulation A**

Regulation A, first adopted in 1936 under section 3(b), has long been the Commission's vehicle for small public offerings to retail investors.<sup>102</sup> Following Title IV of the JOBS Act, the Commission adopted the current two-tier structure in 2015 and raised the Tier 2 ceiling to \$75 million in 2020.<sup>103</sup> Regulation A securities are unrestricted and Tier 2

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<sup>97</sup> 17 C.F.R. § 230.501(a)(5)-(6) (natural persons with net worth over \$1 million, excluding a primary residence, or annual income over \$200,000, or \$300,000 jointly with a spouse or spousal equivalent); *see* Release No. 33-6389, *supra* note 92 (adopting the original thresholds).

<sup>98</sup> *See* FINRA Regulatory Notice 23-08, FINRA Reminds Members of Their Obligations When Selling Private Placements (May 9, 2023); FINRA Regulatory Notice 10-22, Obligation of Broker-Dealers to Conduct Reasonable Investigations in Regulation D Offerings (Apr. 2010).

<sup>99</sup> 17 C.F.R. § 230.504; Adoption of Small Business Initiatives, Securities Act Release No. 33-6949 (July 30, 1992), 57 Fed. Reg. 36442 (1992).

<sup>100</sup> Release No. 33-7644, *supra* note 86.

<sup>101</sup> 17 C.F.R. § 230.504; Release No. 33-7644, *supra* note 86.

<sup>102</sup> Securities Act § 3(b), 15 U.S.C. § 77c(b); Regulation A, 17 C.F.R. §§ 230.251-230.263.

<sup>103</sup> Jumpstart Our Business Startups Act, Pub. L. No. 112-106, tit. IV, § 401, 126 Stat. 306 (2012) (codified at 15 U.S.C. § 77c(b)(2)-(5)) [hereinafter JOBS Act]; Amendments for Small and Additional Issues Exemptions Under the Securities Act (Regulation A), Securities Act Release No. 33-9741 (Mar. 25, 2015), 80 Fed. Reg. 21806 (Apr. 20, 2015); Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets, Securities Act Release No. 33-10884 (Nov. 2, 2020), 86 Fed. Reg. 3496 (Jan. 14, 2021).

preempts state registration, but those benefits are paired with an offering statement on Form 1-A that the Commission must qualify, financial statements (audited in Tier 2), ongoing reporting in Tier 2, a ten percent investment limit for non-accredited Tier 2 investors of unlisted securities, and liability under section 12(a)(2).<sup>104</sup>

#### 4. Regulation Crowdfunding

Regulation Crowdfunding is the closest analogue to a token sale. Congress designed it in Title III of the JOBS Act for small, early-stage issuers raising modest sums from many retail investors over the internet, and the Commission adopted it on October 30, 2015, raising the cap to \$5 million in 2020.<sup>105</sup> Because the exemption opens small offerings to the general public, Congress wrote its substitute protections into the statute (Securities Act sections 4(a)(6) and 4A).<sup>106</sup> Every offering must be conducted through a registered broker-dealer or funding portal with duties to reduce the risk of fraud, non-accredited investors are subject to annual investment limits, issuers must provide financial statements scaled to offering size and file annual reports, securities may not be resold for one year, and section 4A(c) affords purchasers a private remedy for material misstatements.<sup>107</sup>

#### 5. The pattern

The table summarizes the exchange each framework makes:

| Framework                              | Retail purchasers                                | Principal investor protections                                                            |
|----------------------------------------|--------------------------------------------------|-------------------------------------------------------------------------------------------|
| Rule 506(b) (1982) <sup>108</sup>      | Up to 35 sophisticated non-accredited purchasers | No general solicitation; disclosure document; restricted securities; bad-actor bar (2013) |
| Rule 506(c) (2013) <sup>109</sup>      | Accredited only                                  | Verified accredited status; restricted securities; bad-actor bar                          |
| Rule 504 (1992 to 1999) <sup>110</sup> | Unlimited                                        | Free transferability withdrawn in 1999 after penny-stock fraud                            |

<sup>104</sup> 17 C.F.R. § 239.90 (Form 1-A); *see* 17 C.F.R. § 230.252; *id.* §§ 230.251(d)(2)(i)(C), 230.257(b); Securities Act § 12(a)(2), 15 U.S.C. § 77l(a)(2); *see also* Securities Act § 3(b)(2)(D), 15 U.S.C. § 77c(b)(2)(D) (applying section 12(a)(2) to offers and sales under section 3(b)(2)).

<sup>105</sup> JOBS Act, tit. III, 126 Stat. 306 (codified at 15 U.S.C. §§ 77d(a)(6), 77d-1); Crowdfunding, Securities Act Release No. 33-9974 (Oct. 30, 2015), 80 Fed. Reg. 71387 (Nov. 16, 2015); Release No. 33-10884, *supra* note 103.

<sup>106</sup> Securities Act §§ 4(a)(6), 4A, 15 U.S.C. §§ 77d(a)(6), 77d-1.

<sup>107</sup> Securities Act § 4A(a), 15 U.S.C. § 77d-1(a); 17 C.F.R. §§ 227.300-227.305; Securities Act § 4(a)(6)(B), 15 U.S.C. § 77d(a)(6)(B); 17 C.F.R. § 227.100(a)(2); Securities Act § 4A(b)(1)(D), (b)(4), 15 U.S.C. § 77d-1(b)(1)(D), (b)(4); 17 C.F.R. §§ 227.201(t), 227.202; Securities Act § 4A(e), 15 U.S.C. § 77d-1(e); 17 C.F.R. § 227.501; Securities Act § 4A(c), 15 U.S.C. § 77d-1(c).

<sup>108</sup> 17 C.F.R. § 230.506(b).

<sup>109</sup> *Id.* § 230.506(c).

<sup>110</sup> *Id.* § 230.504.

| Framework                                            | Retail purchasers                                                                    | Principal investor protections                                                                                                  |
|------------------------------------------------------|--------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
| Regulation A, Tier 2 (2015) <sup>111</sup>           | Non-accredited investors limited to 10% of the greater of annual income or net worth | Commission qualification; audited financials; ongoing reports; section 12(a)(2) liability <sup>112</sup>                        |
| Regulation Crowdfunding (2015) <sup>113</sup>        | Annual investment limits                                                             | Registered intermediary; scaled financials; annual reports; one-year resale restriction; section 4A(c) liability <sup>114</sup> |
| Proposed Crypto Fundraising Exemption <sup>115</sup> | Non-accredited investors limited to 10% (both tiers)                                 | Commission qualification; financials; ongoing reports; no stated civil liability provision                                      |
| Proposed Crypto Startup Exemption <sup>116</sup>     | Unlimited                                                                            | Principles-based narrative disclosure; general antifraud provisions                                                             |

Every existing framework that admits retail investors pair that access with Commission review, an investment limit, a gatekeeper, a resale restriction, or statutory liability, and ordinarily with several of them. The Crypto Startup Exemption is the only framework, apart from the Rule 504 experiment the Commission abandoned in 1999, that would admit retail investors with none of them.

## B. How Reg Crypto Departs from the Bargain

**The Startup Exemption.** Measured against Regulation Crowdfunding, its nearest analogue, the Startup Exemption permits an offering of comparable size to the same retail population, with greater freedom to solicit, while dispensing with each of the five protections Congress made conditions of crowdfunding.<sup>117</sup> It requires no intermediary, imposes no investment limit (the Release asks whether it should, Request No. 55, p. 85), requires no financial statements, and imposes no resale restriction. It also contains no counterpart to section 4A(c); the Release states only that the general antifraud provisions continue to apply (p. 71).<sup>118</sup>

<sup>111</sup> Regulation A, 17 C.F.R. §§ 230.251-230.263.

<sup>112</sup> Securities Act § 12(a)(2), 15 U.S.C. § 77l(a)(2).

<sup>113</sup> Regulation Crowdfunding, 17 C.F.R. pt. 227.

<sup>114</sup> Securities Act § 4A(c), 15 U.S.C. § 77d-1(c).

<sup>115</sup> Proposed 17 C.F.R. § 228.300.

<sup>116</sup> *Id.* § 228.200.

<sup>117</sup> *Id.*; Regulation Crowdfunding, 17 C.F.R. pt. 227; *see* 17 C.F.R. § 227.204 (limiting issuer advertising of offering terms to notices that direct investors to the intermediary's platform).

<sup>118</sup> Securities Act § 4A(c), 15 U.S.C. § 77d-1(c).

**The Fundraising Exemption.** The Fundraising Exemption is modeled on Regulation A and, in one respect, improves on it by applying the ten percent investment limit in both tiers (p. 117).<sup>119</sup> In three respects, however, it offers less. It extends preemption to secondary trading, which Regulation A does not (see p. 28). It does not state whether section 12(a)(2) or any other civil liability provision applies.<sup>120</sup> And it is coupled with the Rule 400 exit described below.<sup>121</sup>

**Insider resales.** Commenters asked for insider lockups to prevent a “dump on retail” (pp. 122-123). The Commission declined, relying on caps on affiliate sales within Fundraising offerings and on disclosure of any resale restrictions (p. 124). Its own economic analysis acknowledges that ICOs with insider lockup or vesting periods “have lower failure rates” and that “large insider sales can be detrimental to current and future investors” (p. 268). Because the tokens are unrestricted, nothing prevents insiders from selling in the secondary market immediately after an offering. In the Startup Exemption, insider sales are limited only by the overall \$5 million offering cap (p. 223).

**Rule 400.** No existing exemption allows an issuer to remove its securities from the federal securities laws by its own certification.<sup>122</sup> Rule 400 would do so on the filing of a Form TR, with no Commission review or opportunity to object, and the condition is satisfied whether the issuer has “completed” its promised efforts or has “permanently ceased” them (pp. 354-355).<sup>123</sup> A project that fails therefore qualifies on the same terms as one that succeeds. The Release asks whether issuers should be permitted to certify “without requiring them to include any analysis” (p. 169, Request No. 130).

**Rule 500.** State registration of primary offerings is preempted under Rule 506 and Regulation A Tier 2, in each case alongside substitute federal protections.<sup>124</sup> Rule 500 would extend preemption to secondary trading, conditioned only on the issuer’s having satisfied the exemption and remaining “current” in its filings.<sup>125</sup> The Release concedes that secondary purchasers may be unable to verify even that condition, and for that reason omits current reports from it (p. 179). It asks whether preemption should instead be limited as it is under Regulation A (Request No. 144, p. 183).<sup>126</sup>

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<sup>119</sup> Proposed 17 C.F.R. § 228.300; Regulation A, 17 C.F.R. §§ 230.251-230.263.

<sup>120</sup> Securities Act § 12(a)(2), 15 U.S.C. § 77l(a)(2).

<sup>121</sup> Proposed 17 C.F.R. § 228.400.

<sup>122</sup> *Cf. id.*

<sup>123</sup> Proposed 17 C.F.R. §§ 228.400, 239.604 (Form TR).

<sup>124</sup> Proposed 17 C.F.R. § 228.500; 17 C.F.R. § 230.506; Securities Act § 18(b)(4)(F), 15 U.S.C. § 77r(b)(4)(F); 17 C.F.R. § 230.256 (defining “qualified purchaser” in Tier 2 offerings for purposes of Securities Act § 18(b)(3), 15 U.S.C. § 77r(b)(3)); Securities Act § 18(b)(4)(D), 15 U.S.C. § 77r(b)(4)(D).

<sup>125</sup> Proposed 17 C.F.R. § 228.500.

<sup>126</sup> Regulation A, 17 C.F.R. §§ 230.251-230.263.

### C. The Release's Justifications Do Not Support Departing from the Commission's Established Framework

The Release is exceptional in that each reason offered for a separate crypto regime concerns the needs of issuers, not investors. Nothing in this Release cogently explains why purchasers of tokens require less protection than purchasers of securities sold in offerings of the same size.

*Network effects.* The Release's principal justification for this new crypto framework is that restricted securities and limits on retail participation "may impede" the broad distribution a crypto network requires (pp. 10, 194). That is a description of the issuer's business model, not a reason to discount the investor's risk. The Commission has made small offerings to the public freely tradable once before, in 1992, and the experience that led to its 1999 reversal is the best available evidence of the consequences.

*Disclosure.* The Release states that some existing exemptions require disclosures that "may not be relevant" to token purchasers (p. 195). PIABA does not oppose tailored disclosure. But tailored disclosure can be added to Regulation A or Regulation Crowdfunding without discarding their other protections, as the Commission did within the registration framework for asset-backed securities in Regulation AB.<sup>127</sup> Moreover, the Release's record undercuts this premise. It indicates that crypto investors regard "traditional types of disclosure information," including risks, financial overview, management, and governance, as important (p. 26 n.89).

*Retail distribution.* The Release observes that the average ICO had 4,700 investors with a median investment of about \$1,200 (p. 195 n.423). Those figures describe precisely the population for whom Congress required investment limits and a registered intermediary in Regulation Crowdfunding.<sup>128</sup> They are an argument for those protections, not against them.

*Unavailability of Regulation A.* The Release states that Regulation A is "unlikely to be a viable option" because covered investment contracts are not "eligible securities" under Rule 261(c) (pp. 27 n.94, 191).<sup>129</sup> Rule 261(c) is the Commission's rule.<sup>130</sup> If the obstacle is one of definition, the remedy is to amend the definition, not to create a separate exemption with fewer protections. As one commenter told the Crypto Task Force, "if an exemption under Regulation A is available, there would be no need for a safe harbor of the kind described" (p. 29 n.99).

*State law and offshore competition.* Federal preemption of state registration for primary offerings is already available under Regulation A Tier 2, through the same "qualified

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<sup>127</sup> *Id.*; Regulation Crowdfunding, 17 C.F.R. pt. 227; Regulation AB, 17 C.F.R. §§ 229.1100-229.1125.

<sup>128</sup> Regulation Crowdfunding, 17 C.F.R. pt. 227.

<sup>129</sup> Regulation A, 17 C.F.R. §§ 230.251-230.263; *id.* § 230.261(c).

<sup>130</sup> 17 C.F.R. § 230.261(c).

purchaser” mechanism Rule 500 employs.<sup>131</sup> And the appropriate response to the risk that issuers will move offshore, where investor protections are weaker, is not to replicate those weaker protections in the United States.

*Bespoke frameworks.* The Release invokes the Commission’s “historical approach of creating bespoke frameworks” for asset-backed securities and REITs (pp. 10-11). As the Release acknowledges, those are frameworks for registered offerings (p. 11 n.19). They added asset-specific disclosure to registration. They did not subtract its protections.

The Release also records a commenter’s warning that a token exemption could lead issuers “who utilize Regulation A and Regulation [Crowdfunding] to pivot to ‘token’ offerings that are entirely exempt from SEC registration and many of the disclosure obligations that protect investors” (p. 29 n.99). Where the same \$5 million may be raised under Regulation Crowdfunding with its statutory protections or under the Crypto Startup Exemption without them, the characterization of an instrument as a token becomes a means of regulatory arbitrage.<sup>132</sup>

#### ***D. The Missing Gatekeeper***

A recurring feature of the Commission’s exempt-offering rules is a regulated gatekeeper between issuer and retail investor. Regulation D dispenses with a mandatory intermediary on the premise that sales are confined largely to accredited investors and that resale is restricted, a premise PIABA questions (see Part VI.A.1); the frameworks that open offerings to the general public substitute other safeguards, such as Commission qualification under Regulation A and a mandatory registered intermediary under Regulation Crowdfunding. In Regulation Crowdfunding the gatekeeper is the registered funding portal or broker-dealer; in registered offerings it is ordinarily an underwriter and selling broker-dealers subject to FINRA and SEC rules.<sup>133</sup> The Release’s comparison chart notes the crowdfunding requirement that an offering “be conducted on an internet platform through a registered intermediary” (p. 196), yet neither proposed crypto exemption requires one. The Release instead describes crypto’s “ability to reach people without intermediaries” as a hallmark of the asset class (p. 173, quoting a commenter), as if it were a virtue to be promoted rather than a risk to be addressed. The economic analysis goes further and counts the absence of an intermediary as a cost saving. An issuer raising \$5 million under Regulation Crowdfunding “would be required to use an intermediary which usually charges a fee,” averaging about 6.6 percent, while an issuer using the Startup Exemption would not (pp. 222-223). The protection Congress required for retail crowdfunding is treated as an expense to be eliminated rather than an obstacle to potential investment fraud.

The omission matters at two points. At issuance, no regulated party screens the issuer, verifies compliance with investment limits, or delivers investor education. After issuance, because the tokens are unrestricted and Rule 500 preempts state registration of resales,

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<sup>131</sup> *Id.* § 230.256 (defining “qualified purchaser” in Tier 2 offerings for purposes of Securities Act § 18(b)(3), 15 U.S.C. § 77r(b)(3)); Proposed 17 C.F.R. § 228.500.

<sup>132</sup> Regulation Crowdfunding, 17 C.F.R. pt. 227.

<sup>133</sup> Securities Act § 4A(a), 15 U.S.C. § 77d-1(a); 17 C.F.R. §§ 227.300-227.305.

retail trading is likely to occur predominantly on crypto trading platforms that are not registered with the Commission as broker-dealers or exchanges.<sup>134</sup> The consequences of retail custody on such platforms are well documented, from the misappropriation of billions in customer funds at FTX to the holding in *In re Celsius Network LLC* (Bankr. S.D.N.Y. Jan. 4, 2023) that roughly \$4.2 billion in customer “Earn” accounts was property of the bankruptcy estate.<sup>135</sup>

PIABA does not ask the Commission to resolve the regulation of crypto trading platforms in this rulemaking. It asks only that the Commission not extend the benefits of these exemptions, and in particular Rule 500’s preemption of state oversight of secondary trading, to transactions that occur outside any registered intermediary.<sup>136</sup> The Release itself asks whether the “qualified purchaser” definition should turn on “offerings through a registered broker-dealer” (Request No. 139, pp. 180-181). PIABA submits that it should.

The Release is also silent on who may sell these tokens on an issuer’s behalf. While a token remains a covered investment contract, it is a security, and the proposed exemptions relieve the offering only from section 5 of the Securities Act. Any person paid to effect sales for the issuer is therefore a broker who must be registered under section 15(a) of the Exchange Act.<sup>137</sup> Yet the Release never mentions section 15(a), broker-dealer registration, or transaction-based compensation, noting only that its economic analysis assumes market participants comply with existing registration obligations (p. 213 n.456). Token sales are marketed heavily through whitepapers, marketing videos, and social media (pp. 211-212), and that silence invites the use of unregistered sellers. The Commission should state expressly that section 15(a) applies to anyone compensated to sell covered investment contracts, and that Regulation Best Interest governs any recommendation of them to a retail customer.<sup>138</sup>

## E. Recommendations

PIABA respectfully recommends that the Commission:

1. **Build on existing frameworks.** Amend Rule 261(c) to make covered investment contracts eligible for Regulation A and permit the tailored disclosure in proposed Rule 103 to be used in Regulation A and Regulation Crowdfunding offerings, rather than adopt a parallel regime with fewer protections.<sup>139</sup> At a minimum, the Commission should adopt a floor. No crypto exemption should afford retail investors fewer protections than the existing exemption of comparable size, which for the Crypto Startup Exemption is Regulation Crowdfunding.

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<sup>134</sup> Proposed 17 C.F.R. § 228.500.

<sup>135</sup> Press Release, U.S. Dep’t of Justice, Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes (Mar. 28, 2024); *In re Celsius Network LLC*, 647 B.R. 631 (Bankr. S.D.N.Y. 2023).

<sup>136</sup> Proposed 17 C.F.R. § 228.500.

<sup>137</sup> Securities Exchange Act of 1934 §§ 3(a)(4), 15(a), 15 U.S.C. §§ 78c(a)(4), 78o(a); see 17 C.F.R. § 240.3a4-1 (conditions under which associated persons of an issuer are not brokers).

<sup>138</sup> Regulation Best Interest, 17 C.F.R. § 240.15l-1.

<sup>139</sup> 17 C.F.R. § 230.261(c); Regulation Crowdfunding, 17 C.F.R. pt. 227; Proposed 17 C.F.R. § 228.103.

2. **Require a registered intermediary (Request No. 139).** Condition both crypto exemptions on offers and sales through a registered broker-dealer or, for the Startup Exemption, a registered funding portal with the duties imposed by Regulation Crowdfunding Rules 301 and 302.<sup>140</sup>
3. **Adopt investment limits for the Startup Exemption (Request No. 55),** consistent with Regulation Crowdfunding.<sup>141</sup>
4. **Restrict insider resales (Request Nos. 34-35, 81).** Adopt the minimum holding period for related persons that the Commission identified as an alternative (pp. 67, 267), whether time-based or tied to development milestones.
5. **Confine Rule 500 (Request Nos. 136-144).** Limit preemption to primary offerings, or to Tier 2 offerings as under Regulation A.<sup>142</sup> If secondary preemption is retained, condition it on execution through a registered broker-dealer.
6. **Condition Rule 400 (Request Nos. 124-135).** Provide a period during which the Commission may object to a Form TR; require officer certification, public notice to holders, and an express statement that the filing is subject to the antifraud provisions; preserve claims arising before the transition; and do not permit a project that has “permanently ceased” its efforts to rely on the safe harbor without Commission review.<sup>143</sup>
7. **State the liability standard.** Provide expressly that section 12(a)(2), or a remedy equivalent to section 4A(c), applies to statements in Form NOR and Form 1-CRYPTO.<sup>144</sup>
8. **Confirm broker-dealer obligations.** State expressly in the final rule that any person compensated to offer or sell covered investment contracts must be registered under section 15(a) of the Exchange Act and, when recommending them to retail customers, is subject to Regulation Best Interest.<sup>145</sup>

## F. Summary

The Commission’s exempt-offering rules reflect a judgment, refined over four decades and confirmed by Congress in the JOBS Act, that the protections of registration may be relaxed only where something takes their place.<sup>146</sup> The Release does not contend that token purchasers are better able to fend for themselves than other retail investors, or that the risks of early-stage token projects are lower than those of other early-stage ventures. Its justifications rest on the distribution needs of issuers. PIABA respectfully submits that those needs, however genuine, do not warrant an exemption that offers retail investors fewer protections than any framework the Commission currently maintains, and urges the Commission to conform Reg Crypto to the principles that have governed limited offerings since Regulation D.<sup>147</sup>

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<sup>140</sup> 17 C.F.R. §§ 227.301, 227.302.

<sup>141</sup> Regulation Crowdfunding, 17 C.F.R. pt. 227.

<sup>142</sup> Proposed 17 C.F.R. § 228.500; Regulation A, 17 C.F.R. §§ 230.251-230.263.

<sup>143</sup> Proposed 17 C.F.R. §§ 228.400, 239.604 (Form TR).

<sup>144</sup> Securities Act § 12(a)(2), 15 U.S.C. § 77l(a)(2); Securities Act § 4A(c), 15 U.S.C. § 77d-1(c).

<sup>145</sup> Securities Exchange Act of 1934 § 15(a), 15 U.S.C. § 78o(a); 17 C.F.R. § 240.15l-1.

<sup>146</sup> JOBS Act, 126 Stat. 306.

<sup>147</sup> Regulation D, 17 C.F.R. §§ 230.500-230.508.

## **VII. Consumer Protections and Investor Recovery Remedies Must Be Clear and Provide a Path for Accountability**

Despite Reg Crypto borrowing heavily from the Commission's existing limited-offering frameworks like Regulation A, Regulation D, and Regulation Crowdfunding, the Proposal omits many important investor protections Congress prioritized in passing other similar regulatory regimes. As stated below, PIABA highlights some of the material omissions in Reg Crypto compared to these other frameworks that should be addressed in a revised rule proposal.

Specifically, the Proposal's Fundraising Exemption is modeled largely on Regulation A, but contains no counterpart to the statutory rescission remedy that Congress gave crowdfunding purchasers in Securities Act Section 4A(c). It also does not contain a counterpart to the Section 12(a)(2) liability that Congress made a condition of Regulation A as well as no counterpart to the right of crowdfunding investors to cancel their commitments. Moreover, the Proposal does not mention any of these provisions, much less explain why, crypto asset purchasers should do without them. The Startup Exemption in particular cannot be reconciled with the statutory requirement that an exemption be consistent with the protection of investors.

Proposed Reg Crypto would permit issuers to sell covered investment contracts to the general public—up to \$5 million under the startup exemption and up to \$75 million every twelve months under the fundraising exemption—without registration, and in the case of the startup exemption without financial statements, investment limits, or resale restrictions.<sup>148</sup> Yet the Proposal does not give a single purchaser a statutory path to recover the money he or she paid if the offering materials are false. The Release's only answer is that issuers "would remain subject to the antifraud and antimanipulation provisions of the Federal securities laws, including . . . section 17 of the Securities Act and section 10 of the Exchange Act."<sup>149</sup> That is a statement about the Commission's enforcement authority, not an investor remedy. We urge the Commission not to adopt any retail exemption in this space without an express, purchaser-enforceable liability and rescission mechanism.

### **A. Comparable Retail Exemptions Carry an Express Purchaser Remedy**

When Congress authorized small public offerings to retail investors outside full registration, it paired the relief with a private remedy. Regulation Crowdfunding—capped at \$5 million, subject to per-investor limits, and channeled through a registered intermediary—is backed by Securities Act Section 4A(c), which permits a purchaser to bring an action to recover the consideration paid, with interest, or damages if the purchaser no longer owns the security, against an issuer that makes a material misstatement or omission in the

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<sup>148</sup>Release at 2, 60, 82, 85.

<sup>149</sup>Release at 71; *see also id.* at 2, 97.

offering.<sup>150</sup> Of note, Section 4A(c)(3) defines “issuer” for this purpose to include directors and partners, the principal executive, financial, and accounting officers, and “any person who offers or sells the security in such offering.”<sup>151</sup> Likewise, when Congress directed the expansion of Regulation A through Section 3(b)(2), it expressly provided that “[t]he civil liability provision in section 12(a)(2) shall apply to any person offering or selling such securities.”<sup>152</sup> Registered offerings, of course, carry Sections 11 and 12(a)(2).

Reg Crypto breaks this pattern. The fundraising exemption is “modeled in part on Regulation A,” but the Commission proposes it under its general exemptive authority in Section 28 precisely because covered investment contracts fall outside the “eligible securities” limitation of Section 3(b)(3)—and therefore outside Section 3(b)(2)(D)’s liability provision.<sup>153</sup> The startup exemption has no statutory analog at all. The result is an inversion of investor protection: a retail purchaser in a \$5 million crowdfunding offering of conventional equity—an instrument with financial statements, investment caps, and an intermediary gatekeeper—has a Section 4A(c) rescission claim, while a retail purchaser in a \$5 million startup-exemption token offering, with principles-based narrative disclosure and no investment limits, apparently has none. In this upside down scenario the investor taking more risk is apparently given less protection.

## **B. The Remedies the Release Relies On Are Largely Illusory for Retail Purchasers**

*Section 17(a) provides no private remedy.* The courts of appeals have uniformly held that Section 17(a) does not create a private right of action.<sup>154</sup> Nor can the Commission supply one by rule: “[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”<sup>155</sup> Citing Section 17 therefore reassures the Commission, not the investor.

*Rule 10b-5 is a remedy built for large-cap class actions, not small token raises.* A private Rule 10b-5 plaintiff must plead and prove scienter with particularity sufficient to raise a “strong inference,” reliance, and loss causation, under the PSLRA’s heightened pleading standard and automatic discovery stay.<sup>156</sup> The fraud-on-the-market presumption of reliance depends on an efficient market, which newly launched tokens trading on thin, fragmented

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<sup>150</sup>Securities Act § 4A(c)(1)–(2), 15 U.S.C. § 77d-1(c)(1)–(2) (action subject to Sections 12(b) and 13 “as if the liability were created under section 12(a)(2)”; issuer bears burden of proving it did not know, and in the exercise of reasonable care could not have known, of the untruth or omission).

<sup>151</sup>15 U.S.C. § 77d-1(c)(3).

<sup>152</sup>Securities Act § 3(b)(2)(D), 15 U.S.C. § 77c(b)(2)(D) (making Section 12(a)(2) liability a mandatory term of any exemption adopted under Section 3(b)(2)).

<sup>153</sup>Release at 97 & n.222, 103 n.249; Securities Act § 28, 15 U.S.C. § 77z-3.

<sup>154</sup>*See, e.g., Finkel v. Stratton Corp.*, 962 F.2d 169, 174–75 (2d Cir. 1992); *Maldonado v. Dominguez*, 137 F.3d 1, 6–8 (1st Cir. 1998) (“[E]very circuit to have addressed the issue has refused to recognize a private right of action under section 17(a) . . .”).

<sup>155</sup>*Alexander v. Sandoval*, 532 U.S. 275, 286–87, 291 (2001).

<sup>156</sup>*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 324 (2007); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342, 346–47 (2005); 15 U.S.C. § 78u-4(b)(1)–(3).

venues frequently lack; *Affiliated Ute* covers only primarily-omission cases.<sup>157</sup> Loss causation may be especially difficult to isolate in a market as volatile as crypto. And the persons who actually drive token sales—founders, promoters, developers, and paid consultants—“related persons” under proposed Rule 100 who did not “make” the issuer’s statements— may be largely beyond Rule 10b-5’s reach after *Central Bank*, *Stoneridge*, and *Janus*.<sup>158</sup> Section 4A(c) and Section 12(a)(2), by contrast, require no scienter or reliance and reach statutory sellers. As a practical matter, there are significant logistical challenges to bringing a Rule 10b-5 case over a \$5 million raise, which means the typical defrauded purchaser will have no remedy at all.

*Section 12(a)(2) is uncertain, and Section 12(a)(1) disappears once the exemption is perfected.* Whether Section 12(a)(2) reaches an offering circular in an exemption adopted under Section 28 is untested; *Gustafson* confines the provision to public offerings by “prospectus,” and Congress evidently thought an express provision necessary to apply it to Regulation A.<sup>159</sup> Purchasers in unregistered token sales have historically relied on Section 12(a)(1)’s strict-liability rescission remedy.<sup>160</sup> But that remedy exists only when the offering fails an exemption—and proposed Rule 101(d) excuses “insignificant” deviations.<sup>161</sup> The perverse result is that an investor defrauded in a technically compliant offering has fewer remedies than one sold in a botched offering.

*The safe harbor and preemption compound the gap.* Once an issuer satisfies proposed Rule 400, the covered investment contract “will be deemed by the Commission to have ceased to exist,” and the crypto asset is no longer a security.<sup>162</sup> At that point even Rule 10b-5—which requires fraud “in connection with the purchase or sale of any security”—falls away for subsequent purchasers. At the same time, the proposed “qualified purchaser” definition would preempt state registration and merit review, leaving States only their antifraud enforcement authority.<sup>163</sup> Retail purchasers would thus lose state front-end review, receive no federal express remedy, and potentially lose federal securities law coverage altogether on the back end.

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<sup>157</sup>*Basic Inc. v. Levinson*, 485 U.S. 224, 246–47 (1988); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 278–79 (2014); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153–54 (1972).

<sup>158</sup>*Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142–43 (2011).

<sup>159</sup>*Gustafson v. Alloyd Co.*, 513 U.S. 561, 578, 584 (1995); 15 U.S.C. § 77c(b)(2)(D); see also *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 761 F. Supp. 2d 504 (S.D. Tex. 2011) (Rule 144A and Regulation S offerings not made by prospectus; no Section 12(a)(2) liability); *Faye L. Roth Revocable Tr. v. UBS PaineWebber, Inc.*, 323 F. Supp. 2d 1279 (S.D. Fla. 2004) (same, private placements). Cf. *Pino v. Cardone Capital, LLC*, 55 F.4th 1253, 1257–58 (9th Cir. 2022) (Regulation A issuer and its principal could be Section 12(a)(2) statutory sellers based on social-media solicitation).

<sup>160</sup>*Pinter v. Dahl*, 486 U.S. 622, 638, 642–47 (1988); see, e.g., *Williams v. Binance*, 96 F.4th 129 (2d Cir. 2024); *Wildes v. BitConnect Int’l PLC*, 25 F.4th 1341 (11th Cir. 2022); *Balestra v. ATBCOIN LLC*, 380 F. Supp. 3d 340 (S.D.N.Y. 2019).

<sup>161</sup>Release at 44–45.

<sup>162</sup>Release at 163.

<sup>163</sup>*Id.* at 30, 256–58.

## C. Recommendations

First and foremost, PIABA suggests that no new exemptions should be made. However, if the Commission proceeds, Section 28 authorizes the Commission to exempt transactions “conditionally,” and the Commission has long conditioned relief on issuer undertakings.<sup>164</sup> Using that authority, the Commission should:

1. *Condition both exemptions on an express liability undertaking.* Require the issuer, and each related person who offers or sells, to undertake in Form 1-CRYPTO and Form NOR to be liable to purchasers—enforceable by purchasers directly—for rescission (consideration plus interest) or damages for material misstatements or omissions, on terms mirroring Section 4A(c), including its definition of “issuer,” the reasonable-care defense, and Section 13’s limitations periods. A contractual condition of the exemption does not depend on implying a private right of action.
2. *State the Commission’s view* that the Form 1-CRYPTO offering circular and the Rule 103 disclosures are a “prospectus” for purposes of Section 12(a)(2), so that the Regulation A-modeled exemption carries Regulation A’s liability
3. *Bar purchaser-remedy waivers.* Prohibit, as a condition of each exemption, predispute provisions in the covered investment contract, token terms, or platform terms of service that waive or limit the undertaking above, require individual arbitration, or bar class or collective claims.
4. *Provide a cancellation right* comparable to Regulation Crowdfunding Rule 304, and a rescission right if the issuer fails to file a required transition or ongoing report or materially abandons the represented plan of development.<sup>165</sup>
5. *Preserve accrued claims across the safe harbor.* Provide expressly that reliance on Rule 400 does not extinguish claims arising from purchases made while the covered investment contract existed, and that the safe harbor is unavailable *ab initio* where the issuer’s Form TR or related filings are materially false.

Absent these changes, Reg Crypto would become the only retail-facing exemptive regime in which a defrauded purchaser cannot get his or her money back without proving fraud under the most demanding private-action standard in federal securities law. The stated goal of “ensuring that investors are adequately protected” cannot be met by a regime in which investor protection depends entirely on the Commission’s enforcement priorities.

## Conclusion

The SEC’s investor protection mission is as important as it ever has been. PIABA recognizes that Crypto is continuing to become more widely used. However, PIABA urges the

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<sup>164</sup>15 U.S.C. § 77z-3; *see, e.g.*, 17 C.F.R. § 229.512 (required undertakings).

<sup>165</sup>*See* 17 C.F.R. § 227.304(a).

Commission to carefully prioritize investor protection, full and fair disclosure, and the fair, orderly, and efficient markets in any Crypto-related rulemaking or guidance. American investors and retirees need more protections, not more safe harbor and protection for issuers and sponsors. The Commission should not abandon the principles and structures that have been developed and refined for nearly a century. Ensuring adequate disclosure, proper supervision, and compliance should remain the priority.

We thank the Commission for the opportunity to comment on this proposal, and we look forward to continued engagement on this proposal and other emerging regulatory issues.

Sincerely,



Michael C. Bixby  
PIABA President



Joseph R. Wojciechowski  
PIABA Executive Vice-President